

Got AATitude?

*A quantitative analysis of refugee decision-making at the
Administrative Appeals Tribunal*

Honours IV
Government and International Relations
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18,940 words

This work is substantially my own, and where any part of this work is not my own, I have indicated this by acknowledging the source of that part or those parts of the work.

Acknowledgements

They say it takes a village to raise a child; this thesis is no different. I am indebted first to my supervisor Anna Boucher. Her support, encouragement and wealth of knowledge have been indispensable. I need to thank Declan Scott, for helping write the code that made this study possible.

I also want to thank my sister for telling me what I needed to hear and my mother for reading my drafts with such enthusiasm. Finally, I want to thank Isobel, for reminding me what is important.

Abstract

The Administrative Appeals Tribunal (AAT) is the first level of appeal for an asylum seeker whose application has been rejected by the Department of Home Affairs. There have been allegations that appointments at the AAT have become politicised. Despite these concerns, there exists no empirical means to test political influence at the AAT. This thesis develops a method to quantitatively test these allegations and provide further insights into asylum decision-making. Drawing off a specially generated Database of all publicly available refugee decisions at the AAT for the years 2015-2018 (2,272 cases), this study measures the effect of the Party appointing each Member on asylum outcomes. The key finding is that the odds of a Labor-appointed Member giving a favourable decision to an asylum-seeker were 1.46 times higher than those of a Liberal-appointed Member. Further, this study finds that the decision patterns vary significantly between Labor- and Liberal-appointed Members for applications from the same country of origin.

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Introduction

The Administrative Appeals Tribunal (the *AAT*) is the first avenue of appeal for persons seeking asylum in Australia. Its purpose is to allow an independent decision-maker (a Member) to remake the decision of the Department of Home Affairs (the *Department*). In May 2017, the Immigration Minister of Australia, Peter Dutton, criticised the AAT for handing down several controversial decisions favourable to asylum seekers. Dutton suggested the decisions were made by Members with links to the Labor Party.¹ The comments were met with swift backlash from the Opposition and from the Law Council of Australia, which released the following statement;

“The Administrative Appeals Tribunal plays a critical role in overseeing and reviewing decisions made by Federal Government ministers, departments, and agencies every day. For members to face personal criticism for fulfilling their duties is inappropriate. They are reviewing decisions made by government in accordance with law, *not personal preference or ideology.*” (emphasis added)²

One month later, the Coalition government refused to renew the contracts of over 50 AAT Members, most of whom sat in the Migration and Refugee Division.³ The government also appointed over 60 new Members to the Tribunal.⁴ Several of the new appointees were accused of having links to the Liberal Party. Amongst the appointees were ex-political staffers and Liberal Senate candidates.⁵ In February 2019, an additional swathe of appointments was labelled with similar accusations from the media,⁶ from legal professional groups,⁷ and from the Labor Party.⁸

¹ Caitlyn Gribbin, "Peter Dutton blames 'politics' as bid to deport six refugees fails," *ABC News*, 16 May 2017 2017.

² Law Council of Australia, "Minister's comments attacking independence of tribunal were unfortunate, should not be repeated," news release, 17 May 2017, 2017.

³ Michael Koziol, "George Brandis clears out 'infuriating' Administrative Appeals Tribunal," *Sydney Morning Herald*, 28 June 2017 2017.

⁴ Ben Doherty, "Refugee tribunal members lose contracts after Peter Dutton criticisms," *The Guardian*, 2 June 2017 2017.

⁵ Koziol, "George Brandis clears out 'infuriating' Administrative Appeals Tribunal."; Mard Di Stefano, "How The Attorney General Stacked An Independent Tribunal With His Liberal Mates," 3 November 2016 2016; Justine Landis-Hanley David Hardaker, "The Big Stack; How the government stacked the AAT," (24 September 2019 2019).

⁶ Paul Karp, "'Full of Liberal mates': Labor accuses Coalition of 'stacking' tribunal," 21 February 2019 2019.

⁷ Law Council of Australia, "AAT appointments must be transparent and merit-based," news release, 22 February 2019, 2019.

⁸ Michaela Whitbourn, "Federal Labor vows to end political appointments to AAT," (2 February 2019 2019).

Over this same period (2015-2018) the number of active refugee cases awaiting review in the Refugee Division of the AAT ballooned from 5,434 to over 20,000, due to both an increase in the number of asylum applicants⁹ and also dramatic changes in the asylum processing laws in late 2014.¹⁰ Concurrently, there were several highly politicised High Court cases that challenged aspects of the asylum regime in Australia.¹¹ These cases all arose from decisions that were initially made at the AAT and are part of a larger to-and-fro between the High Court and the legislature regarding refugee policy.¹²

The AAT is statutorily required to be “just” and “fair”.¹³ The core values of the Code of Conduct for AAT Members are ‘independence’, ‘impartiality’ and ‘integrity’.¹⁴ Accusations of politicised appointments, ideological decision making, a drastic increase in its workload and the politicisation of its decisions have put these principles in jeopardy. This context gives rise to the central research question: “*To what extent can outcomes of asylum applications between 2015 and 2018 in the AAT be explained by Members’ political preferences?*” The question is fundamentally an empirical one and therefore is answered using a quantitative method to *measure* political influence at the AAT. I create a Database of refugee cases at the AAT, and use statistical analysis to ascertain differences in how Liberal- and Labor-appointed Members make decisions.

Scholarship on the AAT is primarily from legal literature and focuses on the peculiar position of the AAT as a pseudo-judicial body (discussed below). The literature on judicial behaviour, which seeks to understand how ideological and institutional factors affect decisions, has generally overlooked the AAT. Whilst there is a young but growing literature on administrative asylum decision-making in

⁹ AAT, Annual Report 2016-17, (Canberra 2017); AAT, MRD refugee caseload summary by country of reference, (Canberra 2019).

