

OVER THE BORDERLINE: A CRITICAL INQUIRY INTO THE GEOGRAPHY OF TERRITORIAL EXCISION AND THE SECURITISATION OF THE AUSTRALIAN BORDER

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I INTRODUCTION

The policy of territorial excision is a foundational and extraordinary aspect of Australian refugee and immigration policy. First introduced in Australia over 14 years ago in 2001 as part of a package of immigration reforms following the September 11 attacks in the United States, it essentially designates certain parts of Australian territory to be ‘excised’ from Australia’s migration zone.¹ As a result of the policy, any person who reaches an ‘excised offshore place’ by sea without authorisation is classified as an ‘unauthorised maritime arrival’.² Unauthorised maritime arrivals are held to be outside Australia’s migration zone and may not apply for a visa under Australia’s existing onshore visa application process, as set out in the *Migration Act*.³

Up until May 2013 the policy applied to an arc of Australia’s 4891 outlying islands and territories, mainly situated across the northern half of the continent. However, in 2013 it was expanded to include the entire Australian mainland.⁴ As a result of the reform, an ‘unlawful non-citizen’ entering Australian territory ‘at any place’ by sea is designated as an ‘unauthorised maritime arrival’ and as a

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1 ‘Migration zone’ is defined as ‘the area consisting of the States, the Territories, Australian resource installations and Australian sea installations’: *Migration Act 1958* (Cth) s 5(1) (definition of ‘migration zone’) (*Migration Act*).

2 *Migration Act* s 5AA(1).

3 *Migration Act* s 46A(1). Although ‘unauthorised maritime arrival’ is the current statutory designation as at 2015, I refer to those travelling by boat to seek residence in Australia in a number of ways, including as onshore asylum seekers, ‘irregularly’ documented arrivals and unauthorised arrivals. While all of these categories are inadequate, as they are homogenising and often defined from the perspective of the state, I switch between them and seek to avoid categorising all irregularly documented migrants as necessarily intending to seek asylum.

4 *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth) sch 1 item 8, inserting *Migration Act* s 5AA.

consequence, may not make an application for asylum in Australia or for an Australian visa of any kind.⁵ This final expansion of the policy came after a previous federal government's failed attempt to excise the Australian mainland from the migration zone in 2006.⁶ On both occasions, 'excising' Australia from its own migration zone attracted significant national and international attention as a novel means by which to limit irregular migrants' access to Australia's legal system when seeking asylum.

The original policy of territorial excision was established in tandem with a regime entailing that asylum seekers arriving by boat on excised Australian islands could be sent 'offshore', to countries other than Australia, in order to process their claims for refugee protection. While there has been voluminous debate and discussion about the legality of and motivations for the removal of asylum seekers to third countries in the Pacific under what has become known as the 'Pacific Solution',⁷ remarkably little attention has been paid to the history, logic and significance of territorial excision. This is the case despite the progressive expansion of excision, and its centrality in a regime that seeks to control and deter 'unauthorised' boat arrivals. The policy has remained in place in the context of enormously frenetic shifts in Australian migration and refugee policy. Although the consequences and effects of arriving on territorially excised places have been repeatedly modified since excision's inception in 2001, the policy has persisted despite four federal elections and two changes of government, and both major Australian political parties continue to support it.

As such, excision's centrality and endurance in Australia's migration law and policy landscape merits close consideration. Excision is frequently described in passing, as a building block in a policy package that aims to limit the access of onshore asylum seekers to Australian territory and to Australia's onshore refugee

5 Ibid.

6 Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth). See also Department of Immigration and Citizenship, 'Minister Seeks to Strengthen Border Measures' (Media Release, 11 May 2006); Explanatory Memorandum, Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth) 2 [1].

7 Jane McAdam and Kate Purcell, 'Refugee Protection in the Howard Years: Obstructing the Right to Seek Asylum' (2008) 27 *Australian Year Book of International Law* 87, especially 93–103; Susan Kneebone and Sharon Pickering, 'Australia, Indonesia and the Pacific Plan' in Susan Kneebone and Felicity Rawlings-Sanaei (eds), *New Regionalism and Asylum Seekers: Challenges Ahead* (Berghahn Books, 2007) 167; Susan Kneebone, 'The Pacific Plan: The Provision of "Effective Protection"?' (2006) 18 *International Journal of Refugee Law* 696; Savitri Taylor, 'The Pacific Solution or a Pacific Nightmare?: The Difference between Burden Shifting and Responsibility Sharing' (2005) 6 *Asian-Pacific Law and Policy Journal* 1; Tara Magner, 'A Less than "Pacific" Solution for Asylum Seekers in Australia' (2004) 16 *International Journal of Refugee Law* 53; Mary Crock, 'In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows' (2003) 12 *Pacific Rim & Policy Journal* 49; Penelope Mathew, 'Australian Refugee Protection in the Wake of the Tampa' (2002) 96 *American Journal of International Law* 661; Greg Fry, 'The "Pacific Solution"?' in William Maley et al (eds), *Refugees and the Myth of the Borderless World* (Research School of Pacific and Asian Studies, 2002) 23.

status determination processes.⁸ However, the policy does more than provide a means of reclassifying ‘unauthorised’ boat arrivals such that they are excluded from an existing right to apply for asylum under Australian migration law. It also produces and relies upon very particular conceptions of Australia’s territorial border. The idea of excision brings the territorial border to the fore. It uses geographic redefinitions to achieve particular goals relating to national security, and in so doing produces multiple narratives about the role and nature of territorial borders.

My argument is that the policy’s articulation of the role and function of the border relies upon and simultaneously undermines the logic of the securitisation of migration, which, crudely stated, is the discursive process by which the threats, misgivings and dangers facing the state are constructed as a direct consequence of the ‘problem’ of migration.⁹ Securitising discourses assume that the sensible response to this problem is to protect the state by restricting and controlling migration, to prevent the ‘outside’ from coming ‘inside’ and the central site for such control is the territorial border. Such discourses were at the centre of justifications for territorial excision, as an act of national security, limiting the access of ‘outsiders’ to the inside of the state. This is the case even though, as I argue in this article, excision undermines both the logic of territoriality and the construction of territorial borders as delimiting the safety of the state, upon which securitisation discourse relies.

In order to explore these claims, this article is divided into four Parts. In Part II, I outline the literature that has described and critiqued the securitisation of migration. In Part III, I briefly outline the history of territorial excision in Australia and the broader legislative context in which the policy exists. Finally, in Part IV, I explore the constructions of the border within the parliamentary debates regarding territorial excision and argue that they exemplify the functions of the border as imagined within securitisation of migration discourses. I then turn to examine the effects of territorial excision on the physical geography and role of Australia’s borders, and maintain that contrary to securitisation narratives, the geography and rhetoric of excision constitutes a borderscape that undermines territorial conceptions of sovereignty, in order to limit unauthorised migrants’ access to the state and its protections.

Onshore asylum seekers, particularly those arriving by boat, have been at the centre of political debate and discussion in Australia for well over a decade.

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- 8 But, for notable exceptions, see Michelle Foster and Jason Pobjoy, ‘A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia’s “Excised” Territory’ (2011) 23 *International Journal of Refugee Law* 583; Anne McNevin, ‘Border Policing and Sovereign Terrain: The Spatial Framing of Unwanted Migration in Melbourne and Australia’ (2010) 7 *Globalizations* 407; Alison Mountz, *Seeking Asylum: Human Smuggling and Bureaucracy at the Border* (University of Minnesota Press, 2010) 121–45; Prem Kumar Rajaram, ‘“Making Place”: The “Pacific Solution” and Australian Emplacement in the Pacific and on Refugee Bodies’ (2003) 24 *Singapore Journal of Tropical Geography* 290.
- 9 Didier Bigo, ‘Security and Immigration: Toward a Critique of the Governmentality of Unease’ (2002) 27 (Issue 1 Supplement) *Alternatives* 63, 79–81. See also Sharon Pickering and Leanne Weber (eds), *Borders, Mobility and Technologies of Control* (Springer, 2006).

There has been agreement across Australia's two major political parties that domestic policy should aim to minimise and deter the number of asylum seekers reaching Australia. Although the rationale for deterrence has varied, questions of national security and sovereign rights have featured consistently in policy debate that casts onshore asylum seekers as illegitimate refugees and as threats to the safety or integrity of the state. Territorial excision, and my discussion of it here, is best understood within this wider context.¹⁰

II TERRITORIAL BORDERS AND THE SECURITISATION OF MIGRATION

That nation-states assert the right and the duty to control and manage their territorial borders is neither a new nor contentious observation.¹¹ Borders have long been crucial sites from which the nation-state is narrated and constituted.¹² The discursive bases and content of the securitisation of migration also centre on constructions of the border and territoriality. In the securitised state, borders do not just denote the boundaries of the territorial state but are cast as key sites from which the safety and security of the nation can and should be guaranteed and protected. Governments present territorial borders and their regulation as central to national security, and preventing the arrival and potential arrival of undocumented migrants is in turn one of the key objectives of border control and protection.¹³ As a result, national security comes to mean controlling who enters the state and on what terms, rather than protecting citizens from obviously harmful acts. When governments discuss protecting borders by controlling who enters, they are not discussing the protection of the physical borders as such. Instead, it is the state and its inhabitants' safety that is being secured and protected. It is this conception of 'national security' that I rely upon in Part IV when discussing the securitisation of the border.

10 For background, see Jane McAdam, 'Australia and Asylum Seekers' (2013) 25 *International Journal of Refugee Law* 435; see also Michael Grewcock, *Border Crimes: Australia's War on Illicit Migrants* (Institute of Criminology Press, 2009).

11 Scholars from a range of disciplines have pointed out that there is nothing new about the state's preoccupation with the regulation of movement into its territories through border control and border management: see, eg, Ronen Shamir, 'Without Borders? Notes on Globalization as a Mobility Regime' (2005) 23 *Sociological Theory* 197, 209; Richard Devetak, 'In Fear of Refugees: The Politics of Border Protection in Australia' (2004) 8 *International Journal of Human Rights* 101, 103; Mike Grewcock, 'Irregular Migration, Identity and the State – The Challenge for Criminology' (2003) 15 *Current Issues in Criminal Justice* 114, 121. See generally Mathias Albert, David Jacobson and Yosef Lapid (eds), *Identities, Borders, Orders: Rethinking International Relations Theory* (University of Minnesota Press, 2001).

12 For an account of some of the interdisciplinary insights of 'border studies' as a field of inquiry, see Jean-Pierre Cassarino, 'Approaching Borders and Frontiers: Notions and Implications' (Research Report No 2006/03, European University Institute, 2006). Cassarino notes that over the past decades, 'border studies have become legion.' at 1.

13 Catherine Dauvergne, 'Security and Migration Law in the Less Brave New World' (2007) 16 *Social & Legal Studies* 533 ('Security and Migration Law').

