



National Security and Immigration in Australia's Twentieth Century History

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Executive summary

- This article examines the administration of immigration and border controls as instruments of national security, commonly subject to political contestation of a high order.
- It suggests that the Haneef case of 2007 is best understood as the product of an immigration power with a century long history of development.
- It considers three cases of immigration control during the inter-war period in order to highlight the contested development of the Commonwealth's constitutional power over immigration.
- First, the Irish Envoys case (1923) – when the Commonwealth's deportation power was justified by international obligations and made domestically palatable by the spreading indifference of Irish Australians to the cause for which they spoke.
- Second, the Kisch case (1934) – when conventional national security concerns bearing on perceived threats to constitutional government were most in play, but unable to be deployed successfully in ways that would garner the support of all parts of the state apparatus.
- Third, the case of the landing rights of Chinese passengers in transit through Australian ports (1929) - which required diplomatic manoeuvring to avoid international insults aggravating an already defensive White Australia's relations with China and the non-British world.
- The article concludes by emphasising the open and unpredictable consequences of a politics and administration of the Commonwealth's immigration power when it is exercised as an instrument of national security.

Introduction

Modern states are founded on security. In weak states, the economic costs of security make up an excessive proportion of available budget. In strong states, with broad-based obligations to the health, welfare, education and general prosperity of their population, the costs of security are proportionally much less significant. But the political and symbolic values attached to those parts of the state which are supposed to protect their citizens from harm, and the state itself from subversion or attack, are very great.

When Dr Mohamed Haneef was arrested at Queensland's Brisbane Airport early in July 2007, he was not to know that his relationship with a man associated with the Glasgow Airport bombing a few days before would result in his international fame. The notoriety of the case as it developed over the following weeks flowed from a conjunction of facts and contexts: the fact of his prolonged detention under recently enacted counter-terrorism laws; the fact of his being charged with recklessly assisting a terrorist act; the fact of his being released on bail by a Queensland magistrate; the fact of his subsequent re-arrest and subjection to an order of deportation under the Immigration Act; the context of a recent high profile terrorist incident in another country to which he could be linked by association; the context of him being a Muslim; the context of him being in Australia on a working visa; the context of an Australian politics of immigration and security that had been enlivened by the events of 2001 and after; the context of a federal government almost on its knees after a decade in which it had controlled the politics of immigration and made it once again part of a politics of national security.

The Haneef case was the latest in a series of events that have blurred the difference between war-time and peace-time in Australia. It highlighted important questions of Australian law and politics. It provokes historians at least to recall the ways in which its events are made possible by the particular configuration of institutions, powers and politics that made up much of Australia's twentieth century history. In this paper I want to recover some elements of that history. I do so for the purpose of showing some connections between the more general history of security as the foundation of the modern state and the particular history of immigration as a dominant theme of Australian history.

The constitutional powers granted to the parliament of the Commonwealth of Australia at Federation included two relating to migration and migrants. Section 51 of the Constitution sets out the powers of the national parliament 'to make laws for the peace, order and good government' of the Commonwealth. This is the core of the constitution – defining what the government will do for the governed, tying the security objectives of the state (peace, order) to the welfare needs of the populace which are to be met through 'good government'. The language is plain, but the consequences momentous.

Of the 39 sub-sections of Section 51, two deal with migration – one with the business of 'naturalization and aliens', the other with 'immigration and emigration'. It did not take the parliament long to use these powers. In the first year of the Commonwealth the

Immigration Restriction Act established the framework for the national implementation of the White Australia Policy.

Historically the deployment of these powers has been at the service of a vision, constructing an ideal settler community, initially of white British stock, more recently of prosperous and harmonious but cosmopolitan character. Those powers also have been connected to the idea of national defence. They operate through the management of Australia's borders. The immigration powers thus are also an instrument of the security apparatus of the Australian state.

Generally we don't think immediately of the immigration power as an instrument of security. But the Haneef case focussed attention on the nexus of immigration and security because it made concrete the ways in which government can use a range of powers to respond to what it regards as a risk to national security.

The Haneef case is less a new phenomenon in Australia than a re-run of an older story. In what follows I want to explore some earlier connections between these two big themes in Australian history, immigration and security. I do so through looking at three cases in what might be considered the dark years of Australian immigration policy – the two decades after the Great War, when Australian immigration was captive above all to the White Australia Policy, when immigration in any case was limited, and when international conditions did little to encourage change in the view that Australia was an embattled outpost of the *British Empire*.