¹⁰ Mary Crock and Kate Bones, "Australian Exceptionalism: Temporary Protection and the Rights of Refugees," *Melbourne Journal of International Law* 16, no. 2 (2015). RCOA, *State of the Nation: Refugees and People Seeking Asylum in Australia*, Refugee Council of Australia (Surry Hills: Refugee Council of Australia, 2017).

¹¹ *High Court in Plaintiff M68/2015 v. Minister for Immigration and Border Protection & Ors* [2016] HCA 1; *Minister for Immigration and Border Protection v SZSSJ*; *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40; *BEG15 v Minister for Immigration and Border Protection* [2019] HCA 3.

¹² Rebecca Hamlin, *Let me be a refugee : administrative justice and the politics of asylum in the United States, Canada, and Australia* (New York: Oxford University Press, 2014); Rebecca Hamlin, "International Law and Administrative Insulation: A Comparison of Refugee Status Determination Regimes in the United States, Canada, and Australia," *Law & Social Inquiry* 37, no. 4 (2012).

¹³ *Administrative Appeals Act (Cth)* 1975, s 2A.

¹⁴ AAT, Conduct Guide for AAT Members, (Canberra: Commonwealth, 2015).

Canada¹⁵ and the USA,¹⁶ such studies have not yet been conducted in Australia. The Migration and Refugee Division (*MRD*) of the AAT is therefore an institution that has received little academic scrutiny, but heavy criticism in the media and political spheres. It is an interesting subject of analysis as it sits at the nexus of several politically relevant issues: international migration, the expansion of executive power, the undermining of the separation of powers and the rule of law, and the increasing securitisation and criminalisation of refugee policy.

AIMS

This project is grounded in legal realism: the acknowledgement that the reasons for a decision-maker's decision are not simply those that are listed in their published written reasons.¹⁷ By approaching a study of the AAT from a political science perspective, this project aims to investigate whether asylum decision-making is affected by the Member's political attitudes and whether the appointment process is politicised. This thesis does by no means aim to provide a totalising theory on how decisions are made. It does not measure the influence of institutional or other structural political influences on decision-making. Such an aim lies outside the scope of this project. Rather, due to the lack of academic understanding of the AAT, this project aims to test a single theory on decision-making (the attitudinal school) using a quantitative method.

The second aim of this thesis is to consider and synthesise the literature that surrounds the tribunal. As a pseudo-judicial body that is part of the executive, the AAT is relevant to the literature on both judicial behaviour theory, and also administrative studies more broadly. There has been little attempt in Australia to consider the AAT through either of these paradigms. This thesis therefore presents an

¹⁵ Sean Rehaag, "Do women refugee judges really make a difference? An empirical analysis of gender and outcomes in Canadian refugee determinations," *Canadian Journal of Women and the Law* 23, no. 2 (2011); Sean Rehaag, "The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment," *Osgoode Hall Law Journal* 49, no. 1 (2011); Sean Rehaag, "Judicial review of refugee determinations: the luck of the draw?," *Queen's Law Journal* 38, no. 1 (2012).

¹⁶ Jaya Ramji-Nogales, *Refugee roulette : disparities in asylum adjudication and proposals for reform*, ed. Andrew Ian Schoenholtz and Philip G. Schrag (New York: University Press, 2009); Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip Schrag, "Refugee Roulette: Disparities in Asylum Adjudication," *Stanford Law Review* 60, no. 2 (2007); Banks Miller, Linda Camp Keith, and Jennifer S. Holmes, *Immigration Judges and U.S. Asylum Policy* (Philadelphia: DE GRUYTER, 2015).

¹⁷ Grant Gilmore, "Legal Realism: Its Cause and Cure," *Yale Law Journal* 70, no. 7 (1961).

opportunity to extend and develop the literatures on decision-making by applying them to the AAT; a hybrid institution.

Finally, this thesis aims to produce and analyse new data on refugee decisions at the AAT. I code every publicly available refugee decision made by the AAT between July 2015 and December 2018 (2,544 decisions), recording the applicant's country of origin, the name of the Member, and the date, location and outcome of the decision. This will be accompanied by an additional Member database, which records the name of the Member and the government that appointed him or her to the Tribunal. These data enable an analysis of trends in decision-making and most importantly, whether patterns arise as to how Members appointed by different political parties are making decisions. This quantitative assessment also includes a regression analysis, to determine the strength of the relationship between the outcome of a case and the political party appointing the Member, whilst controlling for other variables. In addition, this project considers the pre-existing data on the AAT, in order to contextualise my data and compare it to the universe of decisions.

OVERVIEW OF THESIS

Chapter one contextualises the political and theoretical debates surrounding refugee determination at the AAT. The first section gives an overview of the AAT and seeks to define its key features and purpose. The second section considers the theory surrounding the AAT from different schools, including the administrative and judicial behaviour literatures and the asylum decision-making theory.

Chapter two explains and justifies the method of this project, including the creation of the Refugee Decision Database (the *Database*).

Chapter three presents the results of the quantitative data analysis of the Database. This includes the use of descriptive statistics, cross-tabulation and logistic regression analysis to determine correlations and test the hypothesis.

Chapter four presents the results of this data analysis and discusses the conclusions. This section seeks to answer the core inquiry of this study: to what extent can outcomes of asylum applications

between 2015 and 2018 in the AAT be explained by Members' political influences? It also locates the findings with the literature on decision-making and in political science more broadly.