The securitisation of migration relies upon a conception of the nation that is fundamentally territorial. It answers the confounding question of ‘what is the nation?’ by confidently locating the definition of nation on national territory, and delimiting this definition by reference to the geographical border. The nation and its borders are perceived as places that are geographically contained and singular, and still as places ‘of blood and soil’.¹⁴ Under the securitisation of migration, the successes and (object) failures of complete control of all national borders are presented as the measure of the nation’s coherence, the safety of those who rightfully live within national territories, and a measure of the capability of the sovereign itself.¹⁵

Sociologist Didier Bigo, who has extensively theorised and critiqued contemporary approaches to internal security in Europe, argues that the securitisation of migration depends upon the myth of the bounded sovereign state and on the idea that the integrity of the nation can be maintained by keeping the national ‘inside’ separate from the treacherous ‘outside’.¹⁶ This conception of the nation-state as a container, which serves to clearly differentiate one polity from another, orders national identity and security around concepts such as territoriality, geographical limits, entries, and exits¹⁷ – and it is this version of the nation that justifies the fortification and protection of state borders.¹⁸

This explication of the securitisation of migration sits comfortably within a body of work that has identified the rhetorical twinning of national security objectives with strict(er) regulation of the border, and the now quotidian observation that a dominant response of Western governments to ‘terrorist’ threats has been the sweeping amendment of migration laws and border control practices.¹⁹ Measures implemented in the name of anti-terrorism and national

14 See generally Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge University Press, 2001) 135, 129–36; see also Peter Fitzpatrick, ‘Globalisation and the Humanity of Rights’ (2000) 1 *Law Social Justice and Global Development Journal* <http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2000_1/fitzpatrick>.

15 Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and the Law* (Cambridge University Press, 2008) 169–70.

16 Bigo, above n 9, 65.

17 Ibid.

18 Ibid 67. There is also a substantial literature within international relations tracking and critiquing processes of securitisation. Of particular note for this research is the extensive literature produced by the ‘Copenhagen School’ of securitisation theory, coming out of the former Copenhagen Peace Research Institute. This work pursues, among other things, linguistic and critical discourse analysis methodologies to critique processes of securitisation. See, eg, Jef Huysmans, ‘Revisiting Copenhagen: Or, on the Creative Development of a Security Studies Agenda in Europe’ (1998) 4 *European Journal of International Relations* 479; Holger Stritzel, ‘Towards a Theory of Securitization: Copenhagen and Beyond’ (2007) 13 *European Journal of International Relations* 357. For an application of this work in the Australian context, see Matt McDonald, ‘Deliberation and Resecuritization: Australia, Asylum-seekers and the Normative Limits of the Copenhagen School’ (2011) 46 *Australian Journal of Political Science* 281; and for an overview, see Michael C Williams, ‘Words, Images, Enemies: Securitization and International Politics’ (2003) 47 *International Studies Quarterly* 511. The author thanks an anonymous reviewer for highlighting this literature.

19 Dauvergne, *Security and Migration Law*, above n 13, 533–4. Dauvergne catalogues some of these responses in detail, writing that:

security have routinely fixated on the outsider in the form of the migrant as the embodiment of danger. The migrant is presented as coming from outside even as ‘counter-terrorism’ initiatives operate to deny basic procedural safeguards to those within the state and against ‘others’, who are citizens or residents or sanctioned as temporary visitors. This fixation on the territorial outside has been crucial in causing the edges of national territories (imagined as the only entry-point of the non-citizen) and immigration issues to become increasingly prominent in political discourse.²⁰ Ronen Shamir highlights the role played by the ‘war on terror’ in pairing border regulation with anti-terrorism efforts and national security.²¹ Proponents of the war on terror argue that the immigration system plays a crucial role in the local fight against terrorism as it is the key means by which the outsider is controlled and monitored. Under the logic of securitisation, ‘a well-functioning immigration system ... deters, detects, and promptly removes those who lack a legitimate purpose for entering or staying in the country.’²²

As a consequence of the current securitised framework, the border has come to exist squarely at the centre of ‘the political’, as an imagined object around which interiorities and identities are created.²³ Contemporary discourses of national security and border protection are directed not simply at the exclusion of the unwanted other, but ‘also towards the production and regulation of political subjectivity within the polity. The border allows us to project a limit to the community and to create an “us”.’²⁴ David Newman describes this particular function of the border, writing that ‘[t]he stronger the barrier function of the border ... the more abstract the narrative of what is perceived as lying on the other side.’²⁵

Although borders are not new to narrations of the national, the extent to which the issue of migration is so routinely twinned with the security of the state

The 2001 attacks were followed almost immediately by a crackdown on movement across American borders, which included contested measures such as a registration requirement for categories of immigrants living in the United States and heightened scrutiny of potential asylum seekers from predominantly Muslim states. The London bombings of the summer of 2005 had similar political results. ... Within weeks of the July attacks, Prime Minister Blair had announced an intention to crack down on foreigners, even if amendments to the *Human Rights Act* were required: at 533–4 (citations omitted).

- 20 See Audrey Macklin, ‘Borderline Security’ in Ronald J Daniels, Patrick Macklem and Kent Roach (eds), *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (University of Toronto Press, 2001) 383; Ben Golder, Victoria Ridler and Illan Rua Wall, ‘Editors’ Introduction: “The Politics of the Border/The Borders of the Political” (2009) 20 *Law and Critique* 105; Didier Bigo, ‘Detention of Foreigners, States of Exception, and the Social Practices of Control of the Banopticon’ in Prem Kumar Rajaram and Carl Grundy-Warr (eds), *Borderscapes: Hidden Geographies and Politics at Territory’s Edge* (University of Minnesota Press, 2007) 3; Shamir, above n 11.
- 21 Shamir, above n 11, 202.
- 22 Ibid. See also Sharon Pickering, ‘Border Narratives: From Talking Security to Performing Borderlands’ in Sharon Pickering and Leanne Weber (eds), *Borders, Mobility and Technologies of Control* (Springer, 2006) 45.
- 23 Golder, Ridler and Wall, above n 20, 106.
- 24 Ibid.
- 25 David Newman, ‘On Borders and Power: A Theoretical Framework’ (2003) 18(1) *Journal of Borderlands Studies* 13, 20.

is a more recent development. The idea that sovereignty, by definition, entails that liberal democracies retain the right to control who enters their territory and on what terms they do so is one of the most widely accepted and commonly recited refrains of modern nation-states.²⁶ However, the relationship between the border, the regulation of migration *and* national security no longer needs to be explained as it has come to exist as a form of common sense. Migration no longer only *affects* issues of national security; migration *is* an issue of national security.

Under securitised migration systems, the need to protect the border from the ‘foreign Other’ and the exteriorisation of threats persist²⁷ despite ample evidence about the nature of ‘terrorist’ activity, which reveals borders cannot be sensibly deployed to define safety or to delineate who is apparently ‘with us’ or ‘against us’.²⁸ There is glaring evidence that the constructed threat facing the state cannot be neatly explained by the presence of non-citizens or non-residents within the state’s territory. Those who do not legally ‘belong’ to the nation are constantly within national borders and those who do belong are constantly elsewhere. And yet, the border is still invoked time and time again as the principal site from which the security of the nation ought to be enforced.²⁹ The heightened surveillance now endured by those crossing borders is in part how the border becomes a site associated with crisis and fear. As Alison Mountz argues, locating security enforcement practices at the border has meant that security ‘crises’ are likely to transpire along the geographical margins of sovereign territory, ‘on islands, in airports, at sea, and in offshore detention centers where authorities and migrants encounter each other.’³⁰

Indeed, one of the consequences of the discursive conflation of migration and security is that the efficacy of migration regulations and the functioning of the

26 See Devetak, above n 11. John Howard, former Prime Minister of Australia, famously captured the essence of this principle during the 2001 federal election campaign when, in response to the arrival of onshore asylum seekers, he declared: ‘we will decide who comes to this country and the circumstances in which they come.’: John Howard, ‘Transcript of the Prime Minister’ (Speech delivered at the Federal Liberal Party campaign launch, Sydney, 28 October 2001).

27 Macklin, above n 20, 392.

28 Bigo, above n 20, 10. For a critique of territorial externality as the only basis upon which the nation classifies, governs and excludes, see Patricia Tuitt, ‘Refugees, Nations, Laws and the Territorialization of Violence’ in Peter Fitzpatrick and Patricia Tuitt (eds), *Critical Beings: Law, Nation and the Global Subject* (Ashgate, 2004) 37. See also, for an Australian example, *Thomas v Mowbray* (2007) 233 CLR 307. In this case, a majority of the High Court accepted that the federal government’s constitutional ‘defence power’ could be extended beyond war and external threats, to combat internal terrorist activities and threats.

29 The externalisation of threat is regularly contradicted by the fact that those accused of so-called terrorist acts can and do come from within the territory of a country, as either citizens or residents: Macklin, above n 20, 392. Dauvergne similarly points out that high-profile terrorist attacks have generally not been committed by people who have evaded state scrutiny or who were in breach of any migration law provisions. She highlights the fact that the London bombers, responsible for the terrorist attacks in London in 2005, were citizens and that those involved in the September 11 terrorist attacks held visas for the United States, noting that planning such attacks as citizens is ‘a far better strategy than risk[ing] the heightened surveillance which accompanies asylum seeker status.’: Dauvergne, *Security and Migration Law*, above n 13, 543.

30 Mountz, above n 8, xvii.

physical borders have become one of the key indices of sovereignty itself.³¹ Catherine Dauvergne asserts that border control, migration and citizenship law have become ‘the last bastion of sovereignty’ since the capacity of national governments to control law and policy in so many other areas has been eroded by global forces.³² Consequently, ‘control efforts have been concentrated on those areas that remain, ostensibly, within the direct control of national lawmakers.’³³ These ‘areas’ are the spaces of national borders and ports, and migration policy determining who has permission to remain on sovereign territory and on what basis.

These constructions of the purpose of border regulation assume that a well-functioning sovereign *can and must* achieve full control over who crosses borders and on what basis, and that those who cross without authorisation are the embodiment of the threat to national security. The geography of securitisation discourse is attractively simple. It places the physical edge of the state at the centre of discussions about national security and constructs the inside of the border as safer and more secure than its outside. As a consequence, the physical space of the border is imagined as the fixed and singular site of migration, and therefore of danger. In Part IV, I argue that this flawed vision, of unauthorised migration control *as* national security, dominated both the construction and justification of territorial excision.

III AN OVERVIEW OF TERRITORIAL EXCISION IN AUSTRALIA

In this short overview, I single out territorial excision – as opposed to the policies of offshore processing, mandatory detention and the naval interdiction of asylum seeker boats that have accompanied it. The purpose of this brief overview is to demonstrate that since 2001, the architecture and statutory regime of excision has remained steadfastly in place. At no point were the islands ‘un-excised’. And most significantly, this has been the case while the precise *consequences* of excision and of an asylum seeker’s arrival at an ‘offshore entry place’ have been repeatedly and dramatically reformed and reformulated over excision’s long history. Then, in Part IV, I explore how securitised conceptions of the space and functions of the border have legitimised the pursuit of border protection and the exclusion of onshore asylum seekers, as geographical ‘outsiders’ and threats to the state.³⁴ I show that excision – alongside migration policies in a number of states that limit the entry of irregularly documented persons via geographical manipulations – has *both* relied upon and seriously

31 Dauvergne, *Making People Illegal*, above n 15.

32 *Ibid* 169.

33 *Ibid*.

