Immigration Amnesties in Australia: Lessons for Law Reform from Past Campaigns

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Abstract

In the wake of the COVID-19 pandemic, there have been growing calls to regularise the status of the over 64,000 undocumented people currently living in Australia without regular immigration status. Australia has previously had three legal immigration amnesties in 1974, 1976 and 1980. Yet, the history of these amnesties is little known. This article draws on newly-released and previously unexamined historical materials, including archival government documents and contemporaneous jurisprudence, to present an original account of Australia's three past immigration amnesties as novel moments of executive power and decision-making in the realm of migration law. In doing so, it analyses their legislative context, their implementation and effectiveness in practice, and their legal legacies. Finally, the article addresses the lessons of these past immigration amnesties for current law reform and regularisation efforts, and for Australian migration law today.

Please cite this article as:

Sara Dehm and Anthea Vogl, 'Immigration Amnesties in Australia: Lessons for Law Reform from Past Campaigns' (2022) 44(3) *Sydney Law Review* 381.

 ISSN: 1444–9528

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Thanks to James Watson, Jordana Silverstein and Sarah Charak for their archival and editing assistance, respectively. We also thank Harry Hobbs and the two anonymous reviewers for their insightful comments. All errors remain our own.
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I Introduction

Legal immigration amnesties are mechanisms by which States allow people within their territory, who either do not have lawful migration status or have breached immigration regulations, to regularise their status without risk of punishment or deportation. A little-known aspect of Australia's legal and immigration history is its past use of legal immigration amnesties in 1974, 1976 and 1980. Each amnesty was implemented via executive action and allowed certain non-citizens living in Australia without state authorisation to apply for permanent residence. These three past amnesties occurred under both Labor and Liberal federal governments, and each enjoyed enthusiastic bipartisan support. Each amnesty was explicitly promoted as a way to remedy the issue of people living in Australia without state authorisation or lawful immigration status as humanely as possible, and to avoid further exploitation and uncertainty as a result of this status. Further, in language that seems at odds with contemporary practices of punitive border control and migration management, successive Australian Government Immigration Ministers stressed during each amnesty campaign that any so-called 'illegal immigrants' who came forward would be treated sympathetically, and applicants did not need to fear arrest or deportation. As then Immigration Minister Ian Macphee said of the 1980 Regularisation of Status Program ('ROSP'), the amnesty offered a chance to 'clean the slate, to acknowledge that no matter how people got here they are part of the community'.[1] Amnesties frequently aim to serve the political and policy objective of ensuring as many people as possible within a state's territory have regular immigration status. While successive governments promoted Australia's past immigration amnesties on this basis, none were able to fully resolve the 'problem' of undocumented migration.[2] This suggests that past amnesties are best seen as regular, humane and cyclical legal measures and policy responses to allow significant numbers of undocumented people access to legal pathways to permanency.

The labour shortage impact of the COVID-19 pandemic has highlighted the centrality of undocumented workers to Australia's essential industries, and to the agricultural sector in particular. At the same time, national border closures in response to COVID-19 have limited non-citizens' ability to depart Australia once their visas have expired. As a result, the pandemic has clearly shown the need for, and benefits of, a new immigration amnesty in Australia, with calls for implementing an immigration amnesty gaining momentum.[3] Although exact numbers are unknown, the Australian Government estimates that there are over 64,000 people

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1 'New Amnesty for Illegal Immigrants', *The Canberra Times* (Canberra, 20 June 1980) 3.

2 Kelly Bauer, 'Extending and Restricting the Right to Regularisation: Lessons from South America' (2019) *Journal of Ethnic and Migration Studies* 4497, 4499 <https://doi.org/10.1080/1369183X.2019.1682978>. In this article, we use the term 'undocumented' to refer to people living in Australia without state authorisation, that is, without any lawful or regular immigration status in Australia, even if they may in fact possess a range of different identity documents such as refugee identity cards, passports from their home states or driver's licences. For a discussion of such terminology, see Anne McNevin, *Contesting Citizenship: Irregular Migrants and New Frontiers of the Political* (Columbia University Press, 2011) 19–20.

3 See, eg, Jill Margo, 'Is There a Case for a Pandemic Migration Amnesty?', *Australian Financial Review* (online, 3 July 2021) <https://www.afr.com/policy/health-and-education/is-there-a-case-for-a-pandemic-migration-amnesty-20210630-p585qq>.

living without lawful immigration status in Australia.[4] Support for an immigration amnesty has come from diverse sources, including a cross-section of parliamentarians, the Australian Government's National Agricultural Labour Advisory Committee,[5] labour and migration experts,[6] Victorian Farmers Federation representatives,[7] agricultural sector unions, and undocumented workers themselves.[8] In 2021, for example, a National Party of Australia parliamentarian stated that the pandemic provides 'that perfect moment in history' for an amnesty that 'we will never revisit, where we can get this right'.[9]

Despite the legal and political prominence of Australia's past amnesties at the time of their implementation, they have been subject to surprisingly little scrutiny within both legal and historical scholarship on immigration law and policy in Australia.[10] In this article, we examine these past amnesties in order to draw out lessons for law reform today. To do so, we provide an original account of the significance of these amnesties as forms of executive decision-making in the area of migration law and policy. We draw on newly-released and previously unexamined historical materials, including archival documents of the then Australian Government Department of Immigration and contemporaneous media reporting, that shed light onto Australia's history of immigration amnesties. The amnesties were also subject to judicial consideration. Most notably, the 1977 High Court of Australia decision in *Salemi v MacKellar (No 2)*[11] and the 1982 Full Federal Court of Australia

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4 Department of Immigration and Border Protection (Cth), *BE17/172 – Visa Overstayers for the Financial Year – Programme 1.2: Border Management* (Budget Estimates Hearing, Question Taken on Notice, 22 May 2017).

5 National Agricultural Labour Advisory Committee, *National Agricultural Workforce Strategy: Learning to Excel* (December 2020) 190–1 <https://www.agriculture.gov.au/ag-farm-food/agricultural-workforce/naws#national-agricultural-labour-advisory-committee> ('*National Agricultural Workforce Strategy Report*').

6 See, eg, Joanna Howe, Stephen Clibborn, Alexander Reilly, Diane van den Broek and Chris F Wright, *Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry* (University of Adelaide Law School and University of Sydney Business School, January 2019); Joanna Howe, 'Out of Limbo and into the Light: A Case for Status Resolution for Undocumented Migrant Workers on Farms' (2021) 43(4) *Sydney Law Review* 433 ('Out of Limbo and into the Light'); Bassina Farbenblum and Laurie Berg, Submission No 75 to the Joint Standing Committee on Migration, *Inquiry into the Working Holiday Maker Program* (5 August 2020); Sara Dehm and Claire Loughnan, 'A COVID "Vaccine Passport" May Further Disadvantage Refugees and Asylum Seekers', *The Conversation* (online, 25 February 2021) <https://theconversation.com/a-covid-vaccine-passport-may-further-disadvantage-refugees-and-asylum-seekers-155287>.

7 Kath Sullivan, 'Illegal Worker Amnesty Ruled Out by Government Infuriating Farmers Calling for an Industry Clean Out', *ABC News* (online, 20 October 2020) <https://www.abc.net.au/news/2020-10-20/government-rules-out-worker-amnesty/12784968>.

8 United Workers Union, 'High Risk Situation on Our Farms: New Research Released on the Risks for Undocumented Workers in COVID-19 Pandemic' (Media Release, 20 May 2020) <https://unitedworkers.org.au/media-release/high-risk-situation-on-our-farms-new-research-released-on-the-risks-for-undocumented-workers-in-covid-19-pandemic/>.

9 Jess Davis, 'Calls for Amnesty for Undocumented Workers, as New Report Recommends "One-Off" Visas in Agriculture', *ABC News* (online, 5 March 2021) <https://www.abc.net.au/news/2021-03-05/covid-19-vaccine-calls-for-amnesty-for-undocumented-workers/13218382>.

10 The scant scholarship on Australia's past immigration amnesties is mostly contemporaneous: David S North, 'Down Under Amnesties: Background, Programs and Comparative Insights' (1984) 18(3) *International Migration Review* 524; Colbert Rhodes, 'Amnesty for Illegal Aliens: The Australian Experience' (1986) 5(3) *Policy Studies Review* 566.

11 *Salemi v MacKellar (No 2)* (1977) 137 CLR 396 ('*Salemi*').

decision in *Minister of Immigration and Ethnic Affairs v Haj-Ismail*[12] considered the legality of departmental decision-making in relation to the final two amnesties. These two cases illuminate the nature and limits of executive power vis-à-vis non-citizens that were critical to the operation and implementation of Australia's past amnesties. Taken together, these materials offer a necessarily State-centric account of the framing and objectives of each amnesty campaign and their public reception.[13] They nonetheless allow us to present the specific bureaucratic and governmental aspects of this history, which can directly inform contemporary immigration amnesty efforts. These efforts are made all the more urgent by the uneven effects of COVID-19 on the lives of temporary and undocumented migrants in Australia. We thus argue that the legislative context, implementation and effectiveness of Australia's past amnesties and their legal legacies are instructive for contemporary regularisation initiatives, and further, that the COVID-19 pandemic has reinforced the need for a new immigration amnesty in Australia.

This article has three further parts. In Part II, we examine immigration amnesties as specific legal mechanisms. We then set out the contemporary legislative framework and its capacity to enable regularisation of status in Australia and analyse recent calls for an immigration amnesty in Australia. In Part III, we offer a detailed account of Australia's past three legal amnesties, outlining their legal basis, their political motivations and effectiveness, as well as the key associated judicial challenges and legal legacies. Finally, in Part IV we draw out four important legal lessons and themes from Australia's past experiences with immigration amnesties. These include: the need for amnesties to be informed by a social, rather than strictly legal, conception of citizenship; understanding amnesties as operating primarily within the realm of executive power; the criteria and design that influenced the amnesties' uptake and success; and immigration amnesties as an alternative to Australia's current approach of detection and deportation of unlawful non-citizens. Given recent calls for amnesty have once again brought the idea within the realm of political and legal possibility, we argue that taking these lessons from Australia's past immigration amnesties seriously can enhance and bolster contemporary law reform efforts to regularise the status of undocumented people in Australia today.

II What is a Legal Immigration Amnesty and Why is it Currently Needed in Australia?

In this Part we present the growing evidence that an immigration amnesty is a viable, necessary and desirable legal and policy response to the uncertainty, exploitation and suffering experienced by undocumented people in Australia today. In particular, we explain how and why immigration amnesties have arisen as a legal and political response to the complex and intersecting challenges created by the COVID-19

[12] *Minister of Immigration and Ethnic Affairs v Haj-Ismail* (1982) 57 FLR 133 ('*Haj-Ismail*').

[13] On the state-centricity of official documents, see Natalie Harkin, 'Intimate Encounters Aboriginal Labour Stories and the Violence of the Colonial Archive' in Brendan Hokowhitu, Aileen Moreton-Robinson, Linda Tuhiwai-Smith, Chris Andersen and Steve Larkin (eds), *Routledge Handbook of Critical Indigenous Studies* (Routledge, 2020) 147.

pandemic both for Australia's workforce of temporary migrant labour and for non-citizens living in Australia more generally.