In these same years, through the cases I examine, we also see the consolidation of the nexus between immigration and security. But I am interested also in the way in which the exercise of the immigration power, an exercise of a sovereign power, was subject to constraints, both legal and political, both domestic and international, that point to its vulnerability as an instrument of security. Through such an exercise I hope to show why cases like that of Mohamed Haneef are simultaneously expressions of the great powers of the state, and the origin of political effects that are unpredictable in their outcomes. I want to show, then, the hazards of seeing the politics of security as always predictable and closed.

The Irish Envoys

In March 1923, two representatives of the Irish republican movement arrived in Australia. They had travelled from the United States, and they were on British passports which had been issued in 1921. The Irish Envoys as they became known were Father Michael O'Flanagan and John Joseph O'Kelly. These were not men in the front rank of Irish republicans but neither were they far from the top.

O'Flanagan was a former Vice-President of Sinn Fein, the republican nationalist political movement which drove one part of Ireland towards its break from the United Kingdom. When part of the republican movement refused to accept the legitimacy of the Anglo-Irish Treaty, O'Flanagan followed Eamonn de Valera into opposition to the Free State in

Dublin. O'Kelly had been a key player in election organising for the Sinn Fein electoral triumphs of 1917-18 and a minister in the first republican government of 1919-20. He, too, sided with the republican opposition to the Free State in 1922-3.

By the time O'Flanagan and O'Kelly arrived in Australia to raise funds and support for the Irish republicans battling the Free State, Ireland had been in a state of civil war for 9 months. The men were sent to Australia by De Valera who was attempting to limit the internal feuding between republican factions in the United States.

Irish-Australia was never going to provide a captive audience. In spite of some predictable support from Melbourne's radical nationalist Archbishop Daniel Mannix, Irish Catholic opinion was probably more in sympathy with the public declaration of the parish priest of Sandringham: 'if Father O'Flanagan and Mr O'Kelly, or if Lenin and Trotsky or any other revolutionaries cared to hold a public meeting in Sandringham, this had no connection with Catholicity'.

The message of the Envoys might have been ignored by the daily press but for the opposition from conservative and Protestant groups. They were stirred by O'Flanagan's anti-British diatribes into protests to State and Commonwealth governments. The incendiary presence of two Irish republicans preaching their anti-British message generally was not welcome – and was a potential cause of considerable domestic conflict, political and sectarian.

Late in April, the NSW premier, head of a conservative government with strong links to Protestant associations, urged the prime minister to take action against the Envoys after they arrived in Sydney. One option was a prosecution for sedition under the Commonwealth Crimes Act. The other was action under the Immigration Act to remove persons considered undesirable for a variety of possible reasons.

After the Envoys unwisely agreed to hold a meeting at the Communist Party hall in the city, the prospect of police intervention increased. On 30 April 1923, six weeks after their arrival in Australia from America, the two men were arrested by NSW police at another meeting in suburban Waverley. They were charged with sedition, specifically with 'inciting disaffection' against the government of Ireland.

At this point the Commonwealth government might have awaited the outcome of the criminal charge. But the British government already had made it clear that the passports on which the two men were travelling had been issued during the period between the truce of July 1921 and the transfer of power to the Free State: 'Since the establishment of the Irish Free State with Dominion status every precaution has been observed ... in co-operation with Government of Irish Free State to ensure that movements of persons actively hostile to latter should not go unwatched'.

Without waiting for the sedition charge to be heard, the Commonwealth now initiated Immigration Act proceedings against the Envoys. This proved to be no simple matter, for

there was uncertainty over the composition of the personnel and the powers of a Board to hear the case against the Envoys (i.e. that they were 'persons advocating the violent overthrow of the government of Ireland'). After those matters were resolved, the Board heard the case and made a recommendation to the minister for the deportation of the two men.

The deportation order duly followed. But enforcement was protracted. While the Envoys were detained in Long Bay Penitentiary, they also authorised an appeal against the order. In an important judgment, the High Court determined that the Commonwealth's immigration powers were sovereign and in a matter like this unappealable.