34 Jennifer Hyndman and Alison Mountz, ‘Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe’ (2008) 43 *Government and Opposition* 249, 260.

undermined the discourse of securitisation of migration, and its conception of territorial borders as sites determinative of safety or danger.³⁵

Over the course of 11 years, the policy of territorial excision expanded to a point where in 2012, all Australian territory was defined as being outside of the nation's migration zone for the purposes of unauthorised maritime arrivals. The policy currently exists within a matrix of legislative provisions, the primary function of which is to exclude and deter people who arrive by boat without a valid visa and prevent them from accessing the statutory framework under which applications for a protection visa can be made.³⁶ The exclusion of asylum seekers arriving by boat from Australia's migration zone and their transfer offshore is one of the central means by which they are constructed as security threats and illegitimate refugee applicants.³⁷ As Jennifer Hyndman and Alison Mountz point out, Australia practises an extensive geography of exclusion, via interdiction, detention and the externalisation (or offshoring) of asylum – of which territorial excision forms just one part.³⁸ By detailing excision's long history, this section demonstrates its enduring and central role within Australia's broader geography of exclusion.

Territorial excision was first introduced in late 2001. The policy was part of an extensive set of reforms that was presented as a 'tightening up' of Australia's borders and a 'crackdown' on unauthorised migrants.³⁹ The reforms were part of an 'urgent government response' to what were characterised as waves of boats

35 Ibid 249.

36 See *Migration Act* ss 5AA (definition of an unauthorised maritime arrival), 46A (visa applications by unauthorised maritime arrivals). The question of the legality of the redefinition of sovereign territory under international law, although not the focus of this piece, has been considered in other contexts: see, eg, Alison Kesby, 'The Shifting and Multiple Border and International Law' (2007) 27 *Oxford Journal of Legal Studies* 101; Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* (2006) ch 3. For a general discussion of the duty of non-refoulement of refugee applicants who reach a state's sovereign territory under international law, see Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007); Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 87.

37 See, eg, Fiona H McKay, Samantha L Thomas and Susan Kneebone, "'It Would Be Okay if They Came through the Proper Channels': Community Perceptions and Attitudes toward Asylum Seekers in Australia' (2012) 25 *Journal of Refugee Studies* 113; Danielle Every and Martha Augustinos, 'Constructions of Racism in the Australian Parliamentary Debates on Asylum Seekers' (2007) 18 *Discourse & Society* 411. For accounts of post-September 11 constructions of refugees as terrorists and direct security threats, see Savitri Taylor, 'Guarding the Enemy from Oppression: Asylum-Seeker Rights Post-September 11' (2002) 26 *Melbourne University Law Review* 396; Devetak, above n 7.

38 Hyndman and Mountz, above n 34, 260. As noted, the treatment of asylum seekers arriving by boat within excised territories, including various Australian governments' policies of mandatory detention and offshore processing, has been carefully analysed and documented. For a selection of scholarship addressing these topics, see above n 7.

39 See Australian Associated Press, 'Howard Proposes Change to Australia's Migration Zone', 9 September 2001; David Marr, 'Outside the Law', *Sydney Morning Herald* (Sydney), 15 September 2001, 51.

carrying smuggled migrants and heading towards Australia's territorial waters.⁴⁰ One such boat was the Palapa 1, a small Indonesian fishing boat carrying 433 would-be asylum seekers towards Australia in August 2001, which was rescued by a Norwegian freighter, the MV Tampa. The Australian government denied the MV Tampa permission to enter Australian waters and to dock at the Australian territory of Christmas Island.⁴¹ And then, in a move that attracted worldwide attention, Australian defence force personnel took control of the freighter before it was able to reach the island, disembarked its new passengers onto a naval carrier ship and set sail out of Australian waters.⁴²

On 26 September 2001, less than one month after the MV Tampa performed its rescue, and just over two weeks after the September 11 attacks in the United States, the Australian Parliament passed the policy of territorial excision under the *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth).⁴³ The speed with which the first round of excisions was passed (just eight days after the Bill's introduction) is best understood in light of the panic sparked by the MV Tampa affair. The government presented its response to the MV Tampa as an act of national security, which was echoed in media reports of the event and reflected a broader narrative that characterised Australia's maritime borders as under an extreme and constant threat.⁴⁴ The arrival of six Indonesian smuggling boats in Australian waters in this period was characterised as a 'loss of control' of all

40 Andrew Clennell, 'Politicians Join Forces to Squeeze Boat People: Destination Nauru', *Sydney Morning Herald* (Sydney), 19 September 2001, 8. See especially Grewcock, *Border Crimes*, above n 10, ch 5.

41 For a dispassionate account of these events see the judgment of North J in the habeas corpus action launched to try to prevent the Australian authorities from forcibly removing the MV Tampa from Australian waters: *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452.

42 The Australian government managed to broker agreements whereby the asylum seekers on the Tampa would either be processed in New Zealand or Nauru and these agreements marked the beginning of the Pacific Solution: see Taylor, *The Pacific Solution or a Pacific Nightmare?*, above n 7.

43 ('Original Excision Act').

44 See Australian Associated Press, 'Illegal Boat Arrivals a Pipeline for Terrorists – Reith', 14 September 2001; Tom Allard and Andrew Clennell, 'Howard Links Terrorism to Boat People', *Sydney Morning Herald* (Sydney), 8 November 2001, 6; David Tanner, Megan Saunders and Monica Videnieks, '352 Illegals First of a New Wave', *The Australian* (Sydney), 3 November 1999, 3; Brendan Nicholson, '3500 Set to Enter Illegally', *The Sunday Age* (Melbourne), 17 June 2001, 1; Kerry Taylor, '1500 Ready to Sail from Indonesia', *The Age* (Melbourne), 31 August 2001, 6; Megan Saunders, '5000 New Illegals on the Way', *The Australian* (Sydney), 31 August 2001, 1. See also Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, *A Certain Maritime Incident* (2002) 2 [1.8]. For a meticulous account of the lengths the Australian government went to in order to prevent the freight ship docking on Australian territory, see David Marr and Marian Wilkinson, *Dark Victory* (Allen & Unwin, 2nd ed, 2004).

borders,⁴⁵ and it was taken for granted that more and more boats were set to arrive.⁴⁶

The amendments made by the Original *Excision Act* were one part of a package of six Acts amending the *Migration Act*.⁴⁷ They formed part of an ‘integrated set of legislative and administrative measures,’ to deter irregular arrivals and protect Australia’s borders which included the introduction of offshore processing.⁴⁸ With the original excision amendments came the creation of a new category of Australian territory, ‘excised offshore places’, defined as Australian islands and territories ‘removed from the Australian migration zone’ in certain circumstances.⁴⁹ Any person without a valid visa (an ‘unlawful non-citizen’),⁵⁰ who first reached Australian territory at ‘an excised offshore place’ by sea was classified as an ‘offshore entry person’.⁵¹

The key consequence of the Act was that ‘offshore entry persons’ were prevented from applying for a visa under Australia’s existing application process.⁵² ‘Offshore entry persons’ were also to be barred from access to existing independent administrative and judicial review of migration decisions.⁵³ Crucially, ‘offshore entry persons’ could be transferred to third countries for processing and they were precluded from initiating legal proceedings against the government challenging their designation as ‘unlawful non-citizens’, their potential transfer offshore for processing and the lawfulness of detention.⁵⁴

45 Robert Manne and David Corlett, ‘Sending Them Home: Refugees and the New Politics of Indifference’ (2004) 13 *Quarterly Essay* 1, 12–14.

46 Ibid. See also Janet Phillips and Harriet Spinks, ‘Boat Arrivals in Australia since 1976’ (Research Paper, Parliamentary Library, Parliament of Australia, 2013). This government-produced document shows the number of unauthorised boats that have arrived in Australia each year since 1976: at 22–3. The years leading up to 2001 reveal both the unpredictable and irregular nature of annual boat arrivals and a significant increase in the number of unauthorised boats in this period as compared to the first half of the 1990s: at 22–3.

47 Including the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth); *Migration Legislation Amendment Act (No 1) 2001* (Cth); *Migration Legislation Amendment Act (No 5) 2001* (Cth); *Migration Legislation Amendment Act (No 6) 2001* (Cth). For comprehensive accounts of the law reform package that followed in the Tampa’s wake, see Mathew, above n 7; Crock, above n 7.

48 Senate Select Committee on a Certain Maritime Incident, above n 44, 8–12 [1.39]–[1.58] (disruption and deterrence activities). These measures included the commencement of the offshore processing of boat arrivals via the Pacific Solution and a naval Coastwatch program with the mandate to detect, pursue, intercept and board boats carrying unauthorised arrivals on the high seas as well as in Australian territorial waters. For a thorough and detailed account of government policy dealing with asylum seekers arriving by boat in this period see McAdam and Purcell, above n 7, 93–109.

49 The migration zone is defined as ‘the area consisting of the States, the Territories, Australian resource installations and Australian sea installations’ and also included Australia’s territorial waters: *Migration Act* s 5(1) (definition of ‘migration zone’).

50 *Migration Act* s 14(1).

51 Original *Excision Act* sch 1 item 3, inserting *Migration Act* s 5(1) (definition of ‘offshore entry person’).

52 Original *Excision Act* sch 1 item 4, inserting *Migration Act* s 46A. Note, the terminology ‘offshore entry person’ was replaced with ‘unauthorised maritime arrival’ in 2013 by the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth).

53 See Sue Harris Rimmer, Department of Parliamentary Services (Cth), *Bills Digest*, No 138 of 2005–06, 22 May 2006.

54 *Migration Act* ss 494AA(1)(b), (c), (e).

As a consequence of the reforms, the rights of irregularly documented arrivals are determined by the mode and location of their arrival. The bar on making visa applications for those arriving on excised territories by boat can only be lifted at the discretion of the Immigration Minister, if he or she considers that doing so would be in the public interest. Additionally, the bar on applications travels with the person, such that it remains in place even if the person leaves the excised territory and enters the migration zone at any later date.⁵⁵ The Act allowed for the future excision of additional areas by way of gazetted regulations,⁵⁶ providing a framework for all subsequent expansions of the policy.⁵⁷ The language of territorial excision persisted up until the most recent round of reforms in 2013, even though, as I discuss in the following section, no territory was ever excised from Australia or its migration zone.

Indeed, the history of excision from 2001 onwards is one of expansion and attempted expansion of the policy, such that it is now an entrenched part of Australia's physical and legislative landscape governing irregular boat arrivals. The passing of the Original *Excision Act* marked the beginning of a series of attempts by the then conservative government to excise ever-larger tracts of Australian territory, as well as a number of legal challenges to the introduction of non-statutory offshore processing regimes attached to arriving on an excised territory.⁵⁸ Part IV argues that the policy did not and does not achieve a geographic excision of territory. The policy does, however, effectively excise judicial oversight from refugee determinations through excluding the statutory right to judicial review.⁵⁹ It uses the redefinition of territory to create zones of legal exception, as well as to remove ordinary access to judicial oversight and

55 *Migration Act* ss 46A(2)–(3).

56 *Migration Act* s 5(1) (definition of 'excised offshore place').