A *Immigration Amnesties as Legal Mechanisms*

While amnesties take a range of forms and serve multiple ends,[14] in general, legal immigration amnesties are mechanisms by which governments allow people within their territory without lawful migration status to come forward and regularise their status without risk of punishment or deportation. United States ('US') immigration law scholar Linda Bosniak defines amnesties broadly as 'policies that lift or eliminate the illegality of status imposed on [undocumented people] and that incorporate them into the body politic'.[15] While some definitions focus on the 'illegality' of so-called 'unauthorised non-citizens' and others emphasise the exclusionary nature of migration laws that make people illegal,[16] all immigration amnesties involve the change of status for particular groups of non-citizens. Although legal amnesties are usually considered to be wide-sweeping measures, they may apply to limited subsets of non-citizens, and outcomes for non-citizens may range from temporary reprieves from deportation (such as the US Deferred Action for Childhood Arrivals program)[17] to facilitating more formal pathways to permanency and citizenship.[18] Amnesties may also be referred to as 'legalisation' or 'regularisation' programs, and common criteria delimiting eligibility for amnesty include duration of one's residence within a state or participation in the labour market.[19] And, as Levinson notes, they are 'usually implemented in concert with the internal and external strengthening of migration controls'.[20]

The legal definition of an immigration amnesty has, to date, only been considered in one Australian High Court case. In *Salemi*, Jacobs J defined an immigration amnesty as 'at the least a promise that a deportation order would not be made against a qualifying person within the time during which he was a prohibited immigrant'.[21] Jacobs J reasoned that there were two forms an amnesty could take under the then version of the *Migration Act 1958* (Cth) ('*Migration Act*'): either granting a permanent entry permit to a non-citizen, or sparing a person from the making of a deportation order.[22] Similarly, Murphy J in *Salemi* detailed the 'honourable history [of amnesties] in European civilization' and noted that they can

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14 The idea of amnesty exists in other contexts 'from transitional justice to draft avoidance to parking and library fines': Linda Bosniak, 'Amnesty in Immigration: Forgetting, Forgiving, Freedom' (2013) 16(3) *Critical Review of International Social and Political Philosophy* 344, 345 ('Amnesty in Immigration').

15 Linda Bosniak, 'Arguing for Amnesty' (2013) 9(3) *Law, Culture and the Humanities* 432, 433.

16 George Lakoff and Sam Ferguson, 'The Framing of Immigration', *Rockridge Institute* (online, 25 May 2006) <https://web.archive.org/web/20081021045141/http://www.rockridgeinstitute.org/research/rockridge/immigration.html>.

17 US Citizenship and Immigration Services, *Consideration of Deferred Action for Childhood Arrivals (DACA)* (Web Page, 24 August 2022) <https://www.uscis.gov/DACA>.

18 Amanda Levinson, *The Regularisation of Unauthorized Migrants: Literature Survey and Country Case Studies* (Centre on Migration, Policy and Society, University of Oxford, 2005) 4.

19 Ibid.

20 Ibid 2.

21 *Salemi* (n 11) 453.

22 Ibid.

be 'directed generally to all persons or particularly to certain groups' and 'may be conditional or unconditional'.[23] Murphy J thus characterised 'the power to amnesty or pardon'[24] as an executive power, generally applicable to political infractions or 'crimes against the sovereignty of the State'.[25]

As States increasingly equate orderly migration programs and effective border control with the exercise of state sovereignty, governments generally consider amnesties when other internal and external migration controls have failed.[26] Mármora outlines four broad reasons for States to implement regularisation programs: 'to gain more awareness and control over irregular migration'; 'to improve the social situation of migrants'; 'to increase labour market transparency'; and/or in response to foreign policy goals or agreements.[27] In practice, these motivations overlap, as is evident in the recent turn to regularisation in Australia.

In spite of Australia's own past immigration amnesties, regularisation programs initiated in overseas jurisdictions are generally cited as examples in research and policy addressing the possibility of a current immigration amnesty in Australia.[28] We do not examine international comparators in detail here; however, we note that in the US in particular, the idea of amnesty has 'structure[d] … debates over irregular immigration' in a way that has not been the case in Australia.[29] Further, from 1986–2002, the US and European Union implemented at least 78 amnesty programs, with most EU countries having implemented more than one regularisation program per decade.[30] Spain in particular has implemented six regularisation programs between 1986 and 2005.[31] A common theme among these comparators is the centrality of each State's specific geography, history and domestic migration program in shaping the politics, design and success of amnesty campaigns. These factors, alongside the economic and social significance of people living without status, demonstrate the national specificity of immigration amnesties. This also reinforces the benefits of looking to lessons from Australia's own history of immigration amnesties when considering contemporary calls for a new immigration amnesty.

B *Australia's Legislative Framework and Contemporary Calls for Amnesty*

Recent engagement with the need for an immigration amnesty in Australia has focused on two groups of undocumented people in particular: unlawful non-citizens

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23 Ibid 455.
24 Ibid 456.
25 Ibid 455, quoting *Burdick v United States*, 236 US 79, 95 (1915).
26 Levinson (n 18) 5.
27 Ibid 5–6, citing Lelio Mármora, 'International Migration Policies and Programmes' (International Organization for Migration, 1999).
28 See, eg, Howe et al (n 6) 35.
29 Bosniak, 'Amnesty in Immigration' (n 14) 345.
30 Bauer (n 2) 4499; Alessandra Casarico, Giovanni Facchini and Tommaso Frattini, 'The Economics of Immigration Amnesties', VoxEU: *CEPR [Centre for Economic Policy Research] Policy Portal* (Column, 28 June 2018) <https://voxeu.org/article/economics-immigration-amnesties>.
31 Albert Sabater and Andreu Domingo, 'A New Immigration Regularization Policy: The Settlement Program in Spain' (2012) 46(1) *International Migration Review* 191.

living in the community as the result of overstaying previous visas, and refugee applicants living in the community whose status has lapsed, or who do not have pathways to permanent residency under the *Migration Act*.

Australia has had a legislatively mandated 'universal' visa system since 1994. This means that, under the *Migration Act*, all people deemed Australian non-citizens are required to hold a valid visa while in Australia.[32] Any non-citizen without a valid visa is classified as an 'unlawful non-citizen' and 'must' be taken into immigration detention.[33] The Act has a very broad definition of immigration detention, including 'being in the company of, or restrained by' an authorised Commonwealth officer or being held in a detention centre established under the Act, a state prison, a police station or another place specified by the Minister.[34] The Act also empowers the Minister to grant a person in immigration detention a temporary or substantive visa, even if the person is statutorily prohibited from applying for one.[35] In addition, as we discuss below, the Act limits the Minister's discretion to grant visas outside of existing visa categories and places a statutory bar on visa applications made by specific subclasses of unlawful non-citizens.[36] This means, on the face of it, while the *Migration Act* affords the Minister a discretion to grant certain visa classes to unlawful non-citizens, it does not provide a broad ministerial power to permanently regularise undocumented people.

In 2017, the Australian Government Department of Immigration and Border Protection estimated the number of undocumented people in Australia to be at least 64,000 people,[37] approximately 6,000 of whom had lived in Australia for over a decade.[38] Precise and up-to-date numbers are not available; however, other estimations range up to 90,000 people.[39] Similarly, there is no precise account of the composition of this group, though in 2017 the Government identified the main nationalities of undocumented people as including nationals from Malaysia (14.6%), China (10.1%), US (8%) and the United Kingdom ('UK') (5.7%).[40] In 2013, the Department reported agriculture, forestry and fishing, construction, hotel accommodation and hospitality as the most common industries of work for people without lawful status in Australia.[41]

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32 *Migration Act 1958* (Cth) ss 13, 14 ('*Migration Act*').

33 Ibid ss 14, 189.

34 Ibid s 5 (definition of 'immigration detention').

35 Ibid s 195A. The discretionary grant of short-term bridging visas to those defined as 'unlawful non-citizens' is one way that the Minister may, in practice, temporarily regularise status. While this does temporarily 'lift' unlawful status, it does not operate by way of right or application as per systematic immigration amnesties.

36 Ibid ss 29, 48. Note that the bar does not apply to applications made for a limited number of visa subclasses, including protection-related visas (but see section s 46A).

37 Department of Immigration and Border Protection (Cth) (n 4).

38 Maani Truu, 'The Group of Migrants in Australia Likely to Be Most Impacted by Coronavirus', *SBS News* (online, 20 April 2020) <https://www.sbs.com.au/news/the-group-of-migrants-in-australia-likely-to-be-most-impacted-by-coronavirus>.

39 Malcolm Rimmer and Elsa Underhill, 'Temporary Migrant Workers in Australian Horticulture: Boosting Supply but at What Price?' in Massimo Pilati, Hina Sheikh, Francesca Sperotti and Chris Tilly (eds), *How Global Migration Changes the Workforce Diversity Equation* (Cambridge Scholars Publishing, 2015) 143, 145.

40 Department of Immigration and Border Protection (Cth) (n 4) 2.

41 Howe et al (n 6) 36, citing Department of Immigration and Citizenship (Cth), 'Fact Sheet 87: Initiatives to Combat Illegal Work in Australia' (Factsheet, Commonwealth of Australia, 2013).

The recent emergence of amnesty as a policy option has focused on the risks faced by undocumented people who are currently in the workforce, and specifically on those in the agricultural sectors. One of the findings of Howe, Clibborn, Reilly, van den Broek and Wright's 2019 report into addressing labour challenges in the horticultural industry is that the industry has a 'structural reliance' on undocumented migrant workers as a key source of labour.[42] Again, the precise scope and extent of undocumented work is not known. Researchers have suggested that undocumented workers comprise at least a third of the sector,[43] with Howe and colleagues citing growers and industry association officials who estimate up to 80–90% of their workforce are unlawful.[44] Undocumented workers are highly vulnerable to exploitation and have limited capacity to seek assistance or redress due to their irregular status.[45] The high risks of exploitation identified in relation to this group of workers extends to undocumented people in the workforce more generally, and successive governments and multi-agency government initiatives have failed to address these issues or even to successfully detect undocumented people.[46]

It is in response to the systematic exploitation and harm faced by undocumented workers, and the failure of existing regulatory and enforcement strategies, that recent recommendations for immigration amnesty have emerged. For the agricultural sector in particular, amnesty calls are also motivated by concerns that deportation or removal of undocumented workers will further affect the limited supply of labour. While Howe and colleagues' report does not directly recommend amnesty, it presents amnesty as an example of a 'different regulatory approach' to address the challenges presented by undocumented workers.[47] By contrast, in late 2020, a Government Advisory Committee convened by the Australian Government Department of Agriculture to develop a 'labour strategy for Australian agriculture' made a direct recommendation for a 'one-off regularisation of the undocumented workers in the country'.[48] The recommendation, which privileges the language of regularisation over amnesty, was made as part of the Australian Government's *National Agricultural Workforce Strategy Report*. The Report provides very little detail as to what the regularisation would involve or to whom it might apply. It does, however, present it as a means to eliminate the 'unscrupulous and unethical practices' that labour hire companies use to employ and exploit undocumented

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42 Howe et al (n 6) 35. Our reference to 'undocumented people' is distinct from Howe et al's focus on 'undocumented workers', with the latter category including both visa overstayers and visa holders who are working without formal work rights or in breach of work rights.

43 Rimmer and Underhill (n 39) 143. Howe notes that at least 30,000 horticultural workers are not accounted for in official labour statistics and there is 'increasing recognition' that the bulk of this group are undocumented workers: Howe, 'Out of Limbo and into the Light' (n 6) 438.

44 Howe et al (n 6) 39.

45 Bassina Farbenblum and Laurie Berg, 'Migrant Workers' Access to Remedy for Exploitation in Australia: The Role of the National Fair Work Ombudsman' (2017) 23(3) *Australian Journal of Human Rights* 310.

