Introduction

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The law of unintended consequences is a common adage widely understood by laypersons and academics alike. For academics, particularly sociologists and economists, it provides a useful tool to explain complexities resulting from government policy and law. For the less reverential, it can be laid alongside Murphy’s law as a self-evident outcome that can provide a perfect lens through which to view and analyse complex reactions to and impacts of change.

The 1936 groundbreaking analysis of this concept by sociologist Robert Merton in ‘Unanticipated Consequences of Purposive Social Action’¹ began a long history of deliberate exploration of the unanticipated, unexpected, and unintended consequences of purposeful action that arise from a complex range of factors, and impact in a variety of ways upon society and the individual.

Merton provided us with a definition for an unanticipated consequence and, importantly, established that the definition does not rest solely upon outcomes that impact negatively. Unanticipated consequences can be simultaneously positive and negative; the desirability or otherwise of the effect is often in the eye of the beholder. Merton’s analysis identified five reasons for unexpected consequences, the first being that a simple mistake made through lack of knowledge of a specific situation can, in turn, prevent the accurate prediction of an outcome. The second is the assumption that repeating something that was done in the past will produce the same result in the future. Thirdly, Merton considered that unintended consequences can result

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from an action based on the need for an immediate solution, considered so urgent that the decision to ignore outcomes is deliberate. Fourthly, actions arising from what Merton terms ‘basic values’ in one area of life or society may be so pervasive that they prevent consideration of impacts on other areas of life or individuals. Finally, Merton coined the term ‘self-fulfilling prophecy’ to describe ‘a false definition of the situation evoking a new behaviour which makes the originally false conception come true’.

For those working within the field of migration as practitioners, academics, politicians, and commentators, the vista seems crowded with unintended consequences. In Australia, migration law is a dynamic, highly politicised, cutting-edge area of practice. As members of a migration nation, Australians feel an innate right to regularly participate in and instigate policy and legal changes to migration through social media and commentary. This often leads to outcomes that have the opposite outcome of the original intention, prompting government to implement corrections that, in turn, have unexpected impacts. At other times, legislation is implemented to achieve a specific aim that deliberately ignores consequences, intended or otherwise. For these amongst other reasons, the law of unintended consequences provides a useful analytical tool for examining migration law.

Australia’s history as a geographically defined nation with control over its borders has pushed successive governments to place migration law and policy at the forefront of the political agenda. As a consequence, migration law and policy has become divided into two distinct mechanisms: one for regulating the selection of migrants, and one for regulating the behaviour of migrants once they are selected. This has become increasingly evident as Australia’s migration program has moved from an emphasis on permanent skilled and family migration to an emphasis on temporary migration. The shift has included a reliance on two-stage processes that lead to permanent migration, increasing the number of individuals holding temporary visas, such as those on student visas, work visas, and holiday visas. In recent times, temporary status has also been applied through various mechanisms to asylum seekers and refugees.

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2 Ibid.
This book arose from an inaugural conference on migration law and policy at ANU College of Law, held in October 2013. The conference brought together academics and practitioners from a diverse range of disciplines and practice. The book is based on a selection of the papers and presentations given during that conference. Each chapter highlights one or more of Merton’s five reasons behind unintended consequences. Each explores the unexpected, unwanted, and sometimes tragic outcomes of migration law and policy, identifying ambiguities, uncertainties, and omissions affecting both temporary and permanent migrants.

Together the chapters present a range of perspectives, providing a sense of urgency that focuses on the immediate political consequences of changes to the Australian migration program, and exposing the daily reality for individuals and society as a whole. Merton’s analysis allows us to view each of these chapters in a different light, examining how these outcomes may have come into being.

Each paper chosen for the book addresses issues that are fundamental to contemporary debates about the global nature of migration in the Australian context. As a whole, they create a single text discussing the problem of the controversial nature of migration law and value judgements made by law-makers when considering potential migrant cohorts. Such judgements inevitably impact on individuals who become entangled in the migration process.

The book focuses on the control mechanisms evolving in migration law and policy, and the barriers these create for those who arrive or are already living in Australia. From language tests, to long processing times affecting the arrival of close relatives, to the obvious challenges raised by the immigration detention regime, the landscape is riddled with contradictions and uncertainty. Each author elaborates on these contradictions and explicates the uncertainties arising from the contemporary design of migration law and policy.

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3 Please note that as these papers were written in 2013, many of the links for the reference articles were valid at the time of writing. Those no longer able to be accessed due to departmental changeover or other circumstances have been identified as ‘discontinued’.
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Our authors explore situations where legislation or policy purposefully drafted to remedy one problem has created new and unforeseen problems. They consider circumstances where the tension between politics and legal frameworks may have resulted in outcomes that work to undermine the law, principles of justice, or are in direct conflict with the intent of the legislation put into place by parliament.

In this way, they identify gaps and contradictions — which suggest fear and prejudice, rather than tolerance and fairness — that continue to lie at the foundation of contemporary migration law and policy. These prejudicial fears are based on the assumption that floodgates of migration will be opened to all who want to move to more privileged states.\(^4\) Law based on fear results in the creation of an asymmetrical ethical and legal relationship between the ‘we’ (the receiving population) and the ‘other’ (the incoming migrants).\(^5\)

By exploring the uncertainties and deep state of tension inherent in contemporary measures employed in the management of incoming migration flows, authors expose the ever increasing cracks emerging between migration law, international law, and internationally recognised human rights standards. In doing so, they challenge the contemporary regime and ask how far the cracks, tensions, and uncertainties can grow before they negatively impact on the rule of law. Their perspectives will provide the reader with a passionate, technical, and practical analysis of complex policy and legislation.