The treatment of the men was never oppressive. In spite of the High Court confirmation of the Commonwealth's power, the Envoys were given the option of departing voluntarily. Over some weeks government legal officers negotiated agreement that enabled the men to be freed pending their departure. When the agreement faltered, the government then arranged their deportation on a merchant ship, memorably called the *Mongolia*. The last episode in this lengthy exercise in response to a low-level security threat was the necessity of licensing the ship as one entitled to engage in the coastal shipping trade!

The Irish Envoys case is little remembered outside the realm of legal experts. The proceedings, however, were an important demonstration of the interlocking of security and immigration regimes in Australia. The Envoys themselves proved disingenuous in their mission – shifting from open advocacy of forcible resistance to a government newly established after a protracted period of warfare, to insisting that they were only raising funds for the civilian victims of continuing hostilities in Ireland. There was no evidence that O'Flanagan or O'Kelly themselves were directly involved in violent activities. They scarcely constituted a major security threat to Australia. But their presence in Australia highlighted the double dimension of security concern when political violence in the lands of Australia's diverse groups of settlers threatened to spill over into Australian domestic politics. Their deportation was consistent with an important theme in Australian history – the damping of political enthusiasms for the sake of domestic harmony.

The 'Travelbook-writer'

When he filled out his 'Personal Statement by Alien Passenger' at the Port of Fremantle on 3 November 1934, Egon Erwin Kisch described his profession as 'Travelbook-writer', last permanent residence abroad 'Versailles'.

Kisch was a Czech-born but by 1934 thoroughly cosmopolitan intellectual, a writer-observer of his times who lived in Paris and was associated with a growing movement of anti-fascist intellectuals. He was also a Communist, though he denied this when asked by the authorities on his arrival on Australian shores. He had narrowly escaped prolonged detention or even execution at the hands of Hitler's Nazi regime in the anti-Communist purge that followed the burning of the Reichstag in February 1933.

In 1934, Kisch was little known in Australia. He was in any case a second-string invitee of the Movement against War and Fascism to speak at an Australian Anti-War Congress in November 1934. At first Australian intelligence officers were unsure of who Kisch was – in one of the earliest reports to government the Director of the Commonwealth Investigation Branch reported receiving information ‘that an individual named Ewart Risch or Egon Kisch, believed to be either a German or Czechoslovak national, is on his way to Australia as a visitor to the Centenary celebrations’.

On his arrival by ship at Fremantle, Kisch was prevented from disembarking by the customs officers who acted as immigration control agents, under the direction of the Minister for Interior. Almost immediately it became publicly known that the action followed reports ‘received from abroad’ by the Commonwealth Investigation Branch.

Writers and intellectuals already agitated over the conservative government’s stance on censorship and prosecutions for sedition mobilised in defence of Kisch. Labor parliamentarians, including some closely associated with the Anti-War Congress, also ensured that the case was early raised in parliament. Over a period of four months from November to March, Kisch and his Australian supporters used every resource of politics and law available to them to leave the government with only a Pyrrhic victory by the time he left Australia on the *SS Orford* on 12 March 1935.

Politically the matter was complicated by the instability of the government – a key player was the new attorney-general and future prime minister, Robert Menzies, who found himself required to defend actions of other ministers. Menzies was and remains a divisive figure in Australian history and politics – but there are clear indications that the way in which this particular security matter proceeded was a matter of some concern to him. Why else would he have authorised his officers to negotiate a pathway out of Australia for Kisch – complete with compensation of 450 pounds – for a person he had declared to be a subversive and a danger to the security of the nation?

Kisch’s significance for Australian history of the 1930s and later is far from exhausted by his notorious struggle with the security authorities. But that is what interests us here and I want to highlight in particular the uses of the Immigration Act in this, one of the most exemplary actions linking immigration and security.

Two discretionary powers were exercised by the government, once it had decided that it wanted to keep Kisch from landing in Australia.

The first attempt to stop Kisch was based on a recent (1925) amendment of the Immigration Act. This empowered the government to prohibit the entry of a person about whom, through ‘official or diplomatic channels’, the Australian government had learned, from any other government, information that the person was an ‘undesirable’ inhabitant of the Commonwealth (Immigration Amendment Act 1925, s. 3 [gh]). Information about Kisch apparently had travelled via an intelligence grapevine rather than ‘official or diplomatic channels’. When Kisch challenged his prohibition in the High Court, Justice

Evatt declared that the government had failed to show the means by which it had concluded that Kisch was undesirable.