46 This includes the limited success of the specialist multi-agency taskforce, known as Taskforce Cadena, which aimed to disrupt illegal work, exploitation of undocumented worker and visa fraud: see generally 'Taskforce Cadena', *Australian Border Force* (Web Page, 16 November 2021) <abf.gov.au/about-us/taskforces/taskforce-cadena>.

47 Howe et al (n 6) 45.

48 *National Agricultural Workforce Strategy Report* (n 5) xiv. See also xxvii (Recommendation 25).

people.[49] A peak Australian union that advocates for an amnesty for undocumented farmworkers has expressed a similar rationale for an amnesty,[50] including a suggestion that amnesties should be available where visa conditions are breached due to exploitation or pressure from an employer.[51] More recently, Howe has argued in favour of status regularisation specifically for undocumented migrants working in the Australian horticulture industry, as a one-off means to address both the 'labour crisis' on Australian farms and to 'remove the susceptibility of this group to exploitation'.[52] She notes that both issues have been exacerbated by the COVID-19 pandemic due to the effects of international, state and territory border closures on labour supply and undocumented workers' mobility.[53]

Notably, the *National Agricultural Workforce Strategy Report* explicitly put forward regularisation as part of the public health response to COVID-19. It presents public health concerns for undocumented people and the broader public as a core reason for an amnesty, stating that:

> the current pandemic provides a unique chance to design a one-off regularisation program for social health reasons. It is a potentially dangerous situation for the Australian public to have 60,000 to 100,000 overseas workers avoiding contact with clinics and hospitals.[54]

As noted in the Introduction to this article, prominent calls for amnesty have also come from National Party parliamentarians. To date, lawmakers advocating in favour of amnesty have not provided a clear sense of to whom the amnesty would apply or how it would operate, but it is clear their position reflects both the agricultural industry's structural reliance on an undocumented workforce, and the exacerbation of existing labour supply issues as a result of the pandemic.[55] Notably, most proposals for immigration amnesties have been light on detail. For example, they have not been accompanied by legislative or policy proposals as to how amnesties would operate — including what kinds of immigration pathways they would provide and to whom they would apply.[56]

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49 Ibid xiv.

50 United Workers Union (n 8).

51 Senate Education and Employment References Committee, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (Report, 17 March 2016) 212–13; Shop, Distributive and Allied Employees' Association, Submission No 58 to Senate Education and Employment References Committee, Parliament of Australia, *Inquiry into the Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders* (21 September 2015, authored by Joanna Howe).

52 Howe, 'Out of Limbo and into the Light' (n 6) 434–5.

53 Ibid 438–9.

54 *National Agricultural Workforce Strategy Report* (n 5) 190. The Committee's concerns about the exclusion of people without regular status from COVID-19 public health measures have been echoed by scholars, advocates and the United Workers Union in particular, which has highlighted lack of status as a barrier to accessing vaccination, registration for QR check-ins, and treatment and/or access to quarantine in the case of infection: Davis (n 9).

55 Australia's peak farming body, the National Farmers' Federation, predicted a shortage of approximately 26,000 agricultural workers in March 2021, which is the peak of season: Norman Hermant, 'Asylum Seekers Put Their Hands Up to Fill Labour Shortage in Regional Victoria', *ABC News* (online, 3 January 2021) <https://www.abc.net.au/news/2021-01-03/yarck-asylum-seekers-employed-to-pick-cherries/12998264>.

56 One significant exception is a 'skeletal framework' proposed by Howe for the one-off regularisation of horticultural workers using the existing Temporary Activity (Subclass 408) visa but amending

Amnesty as a potential political and legal solution also pertains to asylum seekers and refugees, who have lived for extended periods in the Australian community either on continual temporary visas or without regular status at all.[57] A complicated regime of post-arrival policies aimed at refugee deterrence has created a population of refugees and asylum seekers who cannot access either permanent residency or citizenship, but who also cannot return 'home' or to their country of persecution. The key factor giving rise to both a permanent temporariness and precarity was the reintroduction of temporary protection as part of sweeping changes made to the *Migration Act* in late 2014.[58] Both Temporary Protection Visas ('TPVs') and Safe Haven Enterprise Visas ('SHEVs') were introduced at this time. These visas last only three and five years respectively and must be renewed on an ongoing basis. While refugees holding SHEVs have some conditional — and to date broadly unattainable — pathways to permanency, this is for the most part a permanently temporary population.[59] The group to which these policies apply has been labelled the 'legacy caseload' by successive Liberal federal governments, and includes people who have lived in the community for up to 10 years.[60]

As with people living without documentation in Australia more broadly, the need for regularisation — and with it access to health services — has been exacerbated for asylum seekers and refugees during the COVID-19 pandemic. The need for regularisation is particularly acute for members of this group who are living in the community without lawful status, due to delays in the renewal of their bridging visas or refusals of bridging visas without clear reasons. As the Refugee Council of Australia notes, this group includes asylum seekers who have made every effort to maintain a lawful status and engage in the Government processes and have been forced into an irregular status, with no rights or entitlements.[61] This group also includes asylum seekers living in community on 'final departure' visas prior to deportation.[62] The size of this population shifts regularly, however as of June 2021,

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eligibility requirements to include applicants who do not currently hold a valid visa, but who can provide evidence 'of having worked in the horticulture industry for a period of six months': Howe, 'Out of Limbo and into the Light' (n 6) 445–7.

57 For a detailed account of this history, see Anthea Vogl, 'Crimmigration and Refugees: Bridging Visas, Criminal Cancellations and "Living in the Community" as Punishment and Deterrence' in Peter Billings (ed), *Crimmigration in Australia: Law, Politics, and Society* (Springer, 2019) 149.

58 *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

59 As at January 2022, 18,810 refugees had been granted TPVs or SHEVs: Department of Home Affairs (Cth), *The Administration of the Immigration and Citizenship Programs: Addendum — March 2022 (Data to January 2022)* (March 2022) <https://immi.homeaffairs.gov.au/programs-subsite/files/addendum-march-22.pdf>.

60 See, eg, Australian Human Rights Commission, *Lives on Hold: Refugees and Asylum Seekers in the 'Legacy Caseload'* (July 2019) 7 <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy>.

61 Refugee Council of Australia, 'Leaving No-One Behind: Ensuring People Seeking Asylum and Refugees are Included in COVID-19 Strategies' (online, 9 April 2020) <https://www.refugeecouncil.org.au/priorities-covid-19/>.

62 Ibid. Recent research has demonstrated that these asylum seekers regularly fall out of regular status due to the complex processes involved in the grant and renewal of bridging visas valid for as short as three or six months: Liberty Victoria, *Bridging the Department's Visa Blindspot* (Report, Rights Advocacy Project, December 2020) 9–10.

there were 2,281 asylum seekers who arrived by boat as part of the 'legacy caseload' residing without a valid visa in the community.[63]

Like undocumented workers, refugees and asylum seekers without permanent status are at high risk of systemic labour exploitation.[64] This is particularly so for people living in the community without a valid visa or regular migration status.[65] Organisations such as the Refugee Council of Australia have recommended creating pathways to residency for refugees and asylum seekers who fill agricultural labour shortages exacerbated by COVID-19.[66] Providing such pathways would address similar issues to those identified in respect of long-term undocumented people — not least their exploitation at work and exclusion from the COVID-19 public health response by virtue of their lack of status.

Implementing a new immigration amnesty was not a policy approach favoured by the Morrison Liberal Government, which resolutely rejected an immigration amnesty as a response to the issues outlined above. Michael Pezzullo, Secretary of the Department of Home Affairs, told a Senate Estimates hearing in March 2021 that an amnesty would 'undermine the integrity' of Australia's visa system and 'create an incentive for people to get themselves smuggled into Australia' or overstay their visa.[67] A similar preoccupation with the 'pull' factors of unauthorised migration is evident in the Department's formal statement on the issue, in which it said that '[b]road regularisation of the status of unlawful non-citizens may perversely encourage non-compliance with migration law', and that '[d]espite the closure of the Australian border, pull factors encouraging illegal immigration are still relevant'.[68]

The absence of any discussion of Australia's past amnesties in contemporary discourse is surprising.[69] In Part III below, we turn to Australia's own experience with immigration amnesties. Although contemporary calls for an amnesty are situated in their own distinct context, we draw attention to how they nonetheless echo issues associated with historical amnesties. In drawing on historical and

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63 Department of Home Affairs (Cth), Australian Government, 'Illegal Maritime Arrivals on Bridging E Visa' (30 June 2021) <https://www.homeaffairs.gov.au/research-and-stats/files/illegal-maritime-arrivals-bve-30-jun-2021.pdf>. See also Louise Boon-Kuo, *Policing Undocumented Migrants: Law, Violence and Responsibility* (Routledge, 2017).

64 See especially Caroline Fleay and Lisa Hartley '"I Feel Like a Beggar": Asylum Seekers Living in the Australian Community without the Right to Work' (2016) 17(4) *Journal of International Migration and Integration* 1031.

65 John van Kooy and Dina Bowman, '"Surrounded with so Much Uncertainty": Asylum Seekers and Manufactured Precarity in Australia' (2019) 45(5) *Journal of Ethnic and Migration Studies* 693; Laurie Berg, Sara Dehm and Anthea Vogl, 'Refugees and Asylum Seekers as Workers: Radical Temporariness and Labour Exploitation in Australia' (2022) 45(1) *University of New South Wales (UNSW) Law Journal* 35.

66 Nick Bonyhady, 'MPs Back Proposal to Give Refugees Residency for Fruit Picking', *The Sydney Morning Herald* (online, 14 September 2020) <https://www.smh.com.au/politics/federal/mps-back-proposal-to-give-refugees-residency-for-fruit-picking-20200914-p55ved.html>.

67 Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 22 March 2021, 190–1 (Michael Pezzullo).

68 Davis (n 9).

69 Cf Susan Love, 'Migrant Amnesties: What Has Australia Done in the Past?', *FlagPost* (online, 29 April 2021) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2021/April/Migrant_amnesties>.

archival materials to give an account of Australia's past three amnesties (in 1974, 1976 and 1980), we trace the legislative framework enabling these campaigns and analyse their political motivations, institutional implementation, effectiveness and legal legacies.

III Australia's Past Legal Immigration Amnesties

Australian migration law was comprehensively reformed in 1958 in order to better regulate the sizable immigration into Australia after World War Two. Under the new *Migration Act 1958* (Cth), any non-citizen (then referred to as either an 'alien' or an 'immigrant') was required to hold a valid entry permit in order to 'legally' enter Australia.[70] These entry permits functioned to authorise a person's presence in Australia either permanently or for a specific period of time. Section 6(2) of the *Migration Act* empowered an 'officer' to grant an entry permit to an 'immigrant'; and s 6(5) specified that an entry permit could be granted to an 'immigrant' before or after they entered Australia.[71] Moreover, s 6(1) deemed any 'immigrant' in Australia without a valid entry permit to be a 'prohibited immigrant'.[72] Once a person was a 'prohibited immigrant', the Immigration Minister had the power to order their deportation.[73] The Minister also had 'absolute discretion' to cancel any temporary entry permits.[74] However, the Act stipulated that a person could cease to be a 'prohibited immigrant' in two specific circumstances: either through the grant of an entry permit,[75] or at the expiry of a five-year period after the time in which they become a 'prohibited immigrant' provided that the Minister had not issued a deportation order in that time.[76]

In practice, this legislative framework — and s 6(5) of the *Migration Act* in particular — was interpreted to empower the Minister to change the status of a 'prohibited immigrant' through authorising the granting of an entry permit.[77] Although the *Migration Act* has today become 'one of the most complex and frequently amended pieces of basic legislation',[78] the Act initially remained relatively stable during its first two decades of operation and was only amended a few times.[79] This meant that the above provisions remained in place for the duration of the 1970s, that is, for the relevant periods discussed below.