1 Context and Theory

1.1 THE ADMINISTRATIVE APPEALS TRIBUNAL

In order to contextualise the forthcoming analysis, it is important to understand the AAT's history and its role in Australia's migration regime. The AAT is the first avenue of appeal for an asylum seeker in Australia. After an applicant's request for a humanitarian protection visa has been denied by the Department of Home Affairs (the Department¹⁸), the applicant may apply for a review of the decision 'on its merits'. This means that the decision is to be re-made by a Member of the AAT, using the same information that is available to the Department. The Member is also, however, able to conduct a hearing, has the opportunity to interview the applicant and is also able to request new information or documents. The purpose of merits review at the AAT (as opposed to judicial review at the Federal Court), is to ensure that the initial decision-maker from the Department determined the *facts* of the case correctly. Where the applicant believes the decision was not made in accordance with *law*, the applicant is able to seek judicial review at the Federal Circuit Court. The application and appeal process are shown in Figure 1.

The AAT was instituted in 1976 in response to the increasing power of the state. Throughout the 20th Century, the responsibilities of the Executive branch of government grew considerably. Commonwealth departments became accountable for making decisions on how government services should be delivered to individuals (eg. welfare, veterans support, housing, healthcare, taxation) and also controlled how people entered and exited the country through migration and citizenship powers. Under common law, the means of appealing such decisions was vague, slow and outdated. It relied on several constitutionally entrenched writ, with cases often being lost or won on the basis of legal technicalities.¹⁹ The Kerr Report of 1971, tasked with assessing the process of review of government decisions, recognised that what the aggrieved person really wanted was to review the decision *on its merits* (as opposed to a review on a question of law), and for the decision to be made again.²⁰ Such a consolidated

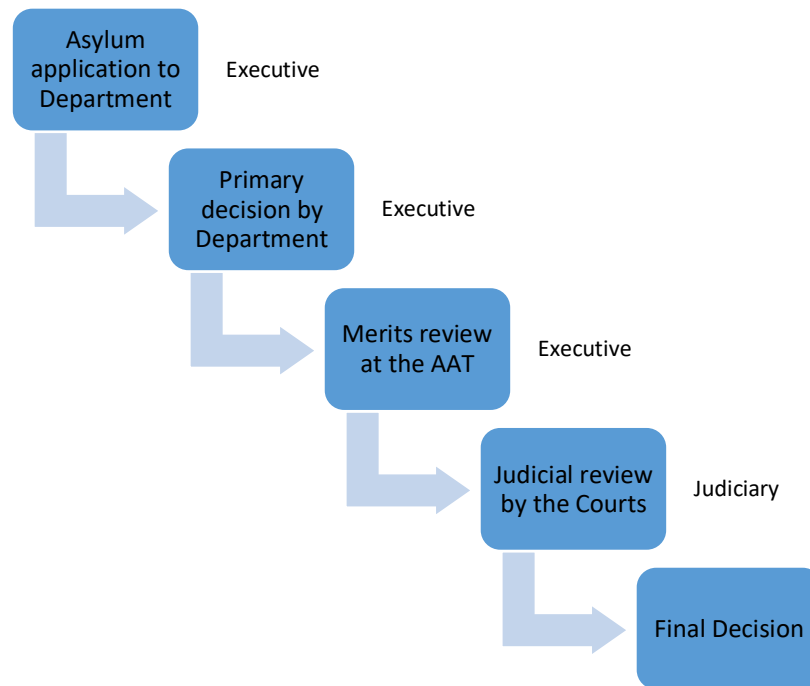
¹⁸ Previously, the Department of Immigration and Border Protection.

¹⁹ Administrative Review Committee, *Report of the Commonwealth Administrative Review Committee*, ed. John Kerr, Parliamentary paper / Australia. Parliament ; PP 144/71., (Canberra: Govt. Printer, 1971), [58].

²⁰ *Ibid.*

body did not exist in Australia nor any other common law nation. In 1976, the AAT was established as a centralised review tribunal that aimed to provide “effective, independent and visible review of all appropriate decisions and to ensuring consistency of review standards across all jurisdictions.”²¹

Figure 1 Diagram of refugee application process.



The founding President of the AAT noted that at its founding, the AAT was novel as it straddled the judicial and executive branches. He recognises that the body could have followed the administrative model to become a “higher tier of bureaucracy” – essentially a rubber stamp for government decisions. Alternatively, it could follow the judicial model, “which would mark it as something standing outside the bureaucracy and *beyond ministerial power to prescribe the policy it was to follow*.”²² He continues, “It is no secret that the AAT followed the judicial method, nor that the period of my presidency was one in which that model was adhered to closely.”²³ Due to this judicial method, the AAT, whilst being an executive institution, has also been heavily influenced by the norms of the judiciary: independence, autonomy, impartiality, non-partisanship, procedural justice, *jurisprudence constante* (the notion that

²¹ Ibid.

²² Gerard Brennan, "Opening Address" (The AAT, twenty years forward: papers presented at a conference to mark the twentieth anniversary of the Administrative Appeals Tribunal, 1-2 July 1996, Canberra, Australian Institute of Administrative Law, 1998). (emphasis added)

²³ Ibid.

previous decisions are persuasive but not determinative on subsequent cases dealing with similar factual scenarios), conforming to statute, and consistency.²⁴ These norms have become *definitive* of the AAT. Indeed, they are explicitly mentioned in the code of conduct, which Members are statutorily required to abide by.²⁵ In summary, therefore, the AAT's purpose is to hold Executive departments accountable by providing an avenue of review for persons aggrieved by government decisions, such that their case could be re-determined far from the political influence present in executive departments.