Before the High Court case was heard, the departmental view was that Kisch was unlikely to succeed. But in circumstances that bear an eerie similarity to those surrounding the determination of the Howard government in 2007 to deal with Dr Haneef, there already were plans afoot to subject Kisch to the dictation test.

In a memorandum written while Kisch was still on board the *Strathaird* in Sydney Harbour, a senior bureaucrat recorded what happened. The Crown Law authorities, reported AR Peters, were confident that the High Court would deliver a judgment in favour of the department, mandating the minister's decision to prohibit Kisch's entry on the basis of secret information received from the British government. Customs officers were more prescient and had requested advice on what to do if the court supported Kisch. Peters' memo continues: 'After consulting the Attorney-General, Mr Knowles [the Departmental Secretary] telephoned that arrangements should be made for a Customs officer to be available to apply an effective dictation test under Section 5 (2). In view of Kisch's reputed linguistic abilities, I suggested Gaelic, and Mr Knowles advised that there would be no objection'.

When the test was applied a few days later it was in fact in Scottish Gaelic, administered by a person with only limited knowledge of the language. In due course the transparent use of the dictation test as a national security device was met by Kisch's legal team appealing the subsequent court order for his deportation. In a judgment that upset some in Australia's Scottish community, the High Court on 19 December 1934 overturned the magistrate's deportation order, on the grounds that 'Scottish Gaelic' was not a European language for the purposes of the Immigration Act.

This second defeat in the High Court meant the government had failed to deploy successfully two of the available exclusionary powers of the Immigration Act. Potentially relevant was a third provision to prevent the entry of a person advocating the violent overthrow of a government. This was unavailable in Kisch's case since the evidence was hard to come by. A search of his luggage by customs officials at Fremantle had not uncovered any prohibited items such as Communist propaganda that might have made him vulnerable on this point. In consequence the government was forced back on the more direct use of the minister's powers to prohibit entry of an undesirable person.

Further legal action followed, with Kisch being sentenced to 3 months imprisonment as a prohibited person subject to a deportation order. But, as this conviction was in turn appealed by Kisch with the help of the battalion of supporters now gathered around him, the government started to retreat. Their cause was helped by Kisch himself, who wanted to depart Australia anyway. With a multitude of legal actions, costs and orders encumbering their client, Kisch's lawyers skilfully negotiated an agreement with the attorney-general for a compensation of 450 pounds

The Kisch case remains an exemplary instance of the use of immigration law in a clumsy attempt to defend national security. With a more experienced and stable government in place the succession of political and legal miscalculations made in doggedly pursuing Kisch might have been avoided. As it was, and in contrast to the outcome in the Irish Envoys Case, an important outcome of Kisch was the fences it constructed around the Commonwealth's use of immigration as a weapon in the national security armoury. And among other things it became a stimulus to the foundation of the Australian civil liberties movement.

The Chinese passengers

In anticipation of his parliamentary defence of the government's ban on Kisch, Attorney-General Robert Menzies had notes prepared on the principles underlying a sovereign power over migration. In the language of these notes, the Kisch case was a 'matter of immigration of an alien, and therefore clearly a case in which any country may decide for itself whether and on what terms it will admit'. Parliament had recognised in its Immigration Act that 'any country is at liberty to refuse entry to persons – (1) who will imperil racial purity; (2) who will imperil moral condition (criminals); (3) who will imperil the peaceful development of local self-government'. In such terms, then, migration and security were brought together as the very core of government.

Imperilling 'racial purity' was a rationale that justified two elements of Australian migration policy – the White Australia Policy, and the medical controls exercised at borders over those whose illness might imperil the health of the nation or otherwise be a burden on the public purse. The Kisch case had indirectly provoked a renewed interest in a key mechanism of the White Australia Policy, which also was of course a security policy. Indeed, an evidently embarrassed Menzies alluded to these inter-connections when defending the government's actions before a Victorian Trades Hall Council delegation only three days after Kisch was stopped at the Fremantle port gate, and before Kisch himself was subjected to a dictation test. 'Whatever is done in relation to these people is done under the Immigration Act. The White Australia Policy is based on the Dictation Test for very obvious inter-national reasons'.