57 Significant further excisions of other outlying islands occurred via regulation in 2005, which will be discussed below. See *Migration Amendment Regulations 2005 (No 6)* (Cth). For a timeline and overview of all excisions and attempted excisions until 2006, see Moira Coombs, Department of Parliamentary Services (Cth), *Research Note*, No 5 of 2005–06, 31 August 2005.

58 See Coombs, above n 57. See especially, the High Court decision in *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, which found that procedural fairness requirements were not being met by the non-statutory processing regime that was established on Christmas Island and that the regime involved the exercise of a statutory power, despite the Commonwealth's insistence to the contrary. See also the successful challenge to the government's proposed return of unassessed asylum seekers to Malaysia in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 (discussed at below n 68).

59 Australian Human Rights Commission, *Immigration Detention and Offshore Processing on Christmas Island: Report* (2009).

Australia is certainly not alone in this use of the legislative redefinitions.⁶⁰ Despite significant decisions of the High Court limiting the government's offshore and non-statutory processing regimes, offshore arrivals' access to statutory status determination and judicial oversight is still granted at the discretion of the Immigration Minister.⁶¹

By 2005, the first proposed expansion of the policy was successful and 4891 islands, forming a sizeable arc around the northern half of the continent, were designated as excised territories.⁶² In May 2006, the Australian government proposed that, in the name of border control and national security, 'designated unauthorised arrivals' arriving *anywhere* on the Australian mainland would be treated as if they had landed in an excised place.⁶³ The 2006 Bill did not pass into

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- 60 See Kesby, above n 36 and the analysis there of *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1. See also Robert A Davidson, 'Introduction: Spaces of Immigration "Prevention": Interdiction and the Nonplace' (2003) 33 (fall-winter) *Diacritics* 3, for a discussion of *Amuur v France* [1996] III Eur Court HR 826; Mountz, above n 8, for a close look at how a host of states, and Canada in particular, have rendered migrants 'stateless by geographical design': at 121. For a much earlier example, see Geoffrey Robertson, *The Tyrannicide Brief: The Story of the Man Who Sent Charles I to the Scaffold* (Chatto & Windus, 2005) 348–50. For a review and critique of the Guantanamo Bay detention camp as an exemplary site outside of law and legal oversight, see Fleur Johns, 'Guantánamo Bay and the Annihilation of the Exception' (2005) 16 *European Journal of International Law* 613. I am grateful to an anonymous reviewer for helping clarify this point.
- 61 See *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, at above n 58. For a look at earlier attempts to remove judicial oversight, see Mary Crock, 'Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law' (2004) 26 *Sydney Law Review* 51.
- 62 *Migration Amendment Regulations 2005 (No 6)* (Cth), inserting *Migration Regulations 1994* (Cth) reg 5.15C; Senate Legal and Constitutional References Committee, Parliament of Australia, *Migration Zone Excision: An Examination of the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 and Related Matters* (2002) 13 [2.34]. The first attempt to expand the excision zone was made via draft regulations in June 2002. Despite their bipartisan support, these regulations did not have the support required to pass the Australian Senate. The government then attempted to pass largely unmodified versions of these further excisions as Bills, rather than as regulations, in 2002 and 2003. After a further failed attempt to expand the excision zone by regulation in 2003, the amendments passed in 2005. The failed Bills and regulations included: *Migration Amendment Regulations (No 4) 2002* (Cth); *Migration Legislation Amendment (Further Border Protection Measures) Bill 2002* (Cth); *Migration Legislation Amendment (Further Border Protection Measures) Bill (No 2) 2002* (Cth); *Migration Amendment Regulations (No 8) 2003* (Cth).
- 63 *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* (Cth). See also Senate Legal and Constitutional Legislation Committee, above n 36; Amanda Vanstone, 'Minister Seeks to Strengthen Border Measures' (Media Release, 11 May 2006); Explanatory Memorandum, *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* (Cth) 2 [1] ('2006 Bill'). Note, the Bill did not replace the regime nominating certain places as 'excised offshore places' but extended this regime to include the mainland via regulation. It also changed the designation for those arriving by boat and subject to offshore processing from 'offshore entry persons' to 'designated unauthorised arrivals'. Although the Government held a majority in both houses of Parliament, it withdrew the Bill just before it reached the Upper House of Parliament. The dissent of one Government senator in the Upper House, endorsed by a number of dissident party members in the Lower House, meant that the Bill would face certain defeat in the Senate: see 'Howard Backs Down on Migration Law, as More Boatpeople Arrive', *Australian Associated Press*, 14 August 2006.

law.⁶⁴ Certainly, the Labor Party, then in Opposition, strongly opposed the mainland excision. However, when the Labor Government came into power the following year, it made clear that it remained fully committed to the architecture of excision as a ‘cornerstone’ of asylum policy.⁶⁵ It was certainly this commitment to excision’s architecture and its perceived ‘successes’ that paved the way for the Labor Government’s reintroduction of legislation extending the effects of excision to the mainland in 2013.⁶⁶

The successful reintroduction of the mainland excision in 2013 makes for a rather jolting lurch forward in this potted history of excision. The enduring nature of excision in the intervening years is highlighted by Michelle Foster and Jason Pobjoy’s conceptual framework of ‘excision and exile’, which describes Australia’s onshore asylum policy in this period.⁶⁷ For Foster and Pobjoy, excision (of Australian territory) *and* exile (of asylum seekers for processing to locations outside of Australia) explain the ‘mutually supporting’ features of Australia’s approach to onshore boat arrivals from 2001 until 2008. However, when the Labor Government was returned to power in 2008, it dismantled the Pacific Solution and third country processing, creating a regime of ‘excision

64 The justification for the 2006 Bill was that asylum seekers who manage to reach the mainland should not be advantaged or rewarded vis-a-vis those who reach excised territories. In 2006, however, the mainland excision proposal was sparked by the arrival of 43 West Papuan asylum seekers who reached Cape York (on the mainland) and the high-profile and significant diplomatic rift it caused between Australia and Indonesia at the time: Jewel Topsfield and Michael Gordon, ‘Vanstone Tries to Woo MPs over Strict Border Protection Policy’, *The Age* (Melbourne), 9 May 2006, 5.

65 Chris Evans, ‘Refugee Policy under the Rudd Government – The First Year’ (Speech delivered at the Refugee Council of Australia AGM Forum, Sydney, 17 November 2008).

66 *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth). The mainland excision passed with comparatively little fanfare in May 2013. Though this is not to say the policy was not criticised: see, eg, UNHCR, *UNHCR Statement: Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012* (31 October 2012) <http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=277:unhcr-statement-migration-amendment-unauthorised-maritime-arrivals-and-other-measures-bill-2012&catid=35:news-media&Itemid=63>. The statement notes that ‘UNHCR’s preferred position has always been for all asylum-seekers arriving into Australian territory, by whatever means, and wherever, to be given access to a full and efficient refugee status determination process in Australia.’: at 1.

67 Foster and Pobjoy, above n 8, 586. The authors credit David Manne of the Refugee and Immigration Legal Centre for this formulation.

without exile'.⁶⁸ From August 2012, however, 'excision *and* exile' once again become the backbone of government policy with the introduction of third-country processing, dubbed as the Pacific Solution Mark II. This occurred as a result of the implementation of the recommendations of the Expert Panel on Asylum Seekers, a government-commissioned panel, charged with producing a report on 'how best to prevent asylum seekers risking their lives by travelling to Australia by boat'.⁶⁹ The Government presented the hastily convened Panel as a means to 'break the deadlock' between the major parties on asylum seekers. However the Panel is best understood as a 'fence-breaking' policy tool, which allowed the Labor Government to reintroduce a full regime of offshore processing, despite its previous, pre-election commitment to dismantling all offshore processing arrangements.⁷⁰

The necessarily final expansion of excision policy, to include asylum seekers who reached the mainland, was also implemented on the recommendation of the Expert Panel.⁷¹ The next Part explores the reasoning and justification for the policy's various expansions and, in particular, highlights the absence in 2013 of the language of excision and a shift away from narratives about border protection and towards the imperative of 'saving the lives' of those travelling by boat.

68 Although an externalised and outsourced element was retained, with processing of boat arrivals intended to primarily take place on Christmas Island: Foster and Pobjoy, above n 8, 590. For an overview of the regime of processing on Christmas Island that was established in 2008, at the end of the first Pacific Solution, see Foster and Pobjoy, above n 8. See also Australian Human Rights Commission, above n 59. For a close analysis of the Labor Government's attempts to put in place a new 'regional solution' prior to 2012, including the failed 2011 proposal to engage in a 'people swap' with Malaysia whereby the government would accept 4000 'UNHCR accepted' refugees from Malaysia in exchange for 800 onshore asylum seekers being sent to Malaysia for processing over four years, see Tamara Wood and Jane McAdam, 'Australian Asylum Policy All at Sea: An Analysis of *Plaintiff M70/2011 v Minister for Immigration and Citizenship* and the Australia–Malaysia Arrangement' (2012) 61 *International and Comparative Law Quarterly* 274; Michelle Foster, 'The Implications of the Failed "Malaysian Solution": The Australian High Court and Refugee Responsibility Sharing at International Law' (2012) 13 *Melbourne Journal of International Law* 1; Sara Dehm, 'Sovereignty, Protection and the Limits to Regional Refugee Status Determination Arrangements' (2012) 28(75) *Merkourios: Utrecht Journal of International and European Law* 53.

69 Australian Government, *Report of the Expert Panel on Asylum Seekers* (2012) 9.

70 Indeed, although presented as a non-partisan 'solution-finder', the Panel was widely understood as a direct response to the Labor Government's failures to secure sufficient support in Parliament to pass its 'regional solution' of sending onshore boat arrivals to Malaysia in exchange for UNHCR-recognised refugees residing in Malaysia: see Wood and McAdam, above n 68; Foster, above n 68; BBC, *Australia Asylum Panel Recommends Offshore Processing* (13 August 2012) <<http://www.bbc.co.uk/news/world-asia-19240306>>.

71 Recommendation 14 of the Panel's report was to amend the *Migration Act* so that 'arrival anywhere on Australia by irregular maritime means will not provide individuals with a different lawful status than those who arrive in an excised offshore place': Australian Government, above n 69, 17.

IV THE GEOGRAPHIES OF AUSTRALIA'S TERRITORIAL BORDER UNDER TERRITORIAL EXCISION

The parliamentary debates and documents surrounding territorial excision in Australia feature two interrelated narratives about the border.⁷² The first narrative is one that presents the border as under constant threat and as a site of potential danger to the nation, which ought to be vigilantly protected and controlled. The second, connected claim is that the border is in a geographically fixed and stable place, and that it *can* be completely and uniformly controlled by a properly functioning sovereign state.⁷³ In tracing these narratives, I argue the border and its imagined geography were shaped and determined by narratives of the border within the securitisation of migration discourse outlined in Part II. In this final Part, I set also narratives of the border against the effects of territorial excision on the physical spaces ordinarily inscribed as Australia's territorial borders. Specifically, I interrogate the government's use of the language and imagined geography of excision, and the *Migration Act* itself, in order to limit the rights of undocumented arrivals. In contrast to narratives of the border presented within the parliamentary debates, the policy of excision's reconfiguring of Australia's borders undermines the ideal of 'border control' and the very territoriality that the policy relies upon to contain and delimit the safety of the nation-state. The result is a legislative manipulation in order to exclude or excise a particular group of people from access to statutory rights, while presenting the policy as a manipulation of physical territory.