In July 2019, a comprehensive review into the AAT was publicly released (the *Callinan Report*).²⁶ The report, conducted by former High Court Justice, Ian Callinan, was statutorily sanctioned and Callinan had wide statutory powers to investigate and collect interviews and input from interest groups. Amongst other things, the Report noted the drastic changes in application numbers, the increasing backlog of cases and the political turbulence in refugee policy.²⁷ Whilst a review of political matters was outside the terms of reference of the report,²⁸ the Callinan Report documents concerns of political influence from several stakeholders, including the Law Council of Australia,²⁹ community legal centres,³⁰ the public sector union,³¹ and even anonymous sitting Members of the AAT.³² In summary, the Report found that the AAT is underfunded, suffers from administrative and legal inefficiencies, and is “not always meeting community expectations”.

In light of the institutional turbulence and accusations of political interference mentioned above, there is a clear rationale for this project. It aims to take the first academic steps in considering whether the AAT is functioning in line with its purpose and foundational principles.

²⁴ Erik Bleich, "Historical Institutionalism and Judicial Decision-Making," *World Politics* 70, no. 1 (2018): 65.

²⁵ AAT, Conduct Guide for AAT Members.

²⁶ Ian Callinan, *Statutory Review of the Tribunals Amalgamation Act 2015* (Attorney-General's Department, 23 July 2019 2019).

²⁷ *Ibid.*

²⁸ Administrative Appeals Tribunal (the Tribunal) Statutory Review: Terms of Reference, (2018).

²⁹ Callinan, *Statutory Review of the Tribunals Amalgamation Act 2015*, 102.

³⁰ *Ibid.*, 107.

³¹ *Ibid.*, 91.

³² *Ibid.*, 121-22.

1.2 THEORETICAL CONTEXT

This study implicates two fundamental principles that underpin the structure of democratic government: the separation of powers and the rule of law. Since the writings of Locke and Montesquieu, the separation of the executive, legislative and judicial powers has been recognised as an essential ingredient for democratic states.³³ The principle is necessary for preventing the holders of power from denigrating and usurping the checks and balances that constrain their ability to exercise that power. As a ‘check’ on the decision-making power of the executive, the AAT should be insulated from political interference and manipulation. Allegations that both Liberal and Labor governments are manipulating the AAT by appointing Members who are politically aligned with their policies undermines this separation of powers and opens the door to the unchecked exercise of power by the Department.

The rule of law, at its most basic level, is the concept that citizens are able to know and obey the law, whilst the government enforces it equally and fairly. The rule of law touches on many sub-concepts (Bingham recognises eight separate ‘sub-rules’).³⁴ The most relevant to this investigation is the requirement that ‘legal right and liability be resolved by application of the law and not the exercise of discretion.’³⁵ There is an obvious and dangerous departure from this principle where an asylum application is determined by the political preferences of the decision-maker, rather than by assessing whether the applicant’s circumstances meet the legal conditions for being a refugee. The importance of these two principles in maintaining a balanced democracy and system of government cannot be understated. Collectively, they ensure the people can trust government decision-making and prevent the arbitrary exercise of power. This study works within this broader theoretical context, as it seeks to uncover the presence of political influence which threatens the rule of law and the separation of powers.

³³ Malcolm P. Sharp, "The Classical American Doctrine of" The Separation of Powers", *The University of Chicago Law Review* 2, no. 3 (1935).

³⁴ Lord Bingham, "The rule of law," *The Cambridge Law Journal* 66, no. 1 (2007).

³⁵ *Ibid*, 72.

1.3 THEORY REVIEW

If one starts from the assumption that decision-makers are influenced by factors beyond the written laws, regulations and policies, the question arises as to *what factors* are most influential? The AAT provides an interesting case study to answer this question, as it sits in between the judicial and executive branches of government. There exists a large body of ‘judicial behaviour’ literature, which seeks to explain how *judges* come to their final decisions by looking beyond the written reasons given in judgements, generally referring to individual and structural accounts. There also exists an extensive literature from the school of administrative studies, which investigates how public officials exercise their discretion. This thesis aims to acknowledge the insights into decision-making given by both of these approaches, in order to provide a comprehensive understanding of the factors that influence refugee decisions in the AAT.

1.3.1 Judicial Behaviour

Whilst decision-makers at the AAT are ‘Members’ rather than ‘judges’, the theories from the judicial behaviour literature are still applicable. The task of a judge and a Member is fundamentally the same. Both roles involve the close analysis of a factual scenario and the application law to those facts in order to resolve a dispute. Both judges and Members have the opportunity to ask questions to the aggrieved parties, question witnesses and examine evidence. Additionally, and as noted above in the section 1.1, the AAT took on the foundational institutional principles of the judiciary. Members can therefore be measured against the same standards of impartiality and independence.

There are three primary strands of theory on how judges make their decisions; the legal, attitudinal and institutional models. The legal model posits that judges make decisions according to precedent, the plain meaning of statutes, and the intent of the framers of statutes.³⁶ This position (also known as legal formalism in legal scholarship) remains the most accepted explanation for judicial behaviour in legal circles. The rise of legal realism in the 1920’s, however, cast significant doubt over the accuracy of legal formalism as an explanation for judicial behaviour. Legal realism recognises that judges’ decisions

³⁶ See for example, Howard Gillman, "What's law got to do with it? Judicial behavioralists test the "legal model" of judicial decision making," *Law & Social Inquiry* 26, no. 2 (2001).

are not the product of the simple application of law to facts. In his reflections on the movement, Grant in 1961 describes the position:

A judge's holding in a case is an ad hoc response to a unique state of facts, rationalized, after the event, with a dissimulation more or less conscious, and fitted willy-nilly into the Procrustean bed of approved doctrine. The motivations of the judicial response are buried, obscure, unconscious and - even to the judge - unknowable.³⁷

Grant's words are the starting point for the attitudinal and institutional schools of judicial behaviour, which seek to explain judicial decisions by uncovering the 'obscure' and 'unconscious' motivations behind the judicial response to refugee decisions.