The Dictation Test was indeed a creation (a policy innovation we might call it these days) for international reasons – a gesture towards a non-racially discriminatory policy for controlling borders. When the High Court laughed the government out of court for administering a test in Scottish Gaelic to the erudite and multi-lingual Kisch it was not the only actor of the inter-war years that was pushing at the doors of the White Australia Policy.

These links bring us to my final case and back to the intersections between immigration, security, a vision of domestic harmony and the norms and demands of international relations. After the late nineteenth century creation of shipping regulations intended to control the movement of Chinese migrants and Chinese-Australian settlers, the careful border management of this element of Australian security developed incrementally into a

humiliating and intensive system of surveillance over Chinese passengers on shipping in Australian coastal waters.

In spite of the White Australia Policy the volume of passenger trade between China and Australia was significant. The Chinese consul-general requested regular advice on the Chinese passenger movement in and out of Australia in 1913 and was provided with the figures regularly from then until 1947 save for a break in the war years. The movement was closely linked to the prevalent economic and political conditions in the two countries – the highest numbers of arrivals and departures occurred in the late 1920s, dropping off during the years of the Great Depression.

In 1929, a new consul-general arrived in Australia. On the way to his posting in Melbourne, Far Tsan Sung stopped off in Sydney where he delivered a speech in which he complained about the 'treatment here of Chinese who', he said, 'were not hogs or cattle'. His arrival in Melbourne was eagerly anticipated by the local Chinese community and he didn't disappoint. The headline in the *Herald* was sensational: 'Give the North to the Chinese'. Many Australians, claimed the consul-general, believed the White Australia Policy was doomed and 'that the whole of North Australia could only become prosperous with Chinese immigration'. The reporter liked Mr Sung's straight talking – he was 'truly representative of the New China, he is typical of the student generation which does not indulge in Mandarinesque verbiage: he goes straight to the point in whatever he has to say'. Sung told the reporter that his object was 'to see that Chinese nationals and Chinese trade are treated on a reciprocal footing'.

On his way down the coast the consul-general had witnessed the routine humiliations to which some Chinese passengers were subject. While he was surprised to 'find Australians individually so friendly to the Chinese', he also had witnessed scenes of officiousness and discrimination at Cairns and then Townsville. By the time he arrived in Melbourne a paper war had commenced, with newspaper reports giving publicity to Sung's complaints and customs officials writing to their superiors explaining themselves. Sung met with the secretary of the Department of Home Affairs, which was responsible for the management of customs and immigration. He followed up 'informally' in writing. He was not making a formal diplomatic complaint but seeking to redress what he regarded as routine discourtesies that might be remedied by administrative action.

Sung's representations exposed the contradictions at the core of the White Australia Policy. As would happen throughout its history there already had been modifications enabling the passage of certain categories of Chinese visitor (particularly merchants and students). These were administrative mechanisms intended to allow the free passage of long-resident Australian Chinese – chief among them were possession of a birth certificate or a CEDT (Certificate of Exemption from the Dictation Test).

But underlying the local administration of border security was a set of norms, a kind of bureaucratic shorthand, about how the ports would be managed. Signs of class distinction were the most important of these norms – the class of ticket was read as a sign of socio-

economic class, and of correlative security risk (escape into the wide spaces of Australia). Anxiety was highest in relation to those in the 'steerage' or third class, but even 'second class' passengers fell under suspicion and were liable to be stopped from landing at intermediary ports.

The port surveillance threatened to harden into a codified system of discrimination, sweeping the Chinese into categories they thought they had escaped. Claiming to have gone some way towards meeting Sung's concerns, the minister signed off on a letter that assured landing permission to Chinese passengers holding relevant papers, including even those travelling third class, but not extending to 'other passengers of the coolie class'.

Sung welcomed the clarification of process, but showed himself well aware of the historical connotations of the words 'coolie class', which might be wrongly applied to Chinese passengers. 'I shall be glad', he wrote firmly, 'if you will kindly define these words clearly, as a well-to-do or a reputable Chinese business man may travel third class merely for economical reasons and yet might be prevented from landing'. Later Sung enlarged on his comments about the travelling habits of business men in a way that complicated customs' simplistic reading of risk of desertion by virtue of class of ticket: 'It is the experience of the shipping companies [wrote Sung] that well-to-do and responsible Chinese who have for long been resident in Australia travel in the third or steerage class because they like Chinese food and also desire to travel with associates of the same firms'.