A Narrating a Securitised Territorial Border

The first press release announcing the policy of excision in 2001 presented the border as a vulnerable site in need of constant protection. The release, entitled

72 I draw upon the parliamentary debates in the Lower and Upper Houses of Australia's federal Parliament in relation to the following Acts and Bills: Original *Excision Act*; *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth); *Migration Amendment Regulations (No 4) 2002* (Cth) (disallowed by the Senate); *Migration Legislation Amendment (Further Border Protection Measures) Bill 2002* (Cth); *Migration Amendment Regulations (No 8) 2002* (Cth) (though note, these regulations were rescinded by the *Migration Amendment Regulations (No 11) 2002* (Cth)); *Migration Legislation Amendment (Further Border Protection Measures) Bill (No 2) 2002* (Cth); *Migration Amendment Regulations (No 8) 2003* (Cth) (disallowed 24 November 2003); *Migration Amendment Regulations (No 6) 2005* (Cth) (disallowed 6 October 2005); *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* (Cth); *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012* (Cth). Much of the recorded debate took place in relation to the proposed Bills rather than the regulations, hence the concentration on debates concerning the relevant Bills in the analysis that follows.

73 In order to analyse constructions of the border with the relevant Parliamentary debates, I conducted key word searches of the following terms on each day excision policy was debated in either house of Federal Parliament: border, edge, coast, territory, security, protection and safety. Since my focus is on territorial borders as they are imagined in justification of the policy, I concentrate on the contributions of those who argued in favour of the policy's implementation and on material rationalising the policy. I have also explored constructions of the border by those opposing the policy, and discuss contrary views where relevant.

‘Australia’s Border Integrity Strengthened by New Legislation’, stated that the intention of the reforms was to ‘ensure the effective control and management of Australia’s borders.’⁷⁴ The Bills were described as reinforcing ‘the sovereign right of Australia to alone determine who could enter the country and in what manner.’⁷⁵ The motifs of effective control, protection and sovereignty were central refrains throughout the excision debates; and the virtue of ‘protecting our borders’ was a source of agreement across almost all parties.⁷⁶ As then Opposition Senator Nick Bolkus put it, ‘[w]e have always protected our borders, and I believe we must always do this.’⁷⁷

It may seem trite to observe the prevalence of the rhetoric of protection and ‘effective control’ within the excision debates and migration policy more generally. The apparent banality of this observation is a function of how the imperatives of controlling and protecting the border are accepted as common sense. Those debating the policy of excision did not challenge the convention of describing border regulation primarily as a project of protection and control. As one Opposition member of Parliament (who did not support excision) would have it, all Australians should get involved in the task of protecting Australia’s borders and the government should train ‘a nationwide team of coastguard volunteers’ and ‘[f]ishing vessel owners and other operators should be given incentives and opportunities to play a role in protecting our borders and their fellow Australians.’⁷⁸

The debates reveal that there was a set of orthodoxies attached to how the territorial border was described in relation to territorial excision. Both major political parties repeatedly outlined the virtues of protecting the border, with the Opposition in 2003 declaring that it remained ‘absolutely serious about protecting our borders’ and that excision was ‘viable and effective strategy to do exactly that’.⁷⁹ Even Andrew Bartlett, the member of a minority party who introduced disallowance motions each time a new piece of excision reform

74 Department of Immigration and Multicultural Affairs, ‘Australia’s Border Integrity Strengthened by New Legislation’ (Press Release, MPS 164/2001, 26 September 2001).

75 Ibid.

76 Government member of Parliament Andrew Robb stated that the original round of excisions had proven to be an ‘outstanding success’: Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 2006, 8 (Andrew Robb, Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs), discussing the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth).

77 Commonwealth, *Parliamentary Debates*, Senate, 24 September 2001, 27 726 (Nick Bolkus), discussing the Migration Amendment (Excision from Migration Zone) Bill 2001 (Cth).

78 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 2003, 14 340 (Michelle O’Byrne), discussing the Migration Legislation Amendment (Further Border Protection Measures) Bill (No 2) 2002 (Cth). A strategy along these lines had already been put in place. Beyond the official navy patrols, the Senate Committee reported that ‘indigenous communities participate at a high level in a number of government related activities, including border protection and monitoring of illegal fishing activity’ and pass relevant information onto departmental officers: Senate Legal and Constitutional References Committee, above n 62, 97.

79 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 2003, 14 340–1 (Michelle O’Byrne), discussing the Migration Legislation Amendment (Further Border Protection Measures) Bill (No 2) 2002 (Cth).

reached the Senate, agreed that the protection of borders was a ‘very sophisticated challenge’ that required ‘very sophisticated answers.’⁸⁰

This statement, similar to many others, manages to construct Australia’s territorial borders as at great, ongoing danger, but as simultaneously protectable by way of sovereign action and government policy, requiring an ‘absolutely serious’ policy response. The image of the border as physical place, which is locatable and permanently vulnerable, recurred throughout the debates. Members of Parliament referred to phantom media reports, signalling that thousands of people were waiting to come to Australia without authorisation, in order to confirm the risks facing the border. For instance, National Party Member of Parliament De-Anne Kelly warned, ‘[t]he reality is that Australia’s borders are under great stress and pressure. According to media reports, there are 5000 potentially unauthorised arrivals waiting to come to Australia from Indonesia.’⁸¹

The rhetoric of the securitised border relies upon narratives of the border as facing imminent danger from the ‘outside’, which can be effectively subdued by the sovereign’s complete control of the border. This narrative is at the very heart of securitisation of migration discourses and obscures a range of other ways in which border polices could be characterised. Sassen reminds us that governments could aim to ‘govern’ borders instead of controlling and protecting them. ‘Governing’ is one way of describing the range of things governments do at territorial borders and airports, particularly when the immigration policy being implemented is not aimed at those already and categorically marked as ‘other’.⁸² But, as Sassen notes, the rhetoric of governance certainly has not been the dominant border policy framework of most Western countries.⁸³

That contemporary borders are sites intimately linked with danger, the exigencies of national security and the legitimacy of the sovereign was frequently taken for granted during the excision debates. Some lone voices within the excision debates in Australia suggested a version of border regulation that involved efficiently processing or ‘managing’ those who cross borders, and which did not immediately invoke ideas of protection, security or control.⁸⁴ The need for such comprehensive protection of the border was not described in relation to all border functions, but pertained to the deflection of unidentified

80 He did not agree, however, that asylum seekers were the source of border security threats: Commonwealth, *Parliamentary Debates*, Senate, 18 August 2005, 45 (Andrew Bartlett), discussing the *Migration Amendment Regulations (No 6) 2005* (Cth).

81 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2001, 30 968 (De-Anne Kelly), discussing the Migration Amendment (Excision from Migration Zone) Bill 2001 (Cth).

82 Saskia Sassen, *Migration Policy: From Control to Governance* (12 July 2006) Open Democracy <http://www.opendemocracy.net/people-migrationeurope/militarising_borders_3735.jsp>. See also Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (Columbia University Press, 1996).

83 Sassen, *Migration Policy: From Control to Governance*, above n 82.

84 Eg, in rejecting the further round of excisions in 2005 (though notably, not the original excisions), Opposition Senator Joe Ludwig claimed that Australians ‘all want a managed and fair system’ and went on to outline how a quick, fair and transparent processing regime would identify ‘[g]enuine refugees’: Commonwealth, *Parliamentary Debates*, Senate, 18 August 2005, 31 (Joe Ludwig), discussing the *Migration Amendment Regulations (No 6) 2005* (Cth).

vessels and unauthorised individuals approaching Australia via its territorial waters. As the Explanatory Memorandum accompanying the original excisions stated, the purpose of excision and border protection was ‘to prevent [unlawful non-citizens] from making a valid visa application simply on the basis of entering Australia at such a place or installation.’⁸⁵

Securitisation of migration identifies the way in which notions of control and protection are used to link the arrival of outsiders with threats to security, even if migrants are not themselves characterised as immediately dangerous or security threats. Security and safety are linked to border control, and those coming from outside undermine ‘protection’ of the state. Indeed, while members of Parliament were reluctant in the first rounds of excision to directly characterise asylum seekers as a threat to national security, this was done implicitly, as the following contribution reveals:

The sovereignty of the country is very important. We naturally need to be vigilant in hard times such as this. We know, of course, about what happened in the United States only last week. People become far more aware of the matters involved in illegal immigration and the integrity of border issues when they see the sorts of unspeakable horrors which occurred in the United States.⁸⁶

Some members of Parliament made the link even more directly. Indeed, what was implicit in many discussions about the need to control the border was made explicit when security and the ‘protection of citizens’ were articulated:

As a nation we have a sovereign right to protect our nation’s borders. Not only do we have a right; as a parliament we have a duty to protect our borders. We are also charged with the responsibility of protecting Australian citizens. This has been brought home forcefully, regretfully, by recent events in the United States. The reason we detain illegal immigrants is so that we can establish identity and check health, character and security issues.⁸⁷

The concomitant narrative of the border featured within the excision debates was a conception of the border as a permanently fixed place that *could be* completely controlled, whereby the government (and therefore the nation) could have complete oversight over who crosses borders and for what purpose. Senator

85 Explanatory Memorandum, Migration Amendment (Excision from Migration Zone) Bill 2001 (Cth) 2 [5].

86 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2001, 30 955 (Con Sciacca), discussing the Migration Amendment (Excision from Migration Zone) Bill 2001 (Cth).

87 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2001, 30 983 (Geoff Prosser), discussing the Migration Amendment (Excision from Migration Zone) Bill 2001 (Cth).

Although such justifications were most present in the first round of excisions, they did recur in discussions about the need to combat people smuggling in the 2002 and 2005: see, eg, Labor Senator Nick Sherry in Commonwealth, *Parliamentary Debates*, Senate, 9 December 2002, 7476 (Nick Sherry), discussing the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 (Cth) and comparing Labor’s ‘border protection’ credentials to the Labor Party’s response to ‘border security threats in World War II’. In 2006, the mainland excision was justified in order to prevent ‘special security guards for Saddam Hussein’ gaining entry to Australia: Commonwealth, *Parliamentary Debates*, House of Representatives, 10 August 2006, 31 (Warren Entsch) discussing the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth).

Randall's characterisation of Australia's maritime borders exemplified this conception of faultless border control:⁸⁸

So Australia is a great destination for many people wanting to visit or migrate, but people do it in an orderly fashion, and that is one of the outstanding things that Australia can do. We can track the people who come here, we do know where they are and we do know when they are coming and going, which makes Australia unlike Britain and many other countries of Europe and the rest of the world ...⁸⁹

This quote is remarkable because it suggests that while some borders are too large and unwieldy to be controlled (since they are not bound by sea), Australia's thousands of kilometres of coastline are in fact fixed, and therefore perfectly capable of being controlled. In a second reading speech in 2006, arguing in favour of the excision of the mainland, government member of Parliament Andrew Robb stated that the original round of excisions had proven to be an 'outstanding success.'⁹⁰ He added that border protection needs to be continually maintained and that, 'it is important that Australia continually review its policy and legislation in this critical area' to ensure that that 'proper arrangements are in place to deal with new developments.'⁹¹ These two declarations, that border protection policies are capable of 'succeeding', but that the act of protecting the border is a serious business that must be vigilantly enforced, represent a view of the border as a place that is at once entirely controllable and permanently vulnerable.