1.3.1.1 Attitudinal Model

The attitudinal model, also called the ideological approach, proposes that decision-makers determine cases according to their policy preferences.³⁸ This thesis will test whether the attitudinal theory of decision-making can explain outcomes at the AAT. Under this understanding, a judge with conservative views would make decisions that align with a conservative ideology and vice versa. This theoretical approach has been pioneered by Segal and Spaeth in the US Supreme Court who developed a comprehensive database of Supreme Court decisions.³⁹ Scholars from the attitudinal school have generally found empirical support for their hypothesis that a judge's ideology is determinative of his or her decision at both Federal and Supreme Court levels.⁴⁰ The attitudinal theorists have also sought to explain judicial outcomes based on the demographic features of either the judge or the litigants themselves, including race, gender or religion.⁴¹ There is, however, little conclusive evidence of a causal

³⁷ Gilmore, "Legal Realism: Its Cause and Cure."

³⁸ Keith E. Whittington, "Once More Unto the Breach: Post-Behavioralist Approaches to Judicial Politics," (Oxford, UK: Blackwell Publishing Ltd, 2000).

³⁹ Jeffrey Allan Segal, *The Supreme Court and the attitudinal model*, ed. Harold J. Spaeth (Cambridge ;: Cambridge University Press, 1993).

⁴⁰ Segal, *The Supreme Court and the attitudinal model*; Thomas G. Hansford, *The Politics of Precedent on the U.S. Supreme Court*, ed. James F. Spriggs (Princeton, NJ: Princeton University Press, 2018); Lee Epstein and Jack Knight, *The choices justices make*, ed. Jack Knight (Washington, D.C: CQ Press, 1998); Cass R. Sunstein et al., *Are Judges Political? : An Empirical Analysis of the Federal Judiciary* (Washington DC: Washington DC: Brookings Institution Press, 2006).

⁴¹ Darrell Steffensmeier and Chester L. Britt, "Judges' Race and Judicial Decision Making: Do Black Judges Sentence Differently?," *Social Science Quarterly* 82, no. 4 (2001); Darrell Steffensmeier and Chris Hebert, "Women and Men Policymakers: Does the Judge's Gender Affect the Sentencing of Criminal Defendants?,"

link between judicial outcomes and such demographic features where the subject matter of the case does not relate to one of those variables.⁴² Where the judge's individual attributes are a key feature of the case, however, there is a more visible correlation.⁴³

However, the extent to which the findings of these scholars can be transferred to Australia is highly limited. The attitudinal approach has met with success in the USA due to the highly politicised nature of judicial appointments. In many states, local judges campaign for their position, and are voted in by their community. Federal and Supreme Court Judges are appointed by the President with an extensive congressional vetting process. This means that the party that controls Congress is able to appoint judges that will be sympathetic to their legislation. Australian decision-making is more similar to European and Commonwealth courts, which exhibit less evidence of ideological influence.⁴⁴ This is partly due to depoliticised judicial appointments, but can also be explained by an increased trust in judicial institutions and the perception that criticism of the judiciary could endanger the justice system.⁴⁵ Despite this criticism, the turbulent political environment that surrounds refugee status determination gives a strong rationale to test the ideological theories at the AAT.

1.3.1.2 Institutional Model

The institutionalist approach acknowledges that decision-makers may have their own ideologies, however emphasises the importance of institutional rules, structures and ideas in influencing decision-outcomes.⁴⁶ Some institutionalists measure the influence of the 'internal' structures of the court, such

Social Forces 77, no. 3 (1999); Malcolm D. Holmes et al., "Judges' Ethnicity and Minority Sentencing: Evidence Concerning Hispanics," *Social Science Quarterly* 74, no. 3 (1993).

⁴² Jeffrey J. Rachlinski and Andrew J. Wistrich, "Judging the Judiciary by the Numbers: Empirical Research on Judges," *Annual Review of Law and Social Science* 13, no. 1 (2017).

⁴³ Adam B. Cox and Thomas J. Miles, "Judging the Voting Rights Act," *Columbia Law Review* 108, no. 1 (2008); Pat K. Chew and Robert E. Kelley, "Myth of the color-blind judge: an empirical analysis of racial harassment cases," Article, *Washington University Law Review* 86; Jonathan P. Kastellec, "Racial Diversity and Judicial Influence on Appellate Courts," *American Journal of Political Science* 57, no. 1 (2013).

⁴⁴ Bleich, "Historical Institutionalism and Judicial Decision-Making," 61-62; Erik Voeten, "The impartiality of international judges: Evidence from the European Court of Human Rights," *American Political Science Review* 102, no. 4 (2008); Arthur Dyevre, "Unifying the field of comparative judicial politics: towards a general theory of judicial behaviour," *European Political Science Review* 2, no. 2 (2010).

⁴⁵ David L. Weiden, "Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia," *Political Research Quarterly* 64, no. 2 (2011).

⁴⁶ Epstein and Knight, *The choices justices make*; Linda Camp Keith, Jennifer S. Holmes, and Banks P. Miller, "Explaining the Divergence in Asylum Grant Rates among Immigration Judges: An Attitudinal and Cognitive

as the layout of judges on the same bench.⁴⁷ Others focus on ‘external’ pressures, including the possibility of the judgement being overturned,⁴⁸ public opinion⁴⁹ and the policy preferences of the government in power.⁵⁰ Historical institutionalists consider the judiciary within their social and intellectual context. They assert that ideas such as judicial restraint, procedural justice, independence and impartiality have created norms in the Courts and therefore have a role in the *preference formation* of decision-makers.⁵¹ Whilst it is possible that institutional factors are causing political influence at the AAT, this thesis does not measure them. Rather, its focus is testing the attitudinal theory of decision-making.