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70 *Migration Act* (n 32) s 5(1), as enacted.
71 Ibid s 6(2), 6(5), as enacted.
72 The concept of a 'prohibited immigrant' was repealed in 1983: see *Migration Amendment Act 1983* (Cth) s 9.
73 *Migration Act* (n 32) s 18, as enacted.
74 Ibid.
75 Ibid s 10, as enacted.
76 Ibid s 7(4), as enacted.
77 Desmond Storer, 'Out of the Shadows: A Review of the 1980 Regularisation of Status Programme in Australia' (Working Paper, International Labour Organization, June 1982) 21.
78 James Jupp, *Immigrant Nation Seeks Cohesion: Australia from 1788* (Cambridge University Press, 2018) 128.
79 For amending legislation, see *Migration Act 1964* (Cth); *Migration Act 1966* (Cth); *Migration Act 1973* (Cth).

A *The 1974 Dispensation*

Australia's first immigration amnesty was in 1974 following the election of the Whitlam Labor Government that saw radical changes to Australia's migration law and policy. Whitlam's most well-remembered legacy in the area of immigration law is his Government's formal ending of the racist White Australia Policy. Legally, the dismantling of the White Australia Policy involved legislative reform efforts to remove overt discrimination from immigration laws, most notably in relation to immigration selection criteria and citizenship requirements. Less well remembered are the Whitlam Government's reforms that sought to make travel to Australia easier through the introduction of the so-called 'easy visa' system in 1973. Alongside this reform, perhaps counterintuitively, the Whitlam Government also announced a 21% reduction of Australia's permanent immigration intake in December 1972 over high unemployment concerns amid a global recession.[80] By making temporary travel to Australia easier while making it harder to permanently migrate to Australia, the number of undocumented people living in Australia increased significantly over the course of the early 1970s. By 1975, immigration officials estimated this population to have reached between 35,000 and 45,000 people.[81]

Concerned that this increased population of undocumented people would lead to pervasive labour exploitation, the Whitlam Government initiated Australia's first formal amnesty program. On 26 January 1974 (officially deemed 'Australia Day' to mark the anniversary of the British invasion and colonisation of Australia), Immigration Minister Al Grassby announced a 'special dispensation' for people living in Australia 'illegally' and 'who claimed to be suffering from exploitation' as a result of their status.[82] The amnesty would be open for 6 months, from late January until the end of June 1974, and the main eligibility criteria was that a person had to have been living in Australia for three years or more and was of 'good character'.[83] At the time, Minister Grassby urged anyone who had entered or remained in Australia 'illegally' to apply for the amnesty, stating that they should not fear arrest and that their cases would be considered 'sympathetically'.[84] He noted that '[i]f they have been good citizens in their time here I am prepared to grant permanent residence and this can lead to their becoming Australian citizens.'[85]

Despite the novelty and openness of the initiative, the amnesty campaign was not particularly successful. By late March 1974, only around 176 people had applied, many of whom had arrived in Australia as 'stowaways on ships'.[86] By the end of the amnesty period, the Department had received 367 applications, all of which were approved.[87] For example, in April 1974 a spokesperson for the Department expressed their surprise that more people had not come forward, stating that it was

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80 Jenny Hocking, *Gough Whitlam: His Time* (Melbourne University Press, 2013).
81 Storer (n 77) 8.
82 'Dispensation for Illegal Immigrants' (1974) 45(2) *Australian Foreign Affairs Records* 114.
83 '176 Take Up Amnesty Offer', *The Canberra Times* (Canberra, 25 March 1974) 3.
84 Ibid.
85 Extract from Minister's Australia Day Message (National Archives of Australia ('NAA'): A446, 1974/95281).
86 '176 Take Up Amnesty Offer' (n 83).
87 Memo from Murphy to Kern, 17 June 1980 (NAA: A463, 1978/1653).

'remarkable really that all those people who have come forward were people who were not being exploited, although the amnesty is intended to help illegal immigrants who may be exploited'.[88] This lack of uptake stemmed from a range of factors, including that the campaign was 'brief and not well publicized'.[89] The campaign's short duration meant that there was little opportunity for the news of successful applications to be publicised and to encourage other people to apply, and the Department did not pursue an active media or community engagement strategy to promote the amnesty or counter community suspicion of the government's motives. In his 1984 study of Australia's past amnesties, North noted that '[s]everal of the ethnic organizations distrusted the Department of Immigration … and told potential applicants not to apply'.[90]

B *The 1976 Amnesty*

Following the 1974 amnesty's low uptake, a subsequent amnesty was initiated two years later, this time under the newly-elected Fraser Coalition Government in 1976. The political commitment to implementing a second amnesty was made during the final week of the 1975 double dissolution election campaign. On 7 December 1975, then Caretaker Prime Minister Fraser announced his intention to initiate an amnesty for certain 'prohibited immigrants' in early 1976 should his government win the election.[91] This focus on immigration law and policy was noteworthy, given that the election campaign concentrated on constitutional and economic issues in the wake of OPEC ('Organization of the Petroleum Exporting Countries') crisis, Australia's mounting debt and inability to obtain international finance under the previous Whitlam Government.

Following the election of the Fraser Government, the newly-appointed Minister for Immigration and Ethnic Affairs, Michael MacKellar, quickly set about defining the scope and terms of the new amnesty. In his January 1976 submission to Cabinet, MacKellar proposed that the scope of the new amnesty should be as broad as possible, and 'relate to overstayed visitors'.[92] However, he also noted that 'should others come forward I will look at each case as sympathetically as possible'.[93] Although the Minister acknowledged concerns that an amnesty program may make 'control of future temporary entrants more difficult and may generate pressure for further amnesties in the future', he submitted that the alternate options of either 'mount[ing] a campaign of detection and deportation' or letting 'the existing situation persist' had major 'drawbacks', particularly the former as it would require 'increased resources in manpower'.[94] Interestingly, a key government apprehension in relation to the amnesty option was that it might prompt 'resentment' among Australian citizens who had been unsuccessful in the past in their attempts to assist

88 'Illegal Migrants Live in Holroyd', *Broadcaster* (Fairfield, NSW, 30 April 1974) 1.
89 North (n 10) 525.
90 Ibid.
91 'Fraser Promises Migrant Amnesty, *The Sydney Morning Herald* (Sydney, 8 December 1975) 9.
92 Memo to Cabinet from Minister for Immigration and Ethnic Affairs, dated January 1976 and circulated to Cabinet on 6 January 1976 (NAA: A10756, LC79).
93 Ibid.
94 Ibid.

or sponsor close relatives to migrate to Australia, with the Minister noting that the '[c]ontinued rejection of such sponsorships in the face of an amnesty to persons who, in many cases knowingly contravened immigration controls, will exacerbate the deep disappointment of such persons'.[95]

Like the earlier amnesty, the 1976 amnesty also was announced on 26 January 1976.[96] The amnesty applied to any person who had arrived in Australia prior to 31 December 1975 and applied for legal status within the stipulated amnesty period. Yet, unlike the 1974 amnesty, this second amnesty would only be open for a three-month period, until 30 April 1976. Publicly, the Immigration Minister stressed that the amnesty was a 'genuine offer' that was intended to 'give security to the many people currently living under a cloud in this country'.[97] In his press release, MacKellar stated that

> [i]n making this offer, the Government realized that many people who were potentially good citizens had come to Australia as visitors in the mistaken hope that it would be easy to obtain resident status once they were here. This hope had not been realized and they now found themselves technically without legal status in Australia. The Government has recognised their problem and has acted humanely to resolve it.[98]

In February 1976, the Immigration Minister clarified that convictions for minor offences, such as traffic offences, working illegally or using false names, did not disqualify a person from the amnesty.[99] In addition, he stated that the Department was not checking tax records for non-compliance issues.[100]

The 1976 amnesty was publicly justified on basis of 'rectifying' the consequences of 'the Labor party's easy-visa system', with the Minister stating that an amnesty was the 'only effective and humane way to overcome this situation', which had created a substantial undocumented population in Australia.[101] That said, the Government stressed that the amnesty would not be repeated, even if it would not necessarily be followed by a more concerted 'campaign to try to find' anyone remaining without authorisation in Australia.[102] Notably, the Labor Party, in opposition, heavily criticised the Government's amnesty campaign on the basis that the amnesty period was too short.[103] In a proposed motion calling on the House to express its 'serious concern and deplore … the action of the Government in its implementation of the Amnesty for Illegal Immigrants', Ted Innes (MP for Melbourne, and former National President of the Electrical Trades Union) called for the amnesty to be extended to a period of 12 months.[104] He also called on the Government to clarify the conditions surrounding the amnesty and 'appoint an

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95 Ibid.
96 Michael MacKellar, Minister for Immigration and Ethnic Affairs 'Amnesty for Prohibited Immigrants' (Press Release, 25 January 1976, NAA: A10756, LC79).
97 '270 Seek Amnesty', *The Canberra Times* (Canberra, 28 January 1976) 3.
98 MacKellar (n 96).
99 'Minor Offences Not to Affect Amnesty', *The Canberra Times* (Canberra, 6 February 1976) 8.
100 'Amnesty Response "Good"', *The Canberra Times* (Canberra, 2 February 1976) 8.
101 'Early Action Promised on Immigrant Amnesty', *The Canberra Times* (Canberra, 6 January 1976) 4.
102 'Amnesty for Illegal Immigrants Ending', *The Canberra Times* (Canberra, 28 April 1976) 10.
103 Commonwealth, *Parliamentary Debates*, House of Representatives, 17 February 1976, 27 (Ted Innes).
104 Ibid.

independent committee of appeal comprised of representatives of our ethnic communities to investigate cases where amnesty has been refused'.[105]

Despite this, the 1976 amnesty had little formal involvement of ethnic community groups. While some groups did approach the Department to request a 'bulk supply of forms',[106] similar to the 1974 amnesty, there was also much reported fear and suspicion of the Department on the part of undocumented people. According to Department officials, it was common for undocumented migrants to send friends with legal status to the Department to collect application forms on their behalf 'because they feared arrest if they went themselves'.[107] By March 1976, the Minister felt compelled to rebuke the notion circulating within the community that the amnesty was a 'trick', stating that such claims were 'cruel' to those who could benefit from amnesty: 'any organisation advising migrants not to take advantage of the amnesty would have it on their conscience for the rest of their lives. The amnesty would allow people to live a full and complete life and have the rights and privileges involved'.[108]

Nonetheless, the limited government outreach to community organisations meant that the final uptake of the amnesty remained low, even though there was a significant increase in applicants in comparison to the previous campaign. Departmental figures show that a total of 8,614 people sought legal status in the amnesty period, with the vast majority of them (63%) residing in NSW.[109] The main nationalities of these applicants were Greek (1,283 applicants), followed by the UK (911 applicants), Indonesia (748 applicants) and China (643 applicants).[110] North notes that if these amnesty applicants were representative of the undocumented population in Australia at the time, then 'one would conclude that the population was roughly half from Europe and half from Asia and the Pacific Islands'.[111] In total, 7,861 applications were approved, 22 were refused and a further 722 lapsed or were dealt with under other policies such as for overseas students applying for permanency.[112]