The advantage of excision, as the government presented it, was that the policies prevented all those who do not belong to the nation from gaining access to the Australian mainland or the legal right to remain in Australia without the direct consent of the Immigration Minister. The Explanatory Memorandum of the original excision Bill explained the Bill's purpose as preventing certain non-citizens from applying for a visa 'unless the Minister determines that it is in the public interest that such a person should be able to make a valid visa application.'⁹² In this sense, access to refugee status for asylum seekers involves the Minister or a delegate carefully scrutinising each and every application made by an undocumented boat arrival to enter the territory of the state. This image, of a government minister having personal (rather than delegated) oversight over every undocumented person allowed to remain within the state, exemplifies the

88 See also Commonwealth, *Parliamentary Debates*, House of Representatives, 9 August 2006, 117 (Peter Slipper), discussing the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth): 'We need to establish a principle so that everyone throughout the world knows that the only people allowed to cross our borders will be people who cross the borders with our consent.'

89 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 August 2006, 28 (Don Randall), discussing the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth) (emphasis added).

90 Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 2006, 8 (Andrew Robb, Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs), discussing the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth).

91 Ibid.

92 Explanatory Memorandum, Migration Amendment (Excision from Migration Zone) Bill 2001 (Cth) 2 [1].

level of control over border crossings both imagined and sought after under securitisation of migration discourses.

Indeed, when the Original *Excision Act* was first introduced into the Upper House of Federal Parliament in 2001, Government Senator Ian Campbell opened his second reading speech by stating that:

The Australian public has a clear expectation that Australian sovereignty, including in the matter of entry of people to Australia, will be protected by this parliament and the government. The Australian public expects its government to exert control over our borders ...⁹³

When the proposal to extend the effects of excision to the mainland re-emerged in 2012, the Labor Government had abandoned its previous opposition to removing the entire mainland from Australia's migration zone.⁹⁴ When the Bill was introduced into Parliament, six years after the last attempt to excise the continent from itself, the justification for defining the mainland as an 'excised offshore place' had shifted away from a focus on borders as sites of threat and protection. Instead, the Government's stated motivation was to reduce the number of asylum seekers dying at sea in their attempts to reach Australian territory, and to ensure that those who reached Australia did not gain an unfair advantage over other legitimate refugees by doing so.⁹⁵ While both of these concerns were certainly present in the previous rounds of excisions, they were secondary to the rhetoric of border control, safety and security. Notably, both justificatory discourses share the ultimate goal of deterring the arrival of undocumented persons on Australian territory.

In his second reading of the 2012 Bill that excised the mainland, Immigration Minister Chris Bowen cited the government's intention to give 'full effect' to the Expert Panel on Asylum Seekers' proposals, which recommended the mainland excision.⁹⁶ The Minister stated that, 'at the forefront of the panel's reasoning in making this recommendation was the need to reduce any incentive for people to take even greater risks with their lives by seeking to reach the Australian mainland to avoid being subject to regional processing arrangements.'⁹⁷ This reasoning for the mainland excision did not explicitly focus on the idea of securing the territorial border or its vulnerability.⁹⁸ Though, at other times, the mainland excision was justified by the application of a 'no advantage' principle,

93 Commonwealth, *Parliamentary Debates*, Senate, 20 September 2001, 27 495 (Ian Campbell), discussing the Migration Amendment (Excision from Migration Zone) Bill 2001 (Cth).

94 Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (Cth).

95 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 October 2012, 12 738 (Chris Bowen, Minister for Immigration and Citizenship), discussing the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (Cth).

96 *Ibid* 12 740. See also Australian Government, above n 69.

97 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 October 2012, 12 738 (Chris Bowen, Minister for Immigration and Citizenship), discussing the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (Cth).

98 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 2012, 13 532 (Chris Bowen, Minister for Immigration and Citizenship), discussing the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (Cth).

first articulated in the Expert Panel on Asylum Seekers' Report.⁹⁹ Under the 'no advantage' principle, the government sought to ensure 'no benefit is gained [by maritime arrivals] through circumventing regular migration pathways' and travelling to Australia by boat.¹⁰⁰ Excision of the mainland was undertaken to ensure that *all* maritime arrivals would be subject to the 'no advantage' principle and regional processing, not just those reaching offshore islands.¹⁰¹

The punitive 'no advantage' policy and the concern to 'save lives' were each presented as the main motivation for the policy. In the 2012 debates, the Labor Government shifted away from the language of 'stopping the boats' and deterrence to the need to create a 'disincentive' for those coming to Australia's border by boat.¹⁰² This was not the case for the Liberal Party Opposition, which repeatedly claimed that the new policy was necessary, as the Government had 'lost control of Australia's borders.'¹⁰³ Liberal Party members mentioned variations on the phrase 'stop the boats' 15 times during the brief mainland excision debates. Though, it is also worth noting that the bulk of the Liberal Opposition's contributions addressed Labor's 'policy backflip', reminding the Labor Party that they had not supported the excision of the mainland in 2006 and had characterised the policy as 'offending decency', 'lunatic', and as 'shameful and xenophobic', among other things.¹⁰⁴

By contrast, in the 2012 debates, the Labor Government carefully avoided the language of excision and any kind of focus on the mainland's borders as having been excised. As discussed in the following section, the amending legislation avoided classifying the mainland as an excised territory, but rather achieved its effect by extending the consequences of excision to persons arriving on the mainland by boat without authorisation.¹⁰⁵ As outlined above, one obvious

99 Australian Government, above n 69, 11–14.

100 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 October 2012, 12 739 (Chris Bowen, Minister for Immigration and Citizenship), discussing the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (Cth). The Labor Government proposed that in order for the particularly punitive and imprecise 'no advantage' principle to be realised, all 'unauthorised maritime arrivals' ought to be processed in regional centres, rather than just those who arrive at excised offshore places. In the debates, they reasoned that those travelling by boat should not be resettled in Australia until it was clear the individual had gained no benefit through journeying to Australia by sea. While not the focus of this article, exactly how the government would determine when the 'no advantage' policy had been fulfilled and how long an asylum seeker must wait until 'no benefit' was gained in resettlement was disturbingly unclear. It also remains unclear who or what the comparator is when invoking the idea of advantage. See Australian Government, above n 69, 11–14, 47.

101 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 October 2012, 12 738 (Chris Bowen, Minister for Immigration and Citizenship).

102 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 2012, 13 436 (Ed Husic).

103 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 2012, 13 527 (Nola Marino). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 2012, 13 427–8, 13 430–1 (Scott Morrison).

104 See Commonwealth, *Parliamentary Debates*, House of Representatives, 9–10 August 2006, discussing the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth).

105 *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth) sch 1 item 8, inserting *Migration Act* s 5AA.

explanation for this is that the policy, following the Expert Panel Report, did represent a ‘backflip’ from the Labor Party’s extremely strong objection to the mainland excision when in Opposition in 2006. Additionally, as I argue in the following section, the controversy of excising the mainland on both occasions relates to the mainland’s border being imagined as the ‘singular’ border of border control, while the borders surrounding outlying islands are not. Another very influential factor in the presentation of the policy as a purportedly compassionate attempt to avoid deaths at sea – rather than as an explicit act of border control and deterrence – was the significant increase in the number of asylum seeker deaths at sea in the period prior to the reform.¹⁰⁶

The geography of the border in the excision debates was imagined as a fixed but potentially permeable site, which if regulated and controlled could be transformed into a place of near perfect control. The space of the border in these discussions was a site of both safety and danger. These constructions align neatly with the role and geography of the border as narrated within securitisation of migration discourse – namely, that territorial borders are physical sites of migration that ought to be protected and controlled since the ‘inside’ of the nation is safe and the ‘outside’, in the form of non-citizens and ‘others’, poses a threat which must be addressed by governments. This construction of the geography of security and the territorial border has been central to the rhetoric justifying territorial excision, and its role in affecting the exclusion of asylum seekers arriving by boat. However, an obvious contradiction arises when the rhetoric of territorial excision and the geographic redefinition of sovereign territory are deployed at the same time as various Australian governments have presented the space and physical fact of the state and its borders as crucial to national security.

B Excision as Undermining Securitised Narratives of the Border

Despite securitisation’s attempts to tell a story of perfect control over stable borders, the need to ‘excise’ territory from the migration zone so as to successfully limit unauthorised arrivals’ access to rights under Australian law reveals that the immense spaces of the border lend themselves remarkably poorly to being completely controlled. Locating Australia’s territorial borders, both real and imagined, as a result of the policy of excision raises the question of how the excised territories ought to be characterised in relation to the nominally singular ‘border’ and the sovereign state of Australia. On one view of the policy, the territorial edges of the excised territory still form the national border for some (authorised arrivals) but not for others (unauthorised arrivals), who can no longer enter Australia at all for the purposes of making a visa application. And yet, those who arrive on the excised territories are in Australia and under Australian sovereign control for all non-migration related purposes and have a status, as ‘unauthorised maritime arrivals’, under Australian law. The border as constructed

¹⁰⁶ Australian Government, above n 69, 75 (Table 7: Number of Deaths and Missing Persons at Sea from October 2001 to June 2012).

by the law has, for some purposes, been removed completely and for other purposes remains at Australia's territorial edge.

In the parliamentary debates, the border of 'border protection' was narrated as being stable, consistent and in a fixed place. However, during the debates, substantial confusion arose when any attempt was actually made to define or describe the relationship between the 'excision' of territory and the space of Australia's sovereign border.¹⁰⁷ Australian governments' ongoing decision to use the language of excision, removal, and rezoning in drafting and communicating the effects of the legislation is a central point of interest in thinking through the spaces of Australia's maritime and territorial borders. The choice of the language of excision is of particular consequence because there were feasibly other legislative paths and alternative statutory language that could have been adopted to achieve the same substantive outcome as 'territorial excision' in regards to undocumented boat arrivals.

The primary effect of the excision legislation is the suspension of specific provisions of the *Migration Act* for a certain class of people.¹⁰⁸ The amendments affect the application of one part of one parliamentary Act and only apply to one category of arrivals.¹⁰⁹ All of the other provisions of the *Migration Act* remain in full force on the excised territory, a fact that sits awkwardly with the phrase used in the original legislation's subtitle: 'Excision from Migration Zone'. As the then Immigration Minister clarified: 'The provisions of the *Migration Act* continue to apply to these islands. The legislative changes made by this bill do not affect Australian sovereignty over these islands. The islands remain integral parts of Australia.'¹¹⁰

Prior to the excision of the mainland in 2013, members of government stated throughout all the debates that the excised islands remained sovereign Australian territory. In 2003, the Immigration Minister insisted that, '[i]f other islands were excised, they would remain just as much part of Australia as they ever were, subject to the exercise of our sovereignty'.¹¹¹ As the Explanatory Memorandum explains, the Act 'does not affect the application of any other provisions of the *Migration Act*' to unauthorised boat arrivals.¹¹²

107 These issues played out not only in parliamentary debates but also in the press. When further excisions were proposed, headlines referred to confusion over whether Australia was abandoning its sovereign territory. See, eg, Megan Saunders, 'Islanders Fear What the Tide May Bring', *The Australian* (Sydney), 5 July 2002, 9; Amanda Hodge, 'Islands Cast Adrift by Zone Ruling', *The Australian* (Sydney), 12 June 2002, 2.