1.3.1.3 *Asylum Decision-Making Literature*

In addition to the general literature on decision-making, there is a small literature on asylum decision-making that attempts to theorise what factors are most determinative of asylum outcomes. As with the judicial behaviour literature, this scholarship is almost exclusively conducted in the US context. Debates within this literature generally sit within the broader “norms versus interests” debate.⁵² The realist school emphasises the role of the diplomatic, security, economic and domestic political interests.⁵³ For this school, a determination to grant asylum to the citizen of another state is shaped by the receiving state's calculation of the benefits and costs of accepting or rejecting the asylum seekers.⁵⁴

Approach," *Law & Policy* 35, no. 4 (2013): 267; Dyeve, "Unifying the field of comparative judicial politics: towards a general theory of judicial behaviour," 302.

⁴⁷ F; Spriggs Maltzman, J; Wahlbeck, P, "Strategy and judicial choice: new institutionalist approaches to Supreme Court decision-making," in *Supreme Court decision-making: new institutionalist approaches*, ed. Cornell W. Clayton and Howard Gillman (Chicago: University of Chicago Press, 1999); Rachael K. Hinkle, "Panel Effects and Opinion Crafting in the US Courts of Appeals," *Journal of Law and Courts* 5, no. 2 (2017).

⁴⁸ Alec Stone Sweet, *The judicial construction of Europe* (Oxford: Oxford University Press, 2004), 25.

⁴⁹ Georg Vanberg, "Legislative-judicial relations: a game-theoretic approach to constitutional review," *American journal of political science* 45, no. 2 (2001); Georg Vanberg, *The politics of constitutional review in Germany*, Political economy of institutions and decisions, (New York: Cambridge University Press, 2005).

⁵⁰ William Eskridge, "Reneging on History? Playing the Court/Congress/President Civil Rights Game," *California Law Review* 79, no. 3 (1991); William Eskridge, "Overriding Supreme Court Statutory Interpretation Decisions," *Yale Law Journal* 101, no. 2 (1991).

⁵¹ Bleich, "Historical Institutionalism and Judicial Decision-Making," 8.

⁵² Keith, Holmes, and Miller, "Explaining the Divergence in Asylum Grant Rates among Immigration Judges: An Attitudinal and Cognitive Approach."

⁵³ Marc R. Rosenblum and Idean Salehyan, "Norms and interests in US asylum enforcement," *Journal of Peace Research* 41, no. 6 (2004): 681.

⁵⁴ Gil Loescher and John A Scanlan, *Calculated Kindness* (Simon and Schuster, 1998); Mark Gibney, Vanessa Dalton, and Marc Vockell, "USA refugee policy: A human rights analysis update," *Journal of Refugee Studies* 5, no. 1 (1992); Mark Gibney and Michael Stohl, "Human rights and US refugee policy," *Open Borders* (1988).

Alternatively, constructivists assert that normative goals are the primary drivers of asylum decisions.⁵⁵ Normative concerns include a humanitarian or altruistic consideration of the asylum applicant and the norms of international and refugee law (such as the principle of *non-refoulement*) that underpin refugee status determination.⁵⁶ As this study is looking at whether political preferences are determinative of decision-outcomes, it is primarily testing the realist school of asylum decision-making. A finding of politicised decision-making indicates that domestic interests effect asylum decisions (rather than the norms of law or humanitarian concerns).

There have been three large quantitative studies into immigration courts. Two in the US⁵⁷ and one of the Immigration Review Tribunal in Canada.⁵⁸ They have all found to varying extents that the personal preferences of decision-makers affects asylum outcomes. The study of Ramji-Nogales (which has a large sample size of 78,459 cases) found that in US Immigration Courts (the equivalent level of review to the AAT), the political party appointing the Immigration Judge did not have a statistically significant effect on decision outcomes.⁵⁹ However, her study did find that decision-makers with previous immigration work experience with the US government granted rates at significantly lower levels than those who had no such prior work experience.⁶⁰ Rehaag, in his study of judicial leave applications (the level of review one step above the administrative tribunal), found Liberal (i.e. progressive) appointees decided in favour of the refugees 1.6 times more than Conservative appointees (sample size of approximately 23,000 cases).⁶¹ Rehaag also found that previous work experience in women's rights granted asylum at a rate 9% higher than other adjudicators.⁶² Both of these scholars,

⁵⁵ Keith, Holmes, and Miller, "Explaining the Divergence in Asylum Grant Rates among Immigration Judges: An Attitudinal and Cognitive Approach."

⁵⁶ Thomas Risse-Kappen et al., *The power of human rights: International norms and domestic change*, vol. 66 (Cambridge University Press, 1999); Margaret E Keck and Kathryn Sikkink, *Activists beyond borders: Advocacy networks in international politics* (Cornell University Press, 2014).

⁵⁷ Ramji-Nogales, Schoenholtz, and Schrag, "Refugee Roulette: Disparities in Asylum Adjudication."; Miller, Keith, and Holmes, *Immigration Judges and U.S. Asylum Policy*.

⁵⁸ Rehaag, "Do women refugee judges really make a difference? An empirical analysis of gender and outcomes in Canadian refugee determinations."; Rehaag, "Judicial review of refugee determinations: the luck of the draw?."

⁵⁹ Ramji-Nogales, Schoenholtz, and Schrag, "Refugee Roulette: Disparities in Asylum Adjudication," 339.

⁶⁰ *Ibid*, 347.

⁶¹ Rehaag, "Judicial review of refugee determinations: the luck of the draw?," 56.