A previous historian reviewing Sung's career in the post has characterised him as 'tactless, abrasive and aggressive', failing to win any more concessions than the quiet diplomacy of his predecessors. Perhaps his diplomacy became more agitated as time went on. But his initial campaign on landing permission was courteous, if firm, and he was not easily pushed aside. When the government conceded that possession of papers would generally enable Chinese passengers of any class to land at Queensland ports, Sung decided to press home his point. On 14 August he asked the department to allow any Chinese passengers, with papers or not, permission to land provided they were spoken for by the purser of the ship. Moreover, addressing the aggravation caused to Chinese passengers being constantly monitored at each port of call along the east coast of Australia he suggested the perfectly sensible approach of checking inbound (from Hong Kong) passengers at Thursday Island alone.

Predictably enough this was too much for the department, which decided that the 'present trial' should be given time to test. The matter rested there for a number of years until the Australian-Oriental Shipping Line revived the issue of what it regarded as pointless mustering and checking of Chinese passengers at every port on the eastern Australia coast. This time the minister signed off on the recommendation that landing rights be extended to other Chinese visitors, such as students who had been admitted to Australia under the exemption provisions of the Immigration Act.

Consul-General Sung was right when he told the Melbourne *Herald* reporter that the White Australia Policy was doomed; he was even half-right when he predicted a possible Chinese future for the North of Australia, whose economy is now dominated by the extraction of vast mineral reserves to resource Chinese economic development. When he confronted the Australian authorities over the treatment of Chinese passengers he also questioned the rationale that tied Australian national interest to the White Australia Policy – and pointed to that policy's long term decline as a pillar of national security.

Conclusion

When Immigration Minister Kevin Andrews exercised his ministerial discretion to deport Dr Mohamed Haneef in July 2007 he did so with a century of authority behind him. This was no new exercise of a ministerial discretionary power as an alternative to deploying other weapons in the national security armoury. Neither was it the first time such a decision had stirred up such a controversy.

In this paper I have examined the context and outcomes of some earlier episodes in Australia's immigration history that bring that history into close contact with the changing priorities of Australia's security history. The positive dimension of well managed immigration programs is their contribution to building a good society, one that is capable of providing a measure of economic and social security while limiting the danger of hostile reception and even violence between newcomers and hosts.

But the objectives of immigration policy, which the Australian case highlights in the most dramatic way, also include the effective maintenance of borders and powers of exclusion of those deemed undesirable. History shows us how the practices of immigration policy are instruments of sovereign government – which exercises them sometimes with ill-advised alacrity, and also in ways that must balance the risks of domestic and international disharmony.

The cases examined here show these features in some relief: the Irish Envoys, whose deportation was justified by international obligations and made domestically palatable by the spreading indifference of Irish Australians to the cause for which they spoke; the Kisch case, in which conventional national security concerns bearing on perceived threats to constitutional government were most in play, but unable to be deployed successfully in ways that would garner the support of all parts of the state apparatus; the case of the landing rights of Chinese passengers which required diplomatic manoeuvring on both sides in order to avoid international insults aggravating an already defensive White Australia's relations with China and the non-British world.

I want to conclude by suggesting that there is another thing that the study of cases like these shows us about the Australian politics of security. That is, to my mind, how extraordinarily open these politics are – how readily actions of government that have their roots in well accepted doctrines of Australian life can be rendered vulnerable through the actions of third parties. As unreliable and unpredictable as the Australian media might be,

it is the indispensable actor in these kinds of episodes – as Sung clearly knew when he used the media in 1929 to start a diplomatic campaign. But the complex relations between government and law in Australia have equally played their role, and continue to do so, in affecting the outcome of immigration politics. And, finally, even within the interstices of government, the precise role of immigration as part of the armoury of national security has been constantly renegotiated. For all these reasons we may conclude that the outcome of immigration decisions made in the interests of national security is unpredictable, dependent on the intersections of domestic and international events, and in ways that sometimes may be more readily described than explained.

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