A significant legacy of the 1976 amnesty was the judicial confirmation of the legal basis for ministerial amnesties under the existing legislation. This occurred in the prominent case of Italian citizen and journalist Ignazio Salemi, who sought judicial review of the ministerial decision to refuse his application for permanency under the 1976 amnesty.[113] At the time, Salemi was a leading organiser within an Australian-Italian migrant organisation, the Federation of Italian Migrant Workers and their Families ('FILEF').[114] Salemi had arrived in Australia to build the FILEF

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105 Ibid.
106 '270 Seek Amnesty' (n 97).
107 'Amnesty Response "Good"' (n 100).
108 'Amnesty Granted: Argentine Is Now Legal Migrant', *The Canberra Times* (Canberra, 6 March 1976) 15.
109 North (n 10) 526.
110 Ibid 527.
111 Ibid.
112 Memo from Murphy to Kern (n 87).
113 *Salemi* (n 11).
114 'The Liberal Immigration Policy Is One of Intimidation against People with Progressive Ideas', *Tharunka* (Sydney, 6 October 1976) 9 ('The Liberal Immigration Policy').

welfare office in October 1974 and was granted a three-month temporary entry permit (that was later extended until July 1975).[115] Notably, Salemi was a member of the Italian communist party, a political organisation with then over 1.7 million members and a considerable presence in the Italian Parliament. In April 1976, Salemi submitted an amnesty application to the Department of Immigration and Ethnic Affairs, after having lived in Australia unauthorised for around half a year.[116] Despite seemingly meeting the criteria, Salemi's application was refused on technical grounds, and he was instead issued with a deportation order under s 18 of the *Migration Act*.[117]

The Minister's decision to refuse amnesty to Salemi attracted public outcry, with the decision seen by migrant community groups and trade unionists as a 'double-cross'.[118] For instance, at a public meeting, attended by then Opposition leader Gough Whitlam and Australian Council of Trade Unions ('ACTU') President Bob Hawke, the Government's decision to refuse amnesty to Salemi was deemed a 'despicable and dishonest act'.[119] Salemi appealed the Minister's decision to the High Court, but he was ultimately unsuccessful and deported in October 1977.[120] Even though the High Court noted in obiter dicta that Salemi appeared to meet the amnesty criteria,[121] the Government initially maintained otherwise. However, by 1977, following the publication of a Commonwealth Ombudsman report that was critical of the Government's decision, MacKellar publicly admitted in Parliament that the decision to refuse to extend amnesty to Salemi was motivated by the fact that Salemi was a communist.[122]

The High Court's *Salemi* decision is best remembered for its judicial consideration of ministerial deportation powers. In *Salemi*, the statutory majority (Stephen, Jacobs and Murphy JJ dissenting) upheld the Commonwealth's position that principles of natural justice did not apply to non-citizens in relation to deportation orders issued under the *Migration Act*, and that the Act did not oblige the Minister to afford Salemi an opportunity to be heard before exercising deportation powers.[123] In his leading judgment, Gibbs J reasoned that the broad nature of ministerial power is tied to security considerations:

> Reasons of security may make it impossible to disclose the grounds on which the executive proposes to act. If the Minister cannot reveal why he intends to make a deportation order, it will be difficult to afford the prohibited immigrant a full opportunity to state his case ...[124]

Following the introduction of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and legislative amendments to the relevant deportation powers under

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115 'Migrant Amnesty Doublecross: Deportation Deadline Set for Ignazio Salemi', *Tribune* (Sydney, 11 August 1976) 10 ('Migrant Amnesty Doublecross').
116 'The Liberal Immigration Policy' (n 114).
117 *Salemi* (n 11) 448; Simone Battiston, '*Salemi v MacKellar* Revisited: Drawing Together the Threads of a Controversial Deportation Case' (2005) 28(84) *Journal of Australian Studies* 1, 1.
118 'Migrant Amnesty Doublecross' (n 115).
119 Ibid.
120 Battiston (n 117) 1.
121 *Salemi* (n 11) 406 (Barwick CJ).
122 'MacKellar: It's Because Salemi's a Communist', *Tribune* (Sydney, 14 September 1977) 11.
123 *Salemi* (n 11) 404 (Barwick CJ), 421 (Gibbs J), 460 (Aickin J).
124 Ibid 421.

the *Migration Act*, in *Kioa v West* the High Court found that *Salemi* no longer provided authority for the application of procedural fairness to non-citizens being deported under the existing statutory scheme.[125] As a result, the majority's reasoning in *Salemi* in relation to the nature of ministerial deportation powers has not left a lasting impact on contemporary interpretations of Australian migration law or the scope of the common law duty of procedural fairness.[126]

For current purposes, a more pertinent aspect of the High Court's *Salemi* decision relates to its ruling on the legal nature of immigration amnesties. Here, the Court unanimously held that the series of ministerial press releases announcing the scope of the 1976 amnesty were not ministerial instruments made under the *Migration Act*, as per the plaintiff's submissions.[127] Instead, the Court characterised the press releases as merely reflecting government policy, meaning that the Minister was not legally bound by the offer to grant an amnesty to all prohibited immigrants as a result of these press releases, even if they met all the eligibility criteria for the amnesty as stipulated in these press releases. In his leading judgment, Gibbs J reasoned that

> there is no principle of law that requires a Minister, who has decided as a matter of policy that a permit should be granted to a particular person or to every person who is a member of a certain class, to ensure that a permit is granted to that person or to any person who proves to be a member of that class. The Minister is free to change his policy, or his decision in a particular case, at any time before it is implemented and a permit is granted.[128]

As Aickin J stated in his reasoning, the announcement of an immigration amnesty was a 'political and not a legal promise'.[129] The ministerial press releases were 'not intended to be self-executing, but to induce' undocumented people to submit applications to the Department for assessment.[130] Barwick CJ similarly noted the political nature of legal immigration amnesties. The Chief Justice reasoned that although the ministerial decision to refuse amnesty to Salemi had given the applicant 'ground for a sense of grievance and disappointment', the Minister was not bound by the 'unguarded and perhaps unwise generality' of the amnesty as governments were free to change their policies or not implement a particular policy in its entirety.[131] As a result, Barwick CJ opined that while it was 'regrettable' that the Minister did 'not wish to extend the amnesty to the applicant', this did not however give rise to a 'legitimate expectation' in law of a grant of a permanent entry permit.[132]

In their dissenting opinions, Murphy, Jacobs and Stephen JJ held that procedural fairness did apply to the ministerial exercise of deportation powers, even as they concurred that press releases did not necessarily constitute ministerial instruments. For instance, in finding that Salemi had a legitimate expectation that

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125 *Kioa v West* (1985) 159 CLR 550, 578 (Mason J), 599 (Wilson J), 624 (Brennan J).
126 For the current expression of the duty, see *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180.
127 *Salemi* (n 11) 396, 413.
128 Ibid 416.
129 Ibid 459.
130 Ibid.
131 Ibid 406.
132 Ibid.

the amnesty criteria would be honoured in relation to his application, Stephen J reasoned that a 'fair reading' of the press releases was that they induced 'prohibited immigrants' to present themselves to immigration authorities, and acted as an assurance that there was no 'risk of arrest and deportation … because the Minister had determined not to deport but instead to permit future lawful residence'.[133] Jacobs J noted that, as the amnesty was 'expressed to be … "a genuine offer", "an open and honest invitation"', Salemi was 'entitled to know' the reason why his application for amnesty was refused and given an opportunity to 'displace that reason'.[134] In contrast, Murphy J's dissenting judgment was broader in its assessment of the legal status of the immigration amnesty and its implications. For Murphy J, amnesties were issued pursuant to the power of the executive arm of government. This meant that

> the announced amnesty should be regarded as emanating from the Executive Government duly exercising its power [with] [t]he effect … that persons who fulfil its conditions are not to be treated as prohibited immigrants, not to be prosecuted, and not to be deported on that account'.[135]

The Minister therefore had no power to issue a deportation order as Salemi, in Murphy J's reasoning, was no longer a prohibited immigrant and '[e]very court [was] bound to take account of and give effect to the amnesty'.[136]

The case usefully highlights how the 1976 amnesty in practice was largely defined through ministerial press releases, rather than any formal legal instruments. This was so much so that the very criteria of the amnesty were primarily communicated to the public via ministerial statements and press releases, and mainly publicised via the press. This shows how this amnesty operated profoundly within the realm of executive decision-making and that procedural fairness rights did not extend to those who applied for amnesty under the program.

C *The 1980 Regularisation of Status Program ('ROSP')*

Australia's third — and to date final — broad immigration amnesty came in 1980. In spite of an earlier government commitment that there would no further amnesty,[137] on 19 June 1980, the new Immigration Minister, Ian Macphee, announced the Liberal Government's new six-month amnesty, or ROSP.[138] At the time, government figures estimated that 60,000 people could benefit from the regularisation program, roughly around the same number of people estimated to benefit from any contemporary amnesty if implemented today.[139] In his press release, Macphee stressed that the ROSP's underlying intention was to deal 'humanely with the problem of illegal immigration' while also seeking to curb such unauthorised

133 Ibid 439.
134 Ibid 453.
135 Ibid 456.
136 Ibid (citations omitted).
137 'No New Migrant Amnesty', *The Canberra Times* (Canberra, 27 May 1978) 8.
138 See above n 1 and accompanying text.
139 'New Amnesty for Illegal Immigrants' (n 1).

migration in the future.[140] The program's main function was to effectively 'clean the slate, to acknowledge that no matter how people got here they are part of the community'.[141] In language reminiscent of the two earlier amnesties, Macphee stressed that the ROSP would also 'offer illegal immigrants in Australia every chance to emerge from a life of fear, uncertainty and risk of exploitation'.[142] Yet, the Minister asserted the need for a 'much stricter' approach in the future, stating that the ROSP would be accompanied by 'tougher new migration laws that will effectively rule out future amnesties'.[143] The new legislation would also significantly restrict the categories of persons in Australia who would be eligible for ministerial change of status in the future.[144]

The Government's motivation for the amnesty was part of an explicit government strategy to increase 'legal migration' and curtail 'illegal migration'.[145] At the time, it was estimated that the number of people living unauthorised in Australia was growing by approximately 7,000 people per year.[146] Notably, unlike the 1976 campaign that promised that there would be no concerted effort to find and deport any persons who did not apply for the amnesty, in his 1980 announcement, the Minister threatened to deport anyone who remained in Australia unauthorised and who had not applied for amnesty after the end of the amnesty period on 1 January 1981.[147] Indeed, the amnesty was also accompanied by a slight increase of 13,000 places in the official migration program (to a total of 95,000 places) in order to facilitate family reunion, without needing to resort to remaining in Australia unauthorised.[148]

The 1980 ROSP was a much broader and more sustained campaign than the earlier two amnesties. For the 1980 amnesty, there were two main categories of eligibility:

1. Anyone who was 'illegally' in Australia at the time of the amnesty, provided they had entered Australia prior to 1 January 1980; and
2. Anyone who was 'lawfully' in Australia at the time of the amnesty, provided they had formally applied for permanent residency on or before 18 June 1980.[149]

That said, departmental documents suggest that the Department was prepared to, and in fact did, adopt a flexible interpretation in relation to these categories. For example, the Department was prepared to consider a person who had arrived after 1 January 1980 and who was in Australia 'illegally' at the time of the amnesty eligible to apply

[140] Ian Macphee, Minister of Immigration and Ethnic Affairs, 'Latest Changes Complete Immigration Package' (Press Release, 19 June 1980, NAA: M651, 31).
[141] 'New Amnesty for Illegal Immigrants' (n 1).
[142] Macphee (n 140).
[143] 'New Amnesty for Illegal Immigrants' (n 1).
[144] Macphee (n 140).
[145] 'New Restrictions on Migrants: Amnesty Over', *The Australian Jewish News* (Melbourne, 23 January 1981) 2.
[146] Stephen Mills, 'Amnesty Offered to Illegal Migrants', *The Age* (Melbourne, 20 June 1980) (NAA: M651, 31).
[147] Ibid.
[148] Ibid.
[149] 'Regularisation of Status Program: Some Questions and Answers' (NAA: M651, 31).

for the amnesty if: they were married to an Australian citizen; their children were Australian citizens; or they were a minor with parents who were Australian citizens.[150] Family applications would be considered as a unit.