⁶² Rehaag, "Do women refugee judges really make a difference? An empirical analysis of gender and outcomes in Canadian refugee determinations," 644-45.

however, do not engage with the political science explanations for asylum outcomes. As the studies were published in legal journals, their discussion focusses on policy reform.

Miller's 2015 quantitative study into asylum decision-making in the US does, however, engage with the political science and international relations literature.⁶³ In that study, Miller finds that the ideological policy preferences of the decision-maker (measured using biographical data on each judge) strongly predict outcomes (sample size of 589,629 cases). Ideologically liberal (i.e. progressive) judges granted asylum at a rate 27% higher than conservative judges. In explaining these results, he rejects the 'interests v norms' binary. Rather, he puts forward a 'cognitive model' of asylum decision-making, which accounts for differences in how conservative and liberal immigration judges approach different information. Using quantitative methods, he finds that the personal policy preferences of the decision-maker have a larger effect on asylum outcomes when considering extra-legal factors such as material and security interests. The attitudes of decision-makers are less important when considering objective legal factors such as human rights conditions.⁶⁴ Whilst the 'cognitive model' may offer more detailed explanations of decision-making, the design of the Database does not allow it to be thoroughly tested.

1.3.1.4 Judicial Behaviour studies in Australia

There is a small but growing body of literature that considers judicial behaviour in Australian courts. There has been some quantitative and qualitative focus on the High Court, finding that both ideological and institutional factors influence decision making.⁶⁵ There have also been a handful of studies focussing on lower courts⁶⁶ including some investigations into ideological and institutional influence in labour rights cases.⁶⁷ These studies are useful in that they indicate that some level of ideological

⁶³ Miller, Keith, and Holmes, *Immigration Judges and U.S. Asylum Policy*.

⁶⁴ *Ibid*, 49.

⁶⁵ Ideological: Weiden, "Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia."; Rebecca D Gill, "The Fading Utility of the Australian Legalist Story: Using Social Background Theory to Explain Outcomes on the High Court," *Available at SSRN 1539885* (2009).

Institutional: Rebecca D Gill, Jason L Pierce, and David Weiden, "Empirical and Legal Trends at the High Court of Australia" (paper presented at the Southwest Political Science Association Annual Meeting, 2011). Both: Russell Smyth, "The role of attitudinal, institutional and environmental factors in explaining variations in the dissent rate on the High Court of Australia," *Australian Journal of Political Science* 40, no. 4 (2005).

⁶⁶ Russell Smyth and Vinod Mishra, "The Publication Decisions of Judges on the County Court of Victoria," *Economic Record* 85, no. 271 (2009).

⁶⁷ James Francis Booth and Benoit Pierre Freyens, "A study of political activism in labour courts," *Economics Letters* 123, no. 3 (2014); James Booth and Ben Freyens, "Ideology and Judicial Decision Making in Australian

influence is present in Australian courts. They also provide some nuanced insights into political interference that is specific to the Australian context. There have, however, been no investigations that focus on immigration decisions nor any that assess the hybrid institution of the AAT. This thesis will address this gap in the literature.

1.3.2 Public Administration

Given the mixed role of Members as both judges and government officials, it is appropriate to assess the literature on public administration, which theorises how officials interact with the public and make decisions. The most relevant theories of public administration are grounded in Lipsky's theories on how public officials exercise their discretion.⁶⁸ He asserts that 'street-level bureaucrats' (officials that interact with the public) have individual preferences, however they are constrained by institutional limitations, including resource constraints, workload pressures, policies and relations with clients and structural influences.⁶⁹ Lipsky's theory has developed to recognise four general categories of influence: (a) individual decision-maker characteristics, (b) organizational characteristics, (c) client attributes, and (d) extra-organizational factors (such as regulations, media, other service agencies).⁷⁰ It should be noted that as in the judicial behaviour literature, these four factors can also be categorised as either institutional or individual factors. This similarity between the two bodies of literature allows this thesis to synthesise insights from the theories of both schools of thought and apply them to the AAT.

Public administration theory has had mixed applications to migration tribunals. There has been some investigation into refugee determination *regimes* (rather than individual Tribunals) in Europe and Canada. These studies generally use an ethnographic method and provide useful insights into how individual and structural factors influence refugee status determination. Dahlvik, for example, conducts an astute assessment of the Austrian refugee determination regime. She finds that individual asylum

Labour Courts."; Anna Boucher, "Measuring migrant worker rights violations in practice: The example of temporary skilled visas in Australia," *Journal of Industrial Relations* 61, no. 2 (2018).

⁶⁸ Michael Lipsky, *Street-level bureaucracy: dilemmas of the individual in public services* (New York: Russell Sage Foundation, 1980).

⁶⁹ Lucy L. Gilson, "Michael Lipsky, Street-Level Bureaucracy: Dilemmas of the Individual in Public Service," in *The Oxford Handbook of Classics in Public Policy and Administration*, ed. Martin Lodge, Edward C. Page, and Steven J. Balla (Oxford: Oxford University Press, 2015).

⁷⁰ Kim Loyens and Jeroen Maesschalck, "Toward a Theoretical Framework for Ethical Decision Making of Street-Level Bureaucracy: Existing Models Reconsidered," *Administration and Society* 42, no. 1 (2010).

decision-makers are just as important as macro-level structural factors in shaping and ‘constructing’ the Austrian migration regime.⁷¹ Satzewich, in his assessment of the Canadian regime also emphasised the influence of individual and ideological factors in asylum decision outcomes.⁷² These studies are useful to the present thesis, as they provide a dense account of how structure and agency *interrelate* in an asylum decision-making context. Such discussion is lacking in the judicial behaviour literature, which (due to its origins in political science rather than sociology) tends to structure its investigations through a rigid quantitative testing of individual theories.