108 See *Migration Act* s 46A.

109 *Migration Act* s 5(1), in particular the definition of 'excised offshore place'.

110 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 2003, 13 586 (Phillip Ruddock, Minister for Immigration and Multicultural and Indigenous Affairs), discussing the Migration Legislation Amendment (Further Border Protection Measures) Bill (No 2) 2002 (Cth).

111 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 2003, 14 350 (Phillip Ruddock, Minister for Immigration and Multicultural and Indigenous Affairs), discussing the Migration Legislation Amendment (Further Border Protection Measures) Bill (No 2) 2002 (Cth).

112 Explanatory Memorandum, Migration Amendment (Excision from Migration Zone) Bill 2001 (Cth) 5 [11]. See also Migration Amendment (Excision from Migration Zone) Bill 2001 (Cth) cl 46A.

Despite the above claims, that the islands most certainly remain ‘a part of Australia’, the government persistently used the language of excision and removal to describe the effect of the legislation on the excised territory’s relationship to the Australian ‘migration zone’. The use of the term ‘excision’, however, represents a mischaracterisation of the effects of the excision on the territory in question. The primary definition of excision is given as ‘[t]he action or process of cutting off or out (any part of the body).’¹¹³ Excision is defined in a figurative sense as ‘[t]he action of cutting off from existence; destruction; extirpation; the condition or state of being cut off.’¹¹⁴ If neither the islands, nor the mainland nor Australia’s sovereignty over these places have been cut away or removed, it is difficult to characterise the territory as having been excised, even if the particular statutory rights of a certain group of people arriving on the islands were revoked or destroyed.

Significantly, entirely the same result could have been achieved if the particular provisions of the *Migration Act* allowing visa applications were described as being suspended or revoked within the confines of a designated area and in regards to a particular category of persons. Such an Act might have been named the ‘Migration Amendment (Suspension of Certain Provisions) Act’. Such a title, however, does not conjure the same explicit images of Australia’s border having been shifted, as inaccessible to outsiders and indeed as finally removed for the purposes of unauthorised arrivals, who would otherwise be understood as reaching sovereign territory. The *Oxford English Dictionary*’s fourth definition of excision is: ‘The action of cutting out or erasing (a passage from a book, a clause from a bill, etc.); an instance of the same.’ This definition could accurately describe the effect of the legislation insofar as one provision of the *Migration Act* was held to no longer apply. However, even then, the provision regarding visa applications was neither removed ‘from the migration zone’ nor from the *Migration Act* for all purposes, but only suspended in specific circumstances and for specific classes of persons.

The statements made by members of Parliament, clarifying that the excision legislation did not entail the relinquishing of any part of Australia’s sovereign territory, were made in direct response to public concern and outright anxiety that Australia’s sovereign territory would be diminished as a consequence of the legislation. Such concerns were reported as coming especially from Australian citizens living on the islands themselves.¹¹⁵ The confusion sparked by the legislation about the status of the islands in relation to Australia was voiced both inside and outside of Parliament. In 2002, the Immigration Minister acknowledged this and sought to allay such worries:

113 J A Simpson and E S C Weiner (eds), *The Oxford English Dictionary* (Clarendon Press, 2nd ed, 1989) vol 5 (definition of ‘excision’).

114 *Ibid.*

115 Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 2002, 4018 (Phillip Ruddock, Minister for Immigration and Multicultural and Indigenous Affairs), discussing the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 (Cth).

I know a lot of people do not understand what is involved. They hear about excision and say, ‘This part of Australia is being lost to us in some way.’ We know that that is not the case. It has not happened in relation to Christmas Island, it has not happened in relation to Cocos Island ...¹¹⁶

In response to these ‘public concerns’, members of government told Parliament that they had made several trips to the affected islands ‘to make it clear that the proposed changes will only affect people who arrive unlawfully.’¹¹⁷ In a 2002 statement, which reveals the disjuncture between the effects of the legislation and the drafting language chosen by the government, a government-produced digest said of the second round of excisions:

Contrary to popular perception, press releases, the second reading speech and even its title, the *Excision Act* did *not* excise these territories from the migration zone. It provided that an ‘offshore entry person’ ... may not make a valid visa application while they are in Australia and while they remain an ‘unlawful non citizen’ ...¹¹⁸

Indeed, despite naming the original policy ‘excision from migration zone’, the government deemed it ‘plainly absurd’¹¹⁹ that anyone would think that the government had reduced ‘either Australian territory or Australia’s borders.’¹²⁰ And yet, the very naming of the first excision Bill as the ‘Migration Amendment (Excision from the Migration Zone) Bill’ and of the islands within the Bill as ‘excised offshore places’ leads rather inexorably to the assumption that the territory had in some way been had been removed or at least separated from Australian territory. Indeed, in response such concerns, in 2005 the government produced a report entitled ‘Excising Australia: Are We Really Shrinking?’,¹²¹ which explicitly sought to clarify that the legislation would not result in a loss of Australian territory.¹²²

The use of the word ‘excision’ in particular to narrate the effect of the legislation on the islands is not only inaccurate, it is also an especially dramatic

116 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 2003, 14 350 (Phillip Ruddock, Minister for Immigration and Multicultural and Indigenous Affairs), discussing the Migration Legislation Amendment (Further Border Protection Measures) Bill (No 2) 2002 (Cth).

117 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 2003, 14 353 (Phillip Ruddock, Minister for Immigration and Multicultural and Indigenous Affairs), discussing the Migration Legislation Amendment (Further Border Protection Measures) Bill (No 2) 2002 (Cth).

118 Nathan Hancock, Department of the Parliamentary Library (Cth), *Bills Digest*, No 176 of 2001–02, 25 June 2002, 2 (emphasis in original).

119 Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 2002, 4018 (Phillip Ruddock, Minister for Immigration and Multicultural and Indigenous Affairs), discussing the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 (Cth). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 2003, 13 587 (Phillip Ruddock, Minister for Immigration and Multicultural and Indigenous Affairs), discussing the Migration Legislation Amendment (Further Border Protection Measures) Bill (No 2) 2002 (Cth).

120 Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 2002, 4018 (Phillip Ruddock, Minister for Immigration and Multicultural and Indigenous Affairs), discussing the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 (Cth).

121 See Coombs, above n 57.

122 The government’s original press release, which announced the policy, gave blatant airplay to the idea of removal and excision of the islands in question: Department of Immigration and Multicultural Affairs, above n 74.

and specialised term with which to describe the rhetorical subtraction of these territories from Australia's migration zone. As noted above, the primary definition of excision is given as 'the action or process of cutting off or out (*any part of the body*)'.¹²³ The word is often understood as a medical term, and related to surgical procedures, disease, and illness. Indeed, the *Oxford Concise Medical Dictionary* also lists excision among its pages. It defines *to excise* as 'to cut out tissue, an organ, or a tumour from the body'.¹²⁴ Under this definition, the nature of the removal to which excision refers is hardly equivocal or implicit. Associating the policy with a surgical extraction renders the excised territory both cancerous and malignant. The territory and its exposure act as metaphors for the unauthorised migration that happens in and around them: they are tumours, and the migration that occurs on them is irregular, hazardous and pathologised.¹²⁵ Here, the rhetorical excision of these spaces is presented as an appropriate and effective remedy.

In light of the language chosen by the government, it is hardly surprising that the legislation was attended by a degree of confusion as to its effects. Nor is it surprising that the government was compelled to assuage members of the populace that they were not in fact surrendering the very sovereign territory they were seeking to defend. The alarmist response that was provoked by the passing of the excision legislation highlights that the geography of the border is ordinarily imagined as a place that is permanent, certain, and locatable. Yet, the debate regarding how the policy affected the geography of Australia's sovereign borders demonstrates the manner in which the policy undermines the territorial nation-state and the central role of the physical border both in relation to national security and the securitisation of migration.

Even accepting the government's construction of the statute, which holds that its provisions do not result in any actual removal of territory, it is clear that a new 'zone' has been created within Australian territory in which the meaning of crossing the border (if not the border itself) had certainly altered or shifted. As a result of the policy, the sites and functions of the border were manipulated and redefined to produce a deliberate duality within Australia's borders. As a result of excision, one set of borders now exists for certain outsiders, namely those arriving by sea without the correct documentation, and another for insiders which, in this specific instance, includes more or less everyone else.¹²⁶ In this sense, it is surely those people arriving by boat seeking asylum who have been excised from the state, and not the islands themselves. Further, as discussed in

123 Simpson and Weiner (eds), above n 113 (emphasis added).

124 Elizabeth A Martin (ed), *Oxford Concise Medical Dictionary* (Oxford University Press, 8th ed, 2010) 262 (definition of 'excision').

125 See Fleur E Johns, 'The Madness of Migration: Disquiet in the International Law Relating to Refugees' (2004) 27 *International Journal of Law and Psychiatry* 587.

126 See Kesby, above n 36. Kesby attends to the ways in which borders are multiple and shift in meaning from group to group. She argues that international law's focus on the territorial border 'may render invisible other borders which are significant for subaltern groups, and thereby fail to address the manner in which borders affect lives and determine outcomes.': at 119.

Part III above, this excision is attended by an excision of the judiciary and administrative review bodies and their oversight of protection claims.

Nothing demonstrates the multiplicity of the border as patently as the map produced by the federal government to illustrate the areas of excision after the second round of excisions were passed in 2005.¹²⁷ The map was available in various reports regarding excision and was attached to a government-produced fact sheet on the issue, entitled ‘Australia’s Excised Offshore Places’.¹²⁸ It depicts a band of bright yellow delimited by a dark blue line arcing around the top of the country. The yellow section is described as the ‘area in which prescribed excised offshore places are located,’ and is unambiguously delineated from both the mainland and Australia’s territorial waters.

Not only does the policy of excision and its attempted redefinition of space challenge the idea of the territorial state, whereby a straightforward mapping of territory determines the limits, safety and responsibilities of the nation-state.¹²⁹ The debates also created a hierarchy among multiple sovereign borders. Most notably, until the mainland of Australia was also excised, Australia’s mainland boundaries came to be understood as more profoundly the border than the ‘other’ borders surrounding Australia’s outlying islands. In the excision debates prior to 2012, the mainland and its territorial edge were constructed and narrated as more legitimately and definitively ‘Australia’ than any of the island territories that also constitute Australia’s sovereign territory. This was most clear in the debates surrounding the proposal to excise Australia from itself in 2006. Here, those members of Parliament who had been perfectly untroubled by the original excision of territory in 2001 became ‘disgusted’, and even ‘utterly disgusted’,¹³⁰ by the idea that we would ‘excise Australia from Australia’ or ‘surrender our

127 See Appendix A below.

128 Department of Immigration and Citizenship, ‘Fact Sheet 81 – Australia’s Excised Offshore Places: Excision Places Map’ (2007). This fact sheet, along with many others, was previously available on the former Immigration Department’s website but is no longer accessible on Department of Immigration and Border Control website, which was in the process of being reconstructed at the time of writing.