The amnesty included specific approval criteria as well as 'certain explicit exceptions'.[151] In addition to the above eligibility categories, a person could not have any serious health issue nor a serious police record. This discriminatory health exception was justified on the basis that people with serious health issues would be a 'permanent drain on welfare resources'.[152] Additionally, there were broadly three groups of people who were ineligible to apply for the amnesty: international students and their immediate families; persons issued with deportation orders under the *Migration Act* and their immediate families; and diplomats and officials of other States.[153] In addition, the Department clarified that the amnesty would not apply to refugees or asylum seekers who would still be eligible for permanent residence status through the 'established processes'.[154]

The shift in terminology towards 'regularisation of status' was important and politically revealing. The Fraser Government was careful not to call the 1980 program an 'amnesty' because the Government had stated that the 1976 amnesty was to be the last one. That said, the 1980 campaign was widely referred to as an amnesty in mainstream media and public discourse. For example, an editorial in *The Age* welcomed the new 'amnesty' as a 'humane and realistic' initiative that would benefit the community, the Government and the individuals themselves, stating that it will 'mean that thousands of people who have been leading secret and clandestine lives will be free to come out into the open and declare themselves'.[155] The amnesty also enjoyed bipartisan support. A few weeks prior to the Government's announcement of the 1980 ROSP, Labor leader Bill Hayden had already publicly committed to supporting a new amnesty, prompting Moss Cass (then Labor immigration opposition spokesperson) to subsequently stress that the amnesty was 'a Labor initiative'.[156] Likewise, in the previous year, certain community groups had renewed their calls for another amnesty. For example, the Ethnic Communities' Council of NSW in March 1979 had urged the Government to initiate a new amnesty in order to 'alleviate the personal stress on illegal immigrants who were unable to come forward and claim Australian citizenship for fear of deportation'.[157]

This meant that, in general, many migrant groups openly welcomed the amnesty while also calling for increased pathways to permanent residency. For example, the Family Reunion Group Organising Committee emphasised the need to make legal family reunion easier in the wake of the amnesty, noting that many people became 'unlawful' in order to remain with family in Australia.[158] At the same time, other migrant groups continued to express suspicion about the Government's

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150 Ibid.
151 Ibid 2.
152 Mills (n 146).
153 'Regularisation of Status Program: Some Questions and Answers' (n 149).
154 Ibid 6.
155 'Editorial: New Chance for Illegal Migrants', *The Age* (Melbourne, 23 June 1980) (NAA: M651, 31).
156 'New Amnesty for Illegal Immigrants' (n 1).
157 'Amnesty Call for 50,000', *The Canberra Times* (Canberra, 19 March 1979) 3.
158 'Amnesty or Deportation?', *Tribune* (Sydney, 25 June 1980) 7.

intentions behind the new amnesty. A 1980 newspaper article in Sydney's *Tribune* stated that migrant groups were 'worried' that the latest amnesty may be a 'trick' to facilitate deportations, claiming that 10 people had been deported after applying under the 1976 amnesty.[159] In response, in July 1980, Prime Minister Fraser personally sought publicly to reassure migrant communities that the regularisation program was not 'a trap to lure [people] into the open so that they can be seized, jailed and deported' and that the government was 'not engaged in some sort of massive deportation exercise'.[160] Acknowledging that to do so would be 'neither effective nor just', Fraser stated that '[r]eaching people who are eligible to apply is a very complex task and it requires the fullest possible support from other sections of the community'.[161] By the end of the amnesty period on 31 December 1980, it was reported that 11,042 applications had been received, covering over 14,000 people.[162] Although this was just under a quarter of the initially estimated 60,000 undocumented people in Australia at the time, the Government declared the program to have been successful.[163] By October 1981, 9,734 applications had been processed, of which 217 were deemed ineligible and 8 were rejected.[164]

One legal legacy of the 1980 ROSP, like the earlier 1976 amnesty, was the expansion of the emerging Australian jurisprudence on amnesties, in particular through the prominent case of Syrian academic and community leader, Haydar Haj-Ismail (also known as Aboud Aboud). Haj-Ismail had arrived in Australia in November 1972 on a temporary entry permit, and soon commenced postgraduate studies in philosophy. In 1975, he was joined in Australia by his wife and daughter. By 1980, Haj-Ismail was active in the Syrian Social Nationalist Party. Although Haj-Ismail spent periods of his next decade in Australia without valid status, his application for permanent residency under the 1976 amnesty was rejected on the basis that the Department considered him to be at the time lawfully in Australia as a 'temporary entry private student'.[165] Following the announcement of the 1980 ROSP, parliamentarian Harry Edwards wrote to the Immigration Minister on Haj-Ismail's behalf to request that the family be granted permanent residency. This representation prompted the Minister in September 1980 to personally allow the family to be considered eligible on the basis of academic achievements, length of stay in Australia and future employment prospects, even though they did not technically meet all the ROSP criteria.[166]

Despite the Minister's initial representation, in June 1981 the Minister reversed his approval and issued a deportation order for Haj-Ismail and his family on the basis of an adverse Australian Security Intelligence Organisation ('ASIO')

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159 Ibid.
160 'Amnesty Not a Trap: PM', *The Canberra Times* (Canberra, 28 July 1980) 7.
161 Ibid.
162 'Last Minute Rush: Migrant Amnesty Ends Tonight', *The Canberra Times* (Canberra, 31 December 1980) 6; Joint Standing Committee on Migration Regulations, Parliament of Australia, *Illegal Entrants in Australia — Balancing Control and Compassion* (First Report, September 1990) 35.
163 'New Restrictions on Migrants: Amnesty Over' (n 145).
164 Joint Standing Committee on Migration Regulations (n 162) 35.
165 Quoted in *Haj-Ismail v Minister of Immigration and Ethnic Affairs* (1981) 56 FLR 67, 70.
166 Ibid.

security assessment that was not made available to Haj-Ismail at the time.[167] Haj-Ismail challenged the decision to refuse him status and the deportation order. In the first instance, the Federal Court held that the Minister's decision was affected by an error of law,[168] and that Haj-Ismail was entitled to an opportunity to be heard prior to any further decision or deportation order given the special circumstances of the case, namely that he was an overseas student who had a legitimate expectation of completing his studies in Australia.[169] Despite this, Ellicott J affirmed the principle set out by the High Court in *Salemi* that 'prohibited immigrants' were not entitled to natural justice in ordinary circumstances.[170] This reasoning was upheld by the Full Federal Court on appeal, with Davies J for the majority affirming that there was no standing right to be heard in relation to an application for a permanent residency permit under the amnesty program, and that there was nothing in the Minister's representations to Mr Haj-Ismail to alter that position.[171]

This case is noteworthy for its affirmation of the unfettered ministerial discretion that applied to both the grant *and* refusal of permanent residency under the ROSP. Notably, there was no submission made to the Court that but for Haj-Ismail's special circumstances there was any general right to be heard in relation to an application under the ROSP. Indeed, Davies J in the Full Court stated that '[t]he large number of applications involved, their geographical diversity and the general nature of the decision to be made makes it clear that Parliament did not intend that there should be any such general right.'[172] Despite this, in a subsequent review of the ROSP commissioned by the International Labour Organization, Storer noted that the lack of a publicised system of appeal for reviewing refused amnesty applications contributed to the 'personal fear and suspicion' and 'distrust' of authorities within migrant communities.[173] Storer thus recommended that an open system of appeal — 'possibly in the form of a tribunal of prominent people who would hear problems or cases of dispute [and make] these judgments open to public scrutiny'[174] — 'would help encourage illegal immigrants to apply for amnesty'.[175]

The most significant legal legacy of the 1980 amnesty, however, was substantial legislative reform of the *Migration Act* constraining the Minister's discretions in relation to change of status. Although moves to reform and tighten exit and entry rules were already evident following the 1976 amnesty, the 1976 reforms were limited in scope. In contrast, the legal reforms introduced through the *Migration Amendment Act (No 2) 1980* (Cth) following the 1980 ROSP were much more extensive and considerably tightened the power of the Minster to regularise a person's status as a result of the insertion of a new section, namely s 6A.[176] Under the new s 6A, a person could only be granted an entry permit after their entry into

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167 Ibid 77–8. The adverse information was based on police suspicion that he was connected to 'violent incidents' within 'the Arabic community': ibid 74.
168 Ibid 89.
169 Ibid 91.
170 Ibid 84, 91.
171 *Haj-Ismail* (n 12) 154.
172 Ibid 159.
173 Storer (n 77) 61.
174 Ibid 52.
175 Ibid 64.
176 *Migration Amendment Act (No 2) 1980* (Cth) s 6A.

Australia if they fulfilled set conditions. These included, for example, that they had been granted territorial asylum or refugee status; were a close relative of an Australian citizen or entry-permit holder; or there were 'strong compassionate or humanitarian grounds' for doing so.[177] In effect, the insertion of s 6A took away the previous broad ministerial discretion to regularise status or initiate a legal immigration amnesty. The amending legislation also included a transitory provision that recognised the validity of applications for entry permits made under the 1980 ROSP, provided that they had been submitted before 1 January 1981.[178] At the time, Minister Macphee warned that these new restrictions would be 'strictly enforced' in order to crack down on 'back-door migration' and 'queue-jumpers', and that anyone who 'broke the law by overstaying their visas would be deported'.[179] These legislative changes were in line with the Government's pledge that there would be no further amnesties following the 1980 campaign.

The following decade saw numerous unsuccessful calls for the implementation of a new immigration amnesty. For instance, in 1985 there was a parliamentary committee review of the departmental costs of controlling 'prohibited immigration' and the Human Rights Commission (a distinct statutory body that existed from 1981 to 1986) submitted to the Committee that the Government should adopt guidelines to allow undocumented people 'who ha[d] integrated into Australian society to remain in the country'.[180] Then deputy chairman of the Commission, Peter Bailey, emphasised that 'the removal of immigrants after they ha[d] set up their life and established families was, in some ways, a denial of basic human rights for them and their children'.[181] Despite such legal arguments, the 1980s marked a rapid and largely bipartisan shift in rhetoric around undocumented people in Australia, including the potential of immigration amnesties more generally. Notably, in the lead up to the 1988 Bicentenary, then Labor Minister for Immigration and Ethnic Affairs Chris Hurford sought to quell rumours of another possible immigration amnesty by asserting that undocumented people were 'queue-jumpers' who had 'mostly broken specific promises not to stay in Australia'; and that there was 'no earthly chance' of an immigration amnesty for people who 'flout Australia's migration laws with impunity'.[182] This increasing government hostility towards unauthorised migration saw a succession of significant law reforms over the 1980s and early 1990s that included the introduction of Australia's universal visa system in 1994 mandating that every non-citizen in Australia must have a valid visa.[183] Such changes not only further tightened official pathways to permanency for undocumented migrants, but also failed to address the phenomenon of an again growing undocumented population in Australia.

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177 Ibid.