Some of the authors in the book consider how law and policy changes designed to restrict the intake of migrants can impact heavily on those who are already residing in Australia. Born out of a need to address a range of perceived political problems, these changes have resulted in an uncertain migration outcome for a range of temporary residents, and have resulted in migrants searching for new and innovative ways to remain in Australia.


Chapter 1, ‘Pathways to Illegality, or What Became of the International Students’, by Sanmati Verma, considers the effects of temporary migration, exposing how legislation and policy made in what Merton terms ‘the imperious immediacy of interest’ can result in outcomes that benefit one sector whilst impacting negatively on others. Verma maps the growth, collapse, and reformation of the international education industry, noting in particular the surge in the vocational education and training sector, fuelled by migration policies linking Australian education with a permanent resident outcome. She traces the current rise of a permanent illegal class of residents made up of former students created from this deliberate use of migration visas to encourage overseas students, and explores what has become of this group, and its impact on the economic and political landscape. Verma’s analysis allows us to see the cascading effect and ongoing consequences of changes designed to meet one goal.

In Chapter 2, Sudrishti Reich continues an examination of the plight of former international students in ‘Great Expectations and the Twilight Zone: The Human Consequences of the Linking of Australia’s International Student and Skilled Migration Programs and the Dismantling of that Scheme’. Reich’s chapter expands on the theme of a lost generation of foreign youth. These are the self-named ‘G5rs’, former students demanding a resolution to their plight caused by the reversal of policy designed to counter the ‘success’ and unintended outcomes of the scheme that created a direct pathway from student status to permanent residence. She amplifies these students’ voices, echoing their pleas from the social media and blogs that detail their despair at the years they have wasted waiting for resolution of their ambiguous visa status. Through a careful analysis of legislation, policy, speeches, media statements and social media, Reich exposes the ludicrous nature of the legislative changes that have occurred as a result of ‘reactive over-compensation’.

Shanthi Robertson continues this analysis of a policy designed to achieve one outcome in Chapter 3, ‘Intertwined Mobilities of Education, Tourism and Labour: The Consequences of 417 and 485 Visas in Australia’. Through a study of the life and work experiences

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6 Merton, above fn 1.
of people on temporary work visas in Australia, Robertson exposes how the government’s intent to promote temporary residence as the only goal in migration conflicts with the goals of the temporary migrant. She demonstrates how temporary residents are travelling through capillary pathways to reach their ultimate destination, creating new social and economic enclaves that silently impact on the broader community.

The silence is given voice by Peter Mares’s chapter ‘Unintended Consequences of Temporary Migration to Australia’. Mares discusses students, temporary workers, and the tenuous position of New Zealand migrants in Australia. Through the stories of individuals caught up in these legislative and policy paradigms, he highlights how legislation based on political will inevitably produce results that impact on legal, administrative, and institutional structures outside of and independent of the intended policy area. Mares argues that a continued reliance on a temporary program, which denies any pathway to citizenship for long-term residents, will ultimately result in an increasing range of negative social and economic outcomes. By exposing the gaps and weaknesses of the temporary migration program, he raises important moral questions that need to be confronted by Australia as a society.

Nowhere is the unintended consequence of legislation made clearer than in the poignant case of Tahiri v Minister for Immigration and Citizenship. Surely this must be a consequence born of error. It is clearly a piece of legislation that has resulted in an outcome that could not be predicted. Joanne Kinslor explores this in ‘Reconsidering What Constitutes Objective Decision-making About Children Crossing International Borders’. Kinslor’s analysis of Tahiri reveals how a legal provision in the migration legislation — Public Interest Criterion 4015 — which was designed to protect children in accordance with international law, has inadvertently resulted in a domestic law that can discriminate against women and leave children living in danger. She demonstrates that the crucial regulation, which is purposefully intended to give effect to Australia’s obligations under the Hague Convention in matters related to child custody, applies across all visa applications. The unintended results are that the domestic law of countries not signatory to the convention is included in all visa decisions affecting child custody. Kinslor calls for a legal acknowledgement of
the importance of evaluative judgements in decision-making, and highlights the need for a timely review of laws that impact negatively on those they are intended to protect.

Benjamin Powell in Chapter 6 argues that limiting migration makes no economic sense. ‘A Brief Case for Open Borders in Australia’ sets the scene for academics and practitioners to think outside of the box when considering unanticipated outcomes. Through the eyes of an economist, Powell challenges the myths that migrants will take jobs, drive down wages, and create a drain on the budget. He provides examples of solutions that could challenge Australia’s current approaches to work, wages, and social security — solutions that may, in turn, lead to more unintended consequences.

From yet another point of view, Desmond Manderson’s ‘Not Drowning, Waving: Images, History, and the Representation of Asylum Seekers’ takes the reader through a harrowing journey of perspectives, highlighting the role of images in determining the way we view and react to specific laws and policies that should call into question our basic humanity. In this thought-provoking chapter, Manderson forces us to contemplate our complicity and ultimate responsibility for policy deliberately designed to harm, and demonstrates the need to embed in decision-making the requirement not just for evidence, but the consideration of outcomes from as many viewpoints as possible.

Peeling back the law to expose the true impact of policy and legislation on society and individuals is the only way we can truly understand the reality of Australia’s immigration system. It has been too easy to dismiss international students, asylum seekers, and temporary residents as people who want to scam a system or jump a queue. Our authors have explored the reality of immigrants’ lives, exposed the law, and examined its consequences. They have challenged us to truly see what is happening, and to acknowledge the humanity of those affected. In doing so, the concept of a law of unintended consequences has provided an excellent lens through which to examine and challenge the sometimes absurd or harmful consequences of migration law and policy.
Bibliography


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