129 Davidson, above n 60. See also Appendix A for the map that depicts the various excision zones up until 2007.

130 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 August 2006, 60 (Kate Ellis), discussing Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth); Commonwealth, *Parliamentary Debates*, House of Representatives, 9 August 2006, 40 (Ann Corcoran), discussing Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth).

borders'.¹³¹ The legislation was described as 'profoundly disturbing'¹³² and as 'so totally dumb and wrong.'¹³³

The disgust, as it was expressed, was not so much in reaction to the legislation barring all undocumented migrants arriving by boat from the right to make an application for asylum. Instead it was articulated as a sense of outrage that Australia would 'abandon' its mainland borders. Member of Parliament, Tony Burke, captured the sense of incredulity that accompanied the 2006 proposal: '[a]nd finally we ended up with this, the most bizarre proposal of all: that border protection would be abolished and replaced with border abolition – that Australia would become a nation without a border.'¹³⁴

In making the above complaints in 2006, members of Parliament often made little or no reference to the previous excision Acts, which had surrendered the borders of 4891 territorial islands over the preceding four years. Equally, while Opposition parties had argued that the second round of excisions and the proposal to excise the mainland represented 'a capitulation, a surrender' of sovereign territory,¹³⁵ the original excision of four islands in 2001 was more or less roundly accepted as a necessary component of Australia's border control strategy.

The lack of concern or care about the borders of the excised islands, demonstrated above, casts them as inferior to those of the mainland. This was equally the case for populated excised islands, such as Christmas and Cocos Islands, which are densely inhabited and established tourist destinations.¹³⁶ During an inquiry into the second round of excisions, government ministers and departmental representatives not only admitted that they did not know the precise number of islands that fell within the original excision zones, but that they also did not know which, if any, of the islands were inhabited at all.¹³⁷ In line with the attitudes of some members of Parliament to the significance of the excised islands, the scale of the map produced by the government depicting the effects of the

131 Commonwealth, *Parliamentary Debates*, House of Representatives, 10 August 2006, 19, 20 (Simon Crean), discussing the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth). As one member of Parliament responded: 'You do not deal with boat arrivals by pretending that you do not have sea borders': Commonwealth, *Parliamentary Debates*, House of Representatives, 10 August 2006, 33 (Anthony Albanese), discussing the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth).

132 Commonwealth, *Parliamentary Debates*, House of Representatives, 10 August 2006, 7 (Bob McMullan), discussing the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth).

133 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 August 2006, 33 (Kim Beazley), discussing the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth). See also the Dissenting Report of the Labor Party and Australian Greens Minority Report in the Senate inquiry into the Bill: Senate Legal and Constitutional Legislation Committee, above n 36.

134 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 August 2006, 23 (Tony Burke), discussing the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth).

135 Commonwealth, *Parliamentary Debates*, Senate, 9 December 2002, 7477 (Nick Sherry), discussing the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 (Cth).

136 During public hearings about this further round of excisions, a representative from the Department of Immigration noted 'an island could be anything from a sandbar to what we might think of as an island': Senate Legal and Constitutional References Committee, above n 62, 13 [2.34].

137 *Ibid.* See also Commonwealth, *Official Committee Hansard*, Senate Legal and Constitutional References Committee, 6 August 2002.

excision legislation is such that only a handful of the islands located in the excised area are visible at all.¹³⁸ For the most part, the yellow-shaded ‘excised’ area, strikes one as an uninterrupted seascape, devoid of any land. A few of the larger excised islands that do not lie in the yellow area are visible; they are shaded in pink and described as ‘[a]rea[s] in which an excised offshore place is located’.¹³⁹

Indeed, the excision of these islands and the offhand way in which they were referred to conveys something about their imagined geography. One imagines the islands to be far-flung, sparsely inhabited, or even completely deserted territories. At the very least, one could safely assume that the members of Parliament who confessed to having little sense of where these islands are and who inhabits these territories assume them to be insignificant and unrelated to the borders that are the subject of ‘border protection’ and securitisation. As a result, the islands become remote and distant from the territorial state; those who land on them do not endanger the nation or pass through to the ‘inside’ of the nation, since they are not on the mainland. However, as some members of Parliament highlighted, far from being distant specks on the horizon, a number of the 4891 excised islands are visible from the mainland or can be reached by foot at low tide.¹⁴⁰ Labor Senator Sandra Kirk explained, ‘[s]ome of these thousands of islands are so close to the Australian mainland that they can be seen by the naked eye. In some cases, you can even walk to them.’¹⁴¹ Further, figures provided by the Australian Bureau of Statistics revealed that there was a total of 20 629 ‘usual residents’ living on excised territories when the first round of excisions occurred.¹⁴²

Significantly, the amending Act of 2012, which rendered those arriving by boat to the mainland subject to the same regime facing ‘offshore entry persons’, did not include the term excision in the title or the Act itself.¹⁴³ Even more significantly, the amending Act did not add the mainland to the list of excised offshore places, which is how the policy was expanded on previous occasions.¹⁴⁴ In this sense, in a somewhat knotty piece of legislative reform, the mainland was not excised, but those arriving on the mainland would be treated in the same way as those arriving at excised offshore places.

138 See below, Appendix A. Another map, which is not attached to the fact sheet but is attached to one of the Senate Inquires into the further excisions, focuses on one area containing a number of excised islands. The map is entitled ‘Australia’s Maritime Zones in the Torres Strait’ and on a vastly different scale, shows more than a hundred islands speckled in just one small area of excision: Senate Legal and Constitutional References Committee, above n 62, 11.

139 See Appendix A below.

140 Commonwealth, *Parliamentary Debates*, Senate, 18 August 2005, 28 (Sandra Kirk), discussing the *Migration Amendment Regulations (No 6) 2005* (Cth); Senate Legal and Constitutional References Committee, above n 62, 13.

141 Commonwealth, above n 140.

142 Senate Legal and Constitutional References Committee, above n 62, 13 [2.35].

143 *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth).

144 As noted, the amending Act made all maritime arrivals subject to the same regime, by setting out that ‘unauthorised maritime arrivals’ landing at any Australian territory would be subject to the same conditions previously faced only by those arriving at ‘excised offshore places’: *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth) sch 1 item 8, inserting *Migration Act* s 5AA.

The rhetorical casting out of the island territories in the previous rounds of excision demonstrates both the impossibility of locating the limits and consequences of sovereignty by simply identifying one geographically fixed and neat territorial border. The comparatively neat edge of Australia's mainland is not Australia's sole sovereign border. Instead, there is an uncertain and indeterminate line that traces the edge of the territorial waters around thousands of islands. The impossibility of actually achieving a timeless border or complete control over spaces inscribed as the border is demonstrated by the government's decision to reconfigure the geography and legal meaning of Australia's formal sovereign borders, including the mainland's borders, so that they performed the work of exclusion that regulation of physical borders could not. The language and enactment of excision are an example of what Hyndman and Mountz describe as 'the respatialization of asylum' in the name of 'security'.¹⁴⁵ In choosing the language and regime of excision, the government readily sacrificed the territorial significance of reaching outlying islands and then the mainland itself in pursuit of perfect border control and a sense of national security.

V CONCLUSION

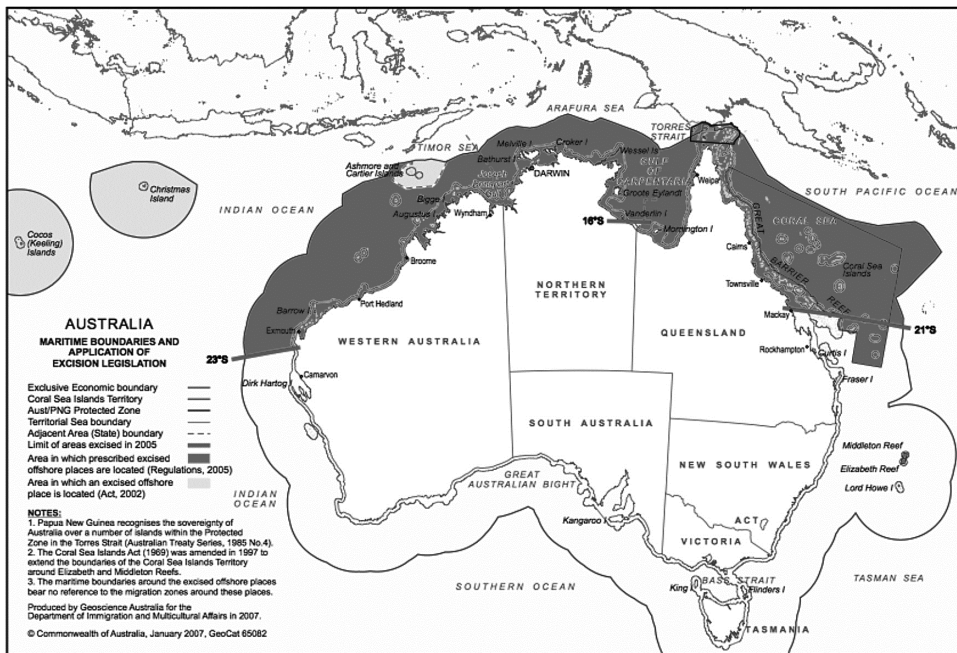
Excision policy has had a significant and ongoing role in how the border and border protection are discussed and understood in Australia. In order to explore the conceptions of the territorial border that territorial excision and its justifications rely upon, this article has attended to the expansions and attempted expansions of the policy. My objective has been to interrogate how particular narrations of the border were used to justify the need for the policy, and its brazen redefinition of the consequences of 'crossing' into Australian territory for asylum seekers who arrive by boat without authorisation.

In this article, I have argued that the enactment and endurance of territorial excision can be explained by discourses that have securitised migration and placed the physical geography of territorial borders and those who approach them at the centre of questions about the security and safety of the state. Territorial excision is not only a means to the end of excluding onshore asylum seekers. It should also be understood as attempting to secure a particular vision of the Australia border as 'under control', secure and directly linked to the safety and definition of the nation. The geography of 'entry' into Australia and its territorial borders, however, are not susceptible to the kind of perfect state 'control' and protection articulated in debates surrounding excision policy. In manipulating the terms of the *Migration Act*, the geography of the border, and redefining the implications of crossing borders, excision replaces the government's inability to finally determine who enters the nation with a policy that allows the state to determine who is 'in' Australian territory for the purposes of access to the state and its protections.

145 Hyndman and Mountz, above n 34, 252.

In overriding the role of presence in Australian territory, excision undermines the very bases of securitisation of migration discourse, territoriality and their construction of physical borders as determining the boundaries of nation and to whom the Australian state has a responsibility. The act of excising territory concedes the fact that the physical spaces of the border cannot be controlled such that they are able to ‘secure’, define and finally delimit the territorial state. In order to perfectly exclude unauthorised (and unwanted) arrivals and asylum seekers, excision undermined the significance of crossing a physical border for certain people and redefined the implications of entering Australian territory.

APPENDIX A: MARITIME BOUNDARIES AND APPLICATION OF EXCISION LEGISLATION



Source: Department of Immigration and Border Protection