178 Ibid s 11.

179 '"Tough" on Illegal Immigrants', *The Canberra Times* (Canberra, 19 January 1981) 7.

180 'Amnesty Call for Illegal Residents', *The Canberra Times* (Canberra, 23 May 1985) 15.

181 Ibid.

182 Chris Hurford, Minister for Immigration and Ethnic Affairs 'No Amnesty for Illegal Immigrants' (News Release, 6 June 1986), republished in 57(6) *Australian Foreign Affairs Record* (June 1986) 548–9.

183 For a general overview of some of these changes, see Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (Federation Press, 2011) esp 148–55.

IV Legal Lessons from Past Amnesties

Although the legacies of Australia's past immigration amnesties are multifaceted, in this Part, we analyse four aspects of these past campaigns that are relevant to immigration law reform today. These lessons highlight the possibilities and challenges surrounding contemporary calls for a further immigration amnesty.

A *Amnesties Informed by a Social Conception of Citizenship*

One of the most prominent aspects of Australia's past amnesty campaigns is that each amnesty was underpinned by what we identify as a politics of social citizenship, rather than a strict conception of citizenship as legal status. Social citizenship, as a normative approach to the politics of national membership, is based on the idea that 'living in a society over time makes one a member and being a member generates moral claims to legal rights and to legal status'.[184] There is a rich literature on diverse forms of citizenship, examining in particular the extent to which '[n]ew connections among citizenship elements …. suggest that we have moved beyond the idea of citizenship as a protected status in a nation-state, and as a condition opposed to the condition of statelessness'.[185] We contend that a normative conception of social citizenship, defined by membership, participation and presence within territory, was central to how successive governments advocated for and promoted immigration amnesty. This social conception of citizenship is a factor that plainly distinguishes the politics of membership during the past immigration amnesties from the politics of citizenship in contemporary Australian politics.

Each historical amnesty was promoted on the basis of the social contribution of undocumented migrants living in Australia *in spite of* their unlawful state, alongside the State's responsibility for their welfare based on their continued presence within Australian territory. Each immigration amnesty campaign recognised and accepted that people could fall into unlawful status for a range of reasons, including through no fault of their own and not as a means to deliberately 'exploit' Australia's immigration laws. By contrast, citizenship as legal status is at the centre of more recent Australian governments' refusal to implement an amnesty to regularise the status of undocumented people. The shift in rhetoric and policy following the 1980 ROSP documented above saw bipartisan support for the view that those without status were 'deliberately deceiv[ing] the immigration authorities' and that the Government could not 'condone people being encouraged to flout Australia's migration laws with impunity'.[186] The Morrison Liberal Government similarly made clear that any form of amnesty would 'undermine the integrity of this government's strong visa system',[187] and incentivising irregular non-citizens to

[184] Joseph Carens, *The Ethics of Immigration* (Oxford University Press, 2013) 159–60.
[185] Aihwa Ong, 'Mutations in Citizenship' (2006) 23(2–3) *Theory, Culture & Society* 499, 499 (citations omitted); Linda Bosniak, *The Citizen and the Alien* (Princeton University Press, 2008).
[186] Hurford (n 182).
[187] Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia Canberra, 22 March 2021, 191 (Michaelia Cash).

come forward with the promise of a permanent status would be a 'perverse distortion' of Australia's immigration program.[188]

This is a classic anti-amnesty stance that maintains what is needed is 'not regularization of [irregular] immigrants but a renewed commitment to rounding them up and ejecting them, and to tightening the borders against future illegal entrants and visa violators'.[189] A critical observation drawn from the historical and archival materials is that such an approach to the politics of immigration and citizenship within the executive government is a political and practical barrier to amnesty. While we are not arguing that an immigrant's 'time and ties in the receiving society' is the only basis upon which to justify or argue for amnesty, we note the centrality of this idea in the historical campaigns.[190]

B *Understanding the Legal Basis of Immigration Amnesties in Australia*

Attending to Australia's past immigration amnesties enables a more nuanced understanding of the changing nature of executive power vis-à-vis non-citizens within the context of Australia's migration law. Our analysis of Australia's past amnesties has demonstrated that these campaigns were all initiated pursuant to the then ministerial discretion powers under the *Migration Act*. For at least its first three decades, the Act explicitly provided the Minister with a largely unfettered power to regularise the status of non-citizens. This meant that each amnesty's initiation, duration and scope were entirely subject to ministerial discretion and government policy.

Today, the Minister's power to regularise the status of 'unlawful non-citizens' has become much more limited and restricted to specific circumstances. These include, for instance, the power to issue any visa, either permanent or temporary, to a non-citizen in immigration detention,[191] or to substitute a 'more favourable decision' in the place of an adverse tribunal migration decision if the Minister thinks it is 'in the public interest to do so'.[192] This statutorily-delimited avenue for ministerial discretion is intended

> to balance what is an otherwise inflexible set of regulations to allow the minister a public interest power to grant a visa in individual circumstances which the legislation had not anticipated and where there were compelling, compassionate and humanitarian considerations for doing so.[193]

The *Migration Act* also stipulates that the ministerial public interest powers are non-compellable and non-reviewable.[194]

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188 Evidence to Senate Legal and Constitutional Affairs Legislation Committee (n 67) 192 (Michael Pezzullo).
189 Bosniak 'Amnesty in Immigration' (n 14) 344–5.
190 Ibid 345.
191 *Migration Act* (n 32) s 195A.
192 Ibid s 417.
193 Kerry Carrington, 'Ministerial Discretion in Migration Matters: Contemporary Policy Issues in Historical Context' (Current Issues Brief No 3 2003–04, Parliamentary Library, Parliament of Australia, September 2003) 1.
194 *Migration Act* (n 32) s 195A.

In practice, however, the high volume of requests for ministerial 'intervention' in recent decades has led to this becoming a 'God-like' area of executive decision-making.[195] The wide ministerial powers within the current *Migration Act* fail to provide adequate transparency or accountability for discretionary decision-making. This critique has been especially relevant to the use (and abuse) of executive discretions in relation to onshore asylum seekers in Australia.[196] Notably though, the trend of widening executive power has generally not been mirrored in relation to the granting of visas. While ministerial public interest powers are intended as a kind of 'safety net' for individual decision-making, they appear unable to provide an adequate response to systemic phenomena such as the growth of the undocumented population in Australia. This is particularly the case as, under the present Act, the Minister is not authorised to regularise the status of non-citizens unless certain jurisdictional facts exist, such as they are being held in immigration detention, they have had their visa automatically cancelled on particular grounds, or they are the subject of a negative migration decision at a tribunal level.[197]

Amnesties thus raise the question of place of ministerial discretion within Australia's migration law. We suggest that one of the advantages of the now repealed s 6(5) of the *Migration Act* — that operated for the duration of Australia's three legal amnesties — was that it implicitly recognised the benefits of empowering the Minister to change the status of people who had become unauthorised within Australia (for example, as a result of a failure to understand visa restrictions or an inability to meet strict migration criteria). Indeed, in its April 1985 report, *Human Rights and the Migration Act 1958*, the Human Rights Commission stated that change of status provisions were a 'welcome amelioration of the stringency of entry conditions' found elsewhere in the Act, and called for the 'reinstatement' of a broad 'amnesty provision'.[198] Storer's study shows that the harder legislative pathways to permanency are, the more likely it is that people will remain in Australia unauthorised, resulting in a growing undocumented population.[199] In this sense, the declaration that the 1980 ROSP would be the last amnesty and the corresponding legislative amendments that removed the earlier broad change of status ministerial power has contributed to the creation of new groups of undocumented people.

As noted, unfettered ministerial power to regularise the status of non-citizens gave the executive government control over the scope and duration of each amnesty campaign. The *Migration Act* does not currently make any mention of immigration amnesties or regularisation of status programs. During all three past campaigns, the Act did not specify the eligibility details, operation or scope of any of these amnesties. To our knowledge, the only mention of 'regularisation' in the history of the *Migration Act* appeared in 1981 after the 1980 ROSP as a transitionary provision

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195 Liberty Victoria, *Playing God: The Immigration Minister's Unrestrained Power* (Report, Rights Advocacy Project, 2017).

196 Joyce Chia and Savitri Taylor 'A Masterclass in Evading the Rule of Law: The Saga of Scott Morrison and Temporary Protection Visas' (2021) 44(3) *University of New South Wales (UNSW) Law Journal* 1114.

197 See eg *Migration Act* (n 32) ss 195A, 417, 501C.

198 Human Rights Commission, *Human Rights and the Migration Act 1958* (Report No 13, April 1985) xiii [16].

199 Storer (n 77) 32.

for removing the ministerial discretion to initiate future amnesties and ensuring that no subsequent amnesties could be implemented without the approval of Parliament.[200]

Revisiting the history of Australia's past immigration amnesties thus invites a reconsideration of the place of executive action in Australia's immigration laws. Ministerial discretion allowed each past amnesty to be implemented efficiently and flexibly, largely with bipartisan support. This accords with the conception of amnesties as fundamentally exercises of executive mercy and pardon, in spite of existing legal frameworks.[201] While unfettered executive power has, in more recent history, rarely been exercised to facilitate access to permanent residency or secure migration status, we note the centrality of executive action in most amnesty campaigns, including Australia's, and the challenges of enacting amnesty in the absence of provisions enabling such executive authority under the current Act.

C *Legal Criteria and Design of Amnesties*

There are a range of factors that shape the design of immigration amnesties, including the criteria for eligibility, the type of immigration status offered, as well as the duration and publicity of the campaign itself. Research on immigration amnesties across jurisdictions demonstrates that the campaigns that successfully achieve regularisation for identified groups rely on careful promotion, community engagement and publicity, do not have onerous evidentiary requirements (for example, proof of length of residence) and are characterised by clear, objective eligibility criteria.[202] In her in-depth analysis of regularisation programs across nine countries, Levinson identifies 'lack of publicity, having overly strict requirements that limited migrant participation … and lack of administrative preparation' among 'the most common reasons for program failure or weakness'.[203]

Australia's first campaign ran for only six months and, as noted earlier, was 'brief and not well publicized'.[204] The same can be said of each subsequent amnesty. The second campaign in 1976 lasted just three months, with the 1980 ROSP lasting six months in total. While the Government expressed surprise at the minimal uptake, especially in relation to the 1974 and 1976 campaigns, this lack of uptake reflects the limited time for undocumented communities to learn about the campaigns, let alone for Government to actively promote or foster trust in these campaigns. Applicant numbers, however, rose steadily across the campaigns: 176 in 1974; 8,614 in 1976; and over 14,000 in 1980. This is, in part, attributable to undocumented communities becoming familiar with the idea of amnesty over time and the 'success' of applicants in previous campaigns fostering increased trust in the campaigns. The increased uptake in 1980 is also a function of the substantial broadening of eligibility, whereby, for example, persons with status who had arrived before

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200 *Migration Amendment Act (No 2) 1980* (Cth) (n 176) s 11.

201 Though for a critique of this framing, see Bosniak, 'Amnesty in Immigration' (n 14).

202 See, eg, Doris Meissner, David North and Demetrios Papademetriou, 'Legalization of Undocumented Aliens: Lessons from Other Countries' (1987) 21(2) *International Migration Review* 424.

203 Levinson (n 18) 6.

204 North (n 10) 525. See also text accompanying n 84.

1 January 1980 were eligible to apply (the amnesty period began in mid-1980). By comparison, the key criterion of the 1974 amnesty was a minimum of three years' presence for eligibility.[205]

The promotion of amnesty campaigns among affected populations is also critical to their success and, similarly, requires time. Information, consultation and outreach regarding campaigns is required to build trust and support among migrant and undocumented communities.[206] Historical and archival materials relating to Australia's past amnesties confirm that promotion of the 1974 and 1976 campaigns was limited and less effective, with media at the time reporting fear and suspicion of the Department among undocumented people. Indeed, there were concerns that the offer of amnesty was a 'trick' to detect unlawful migrants once they had come forward.[207] While members of the Government attempted to discredit such claims, Australia's past experience underscores the need for a clear and thoughtful community engagement, outreach and promotion strategy, informed by affected groups and their representatives themselves. By contrast, during the 1980 amnesty the Department 'mounted a substantial and highly successful publicity campaign', which included targeting foreign language press and radio, and the translation of amnesty information into 48 languages.[208] As well, the Department's field staff were encouraged to share applicants with 'interesting case histories' with departmental publicists and once the amnesty was underway, the media strategy concentrated on 'heart-warming human interest stories' rather than a 'discussion of immigration policy'.[209] However, while Storer notes the considerable media budget to support the ROSP, a survey of a broad range of ethnic community organisations following the ROSP suggested that still not enough time and effort was spent on outreach to grassroots and ethnic organisations, that translations lacked accuracy and that there was not sufficient clarity regarding eligibility criteria including the effect of criminal records and 'times of eligibility'.[210]

Alongside effective outreach, the political rhetoric and framing of both the idea of amnesty and undocumented people generally were significant factors in how the amnesties operated. The 1974 amnesty stipulated only those of 'good character' ought apply and each amnesty established exclusion criteria for 'criminal' non-citizens.[211] In 1976 and 1980, however, Ministers MacKellar and Macphee made it clear that minor criminal offences and misdemeanours would not affect eligibility[212] and each campaign emphasised that cases would be treated 'as sympathetically as possible' and eligibility criteria would be given a broad interpretation.[213] As well, alongside formal eligibility criteria, we note that each amnesty was unambiguously

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[205] See above n 83 and accompanying text. The cost of applying was also accessible; in 1980, an application cost approximately $100 covering a $50 application fee and required tests: Stephen Mills, 'Thousands of Migrants Ignore Amnesty Offer', *The Age* (Melbourne, 30 October 1980) (NAA: M651, 31).

[206] Meissner, North and Papademetriou (n 202).

[207] See above n 107–8 and accompanying text.

[208] North (n 10) 530.

[209] Ibid 530–1.

[210] Storer (n 77) 34.

[211] See above nn 83–5 and accompanying text.

[212] See above nn 99, 151 and accompanying text.

[213] See, eg, above nn 84, 92, 150 and accompanying text.

framed as a mechanism to end exploitation of non-citizens' labour and as motivated by concerns about existing inhumane conditions and the welfare of undocumented persons.[214] This language of 'humanity' can be contrasted with — and sat ambivalently alongside — the framing of amnesties as a precursor to stronger immigration enforcement, and a last chance to regularise before a shift to immigration control and deportation.[215] Such ambivalent framing can be seen in past campaigns, with notions of good character and the good migrant, versus 'criminal' non-citizens, persisting.[216] As well, a 'promise' of migration controls following the amnesty period featured strongly in the 1980 campaign, and as we note, has effectively limited the possibility for further regularisation programs. However, during each amnesty, the Government also emphasised that the campaigns aimed to 'allow people to live a full and complete life and have the rights and privileges involved'[217] — and, as a consequence, offered unqualified permanent status to (almost all) people who applied.

D *Amnesties as a Humane and Effective Legal Response*

A final key lesson from Australia's past amnesties is that amnesties ought to be seen as a more humane and less costly response to unauthorised migration in direct comparison to two alternate options: either accepting the status quo of a large undocumented population in Australia, or adopting a large-scale detection and deportation model. In particular, Minister MacKellar acknowledged in the lead up to the 1976 amnesty that the detection and deportation approach would be costly and require 'increased resources in manpower'.[218] Indeed, departmental data shows a sharp decline in deportations during both the 1976 and 1980 amnesty campaigns.[219]

In contrast, it is clear that in the intervening four decades since the 1980 ROSP, Australia has come to embrace a detection and deportation model in relation to undocumented people.[220] The *Migration Act* currently states that all 'unlawful non-citizens' must be detained in immigration detention and places an obligation on the Minister to remove an 'unlawful non-citizen' from Australia 'as soon as reasonably practicable'.[221] As a consequence, the Department allocates significant financial funds to visa compliance, immigration detention and deportations, including raids on workplaces and private residences in order to locate 'unlawful non-citizens' and detect unauthorised work. In 2019–20, for example, the Department reported 14,809 'location events' in relation to apprehending people deemed 'unlawful non-citizens' and 2,394 'location events' relating to 'illegal

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214 See, eg, above nn 82, 97, 140 and accompanying text.
215 See, eg, above nn 101, 141–3 and accompanying text.
216 Note too contemporaneous rhetoric about boat people and fear of 'invasion' and floods of arrivals from Indochina: see, eg, Klaus Neumann, *Across the Seas: Australia's Response to Refugees: A History* (Black Inc, 2015) ch 5.
217 'Amnesty Granted: Argentine Is Now Legal Migrant' (n 108).
218 Memo to Cabinet from Minister for Immigration and Ethnic Affairs (n 92).
219 North (n 10) 534.
220 Cf Australia's long history of forcible deportations: Glenn Nicholls, *Deported: A History of Forced Departures from Australia* (UNSW Press, 2007).
221 *Migration Act* (n 32) s 198.

workers'.[222] In addition, in recent decades, the number of people forcibly deported from Australia has grown steadily, rising to around 10,000 persons per year from 2000 onwards.[223] For example, in 2019–20, 10,505 people deemed 'unlawful non-citizens' were returned from the Australian community or removed from onshore detention.[224] Such removals can entail an elaborate process, with the Department formalising a 13-week schedule for a person's removal.[225] While the Act allows for the Commonwealth to recover the cost of removal (including the cost of immigration detention) from a deported person,[226] in practice, the likelihood of such debt recovery is slim.

Writing in a US context, Koh argues for the need to 'downsize' the contemporary deportation state by 'scaling back the size and scope of the governmental infrastructure that has made mass detention and deportation possible'.[227] Koh defines the 'deportation state' to consist of a 'federal administrative infrastructure for enforcing the immigration laws through deportation and detention'.[228] Koh draws particular attention to the massive expansion of funding, staff and bureaucratic infrastructure that has not necessarily resulted in increased immigration compliance, but instead stigmatises people and subjects them to dehumanising treatment. Koh thus shows that the 'deportation bureaucracy has evolved into a regime that wields disproportionate levels of power over its subjects, and its operative realities raise extensive fairness concerns'.[229]

Although Koh traces the particular historical developments and current immigration enforcement practices in the US, her critique of the deportation state is salient in an Australian context too, particularly when she writes that:

> this growth in the deportation state has yielded questionable results. The dominant tools used by immigration enforcement — quasi-criminal measures like physical incarceration, with attendant costs leading to family separation, displacement, and distrust in government — have led to harms exacted upon immigrant communities, especially communities of color.[230]

Similarly, Turnbull notes in a UK context that immigration detention 'primarily targets poor, racialized men and women and is reflective of systemic inequalities along interconnected lines of race, gender, sexuality, class, ability, and religion'.[231] Likewise, the Australian apparatus of immigration enforcement and

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222 Department of Home Affairs (Cth), *2019–20 Annual Report* (2020) 239.

223 Glenn Nicholls, 'Gone with Hardly a Trace: Deportees in Immigration Policy' in Klaus Neumann and Gwenda Tavan (eds), *Does History Matter? Making and Debating Citizenship, Immigration and Refugee Policy in Australia and New Zealand* (ANU Press, 2009) 9, 16.

224 Department of Home Affairs (Cth), *2019–20 Annual Report* (n 222) 93.

225 Department of Home Affairs (Cth), *Removal from Australia — Notifying Stakeholders of the Removal* (Procedural Instruction, 13 September 2018).

226 *Migration Act* (n 32) ss 210, 215, 262.

227 Jennifer Lee Koh, 'Downsizing the Deportation State' (2021) 16(1) *Harvard Law and Policy Review* 85, 88.

228 Ibid 85.

229 Ibid 98.

230 Ibid 89.

231 Sarah Turnbull, 'Racial Innocence, Liberal Reformism, and Immigration Detention: Towards a Politics of Abolition' in Kelly Struthers Montford and Chloë Taylor (eds), *Building Abolition: Decarceration and Social Justice* (Routledge, 2021) 29 (Abstract).

deportation disproportionately affects migrant communities of colour undertaking so-called 'unskilled work'. Critiquing the present detection and deportation model — both in terms of economic cost and impact on non-citizens — and holding onto other models for understanding legal belonging beyond formal citizenship, thus, provides further grounds for embracing regularisation campaigns. Amnesty politics, at its most radical, has the capacity to illuminate or underscore ethical arguments for racial justice and migrant justice, including through the abolition of immigration detention, the 'deportation state' or even (the policing of) state borders more generally.

V Conclusion

The COVID-19 pandemic has clearly shown the need for a new immigration amnesty in Australia. The pandemic's constraints on international travel exacerbated existing and chronic labour shortages and frustrated the capacity of non-citizens to leave or travel within Australia. This includes the over 64,000 undocumented people who have lived in the Australian community for extended periods. To date, successive Australian governments' responses to the specific effects of COVID-19 on temporary visa-holders have been limited, and primarily addressed to those who have some form of regular status that is due to expire. The initial response has included the introduction of a temporary 'COVID-19 pandemic event' visa.[232] The visa was available to non-citizens who are unable to depart Australia due to COVID-19 *or* who are currently working in an identified 'critical sector', and is valid for 90 days or 12 months respectively. While a necessary and immediate response, the COVID visa was a stop-gap measure. It temporarily ameliorated the situation facing non-citizens *with* lawful status and did not address the predicament facing undocumented people, which includes the ongoing barriers they face in accessing healthcare and vaccination programs.

In this article, we have looked to Australia's past immigration amnesties as a valuable and underexplored legal resource for contemporary regularisation campaigns and reforms. As we have noted, the absence of any discussion of Australia's past amnesties in contemporary calls for regularisation is surprising. Acknowledging that such contemporary calls take place in their own political context, we have nonetheless suggested that attention to Australia's past amnesties can constructively inform present efforts and arguments in favour of a new amnesty. In drawing on historical materials, including a number of newly-released archival government documents, we have given a clear account of Australia's past legal amnesties in 1974, 1976 and 1980, as well as traced the key jurisprudence and legal legacies that followed on from these campaigns. Legal challenges brought by people excluded from amnesty highlight the scope and nature of the amnesties' operation, the limits of executive power in relation to each campaign and the inevitable intersection between law and politics in the awarding (and withholding) of amnesty at the time. In both the *Salemi* and *Haj-Ismail* cases, untested national security

[232] Temporary Activity visa (Subclass 408) (COVID-19 Pandemic event). Note Howe's proposal for the use of this visa as a means of regularisation for horticultural workers: above n 52 and Howe, 'Out of Limbo and into the Light' (n 6).

concerns and the use of wide statutory deportation powers trumped each applicant's access to amnesty. Ultimately, we suggest that in order for a contemporary amnesty to be successfully implemented, it must be informed by a social conception of citizenship, grapple with the nature of executive discretion, and adopt an inclusive criteria and consultative process for engaging migrant communities. It must also be presented as a humane and effective legal response to the harmful practices associated with the prevailing detection and deportation model for addressing the presence of undocumented people in Australia today.