There have been no such ethnographic investigations into the Australian regime nor into the decision-making at the AAT. This may be due to the extremely strict privacy measures enforced by the Tribunal and the Home Affairs Department. Whilst these measures protect the identity of asylum seekers (who may be persecuted in their country of origin if discovered to have sought asylum in a foreign country), the administrative process of refugee-determination is made less transparent. This thesis therefore contributes to the public administration literature by expanding its application to the Australian regime and attempting to scrutinize the ‘black box’ of refugee tribunals.⁷³

1.4 HYPOTHESIS

In light of this theory review and considering the accusations of bias made by politicians and in the media, I have come to the following hypothesis:

H₁: Liberal-appointed Members will overturn cases at a lower rate than Labor-appointed Members

This hypothesis has two justifications; one based on decision-making theory, and the other based on accusations of bias made in media and politics.

First, and from a theoretical perspective, the hypothesis is grounded in the attitudinal school of judicial behaviour. It assumes that Members carrying right-wing political preferences will make

⁷¹ Julia Dahlvik, "Asylum as construction work: Theorizing administrative practices," *Migration Studies* 5, no. 3 (2017).

⁷² Vic Satzewich, *Points of entry: how Canada's immigration officers decide who gets in* (Vancouver: UBC Press, 2015).

⁷³ Sule Tomkinson, "Who are you afraid of and why? Inside the black box of refugee tribunals," *Canadian Public Administration* 61, no. 2 (2018/06/01 2018).

decisions in line with a right-wing ideology, and vice versa. Whilst the parties have maintained bipartisan support for many aspects of refugee policy since 2012 (including offshore detention, boat turn-backs and a general regime of deterrence),⁷⁴ the Labor party advocates for higher intake of refugees. The Liberal and National Parties have consistently maintained a refugee intake under the UNHCR Humanitarian Programme of between 12,000 and 13,750 since 1996.⁷⁵ In contrast, the Labor Party has maintained support for increasing the refugee intake to at least 27,000 whilst in Opposition.⁷⁶ Therefore, whilst acknowledging that there may be little difference in the substantive policy preferences of the Liberal and Labor parties, it can be inferred that a Labor-appointed Member with left-wing political preferences would be more prepared to grant a refugee visa than a Liberal-appointed Member. This reasoning is based in the realist school of asylum decision-making theory, as it posits that the domestic policy goals of the appointing Party will override the humanitarian concern for the asylum applicant, or the norms of international law.

The second reason for this hypothesis is the accusations made by prominent Members of the Liberal Party that Labor-appointed Members determine decisions politically, and have been overturning asylum decisions of the Department too frequently.⁷⁷ As mentioned above, these accusations have also been countered by the Labor Party, who allege that the appointment process at the Tribunal has been politicised by the Liberal Party. Members are allegedly appointed not based on merit, but on political links and favours.⁷⁸ Subsequent investigations in the media have found that over 65 Members at the Tribunal have close links with the Liberal Party, either as ex-political staffers, donors, members of the Party, ex-Members of Parliament or past Liberal candidates at elections.⁷⁹ These media reports allege that this was done to ensure that the strict asylum processing regime instituted by the Liberal Party is

⁷⁴ Thomas Gammeltoft-Hansen and Nikolas F Tan, "The end of the deterrence paradigm? Future directions for global refugee policy," *Journal on Migration and Human Security* 5, no. 1 (2017). John Minns, Kieran Bradley, and Fabricio Chagas-Bastos, "Australia's Refugee Policy," *International Studies* 55, no. 1 (2018).

⁷⁵ Janet Phillips, *A comparison of Coalition and Labor government asylum policies in Australia since 2001* (Parliamentary Library, 2014).

⁷⁶ Australian Labor Party, 48th National Platform: A fair go for Australia, (2018).

⁷⁷ Gribbin, "Peter Dutton blames 'politics' as bid to deport six refugees fails."

⁷⁸ Whitbourn, "Federal Labor vows to end political appointments to AAT."

⁷⁹ David Hardaker, "The Big Stack; How the goernment stacked the AAT."

not being undermined or disrupted by left-wing Members at the AAT.⁸⁰ This study tests the veracity of these allegations.

⁸⁰ Ibid.

2 Methods

2.1 INTRODUCTION

Testing political influence in the AAT presents significant methodological challenges. The refugee tribunal has been compared to a ‘black box’ in the public administration literature.⁸¹ The sensitive nature of asylum hearings and the private decision-making process makes the institution difficult to penetrate as a researcher. The fundamental difficulty, however, is that the exact issue this project is attempting to uncover (i.e. political influence) should not be there at all. As explained above, the AAT is required to be just, fair and unbiased under statute,⁸² the common law⁸³ and the rule of law.⁸⁴ Therefore, any person associated with the institution is intent on defending its independence and impartiality.

In response to this challenge, this thesis takes a quantitative approach, which examines the written reasons of AAT decisions to find patterns in decision-making. I create a Refugee Decision Database (the *Database*), which consists of all publicly available asylum decisions between July 2015 and the end of 2018, amounting to 2,544 cases. These cases are coded along several variables, including the outcome of the decision, the Member making the decision and the political party that appointed that Member. This data is used to interrogate the allegations of biased decision-making by assessing how Liberal- and Labor-appointed Members differ in their decisions, whilst controlling for other explanatory variables. This Chapter will first give an overview of the methods used in the public administration and judicial behaviour literature to assess decision-making and then outline how the strategic approach of this thesis contributes to that literature. It will then proceed to outline and justify the decisions made in designing my quantitative method.

⁸¹ Tomkinson, "Who are you afraid of and why? Inside the black box of refugee tribunals."

⁸² *Administrative Appeals Act (Cth)* 1975, s2A.

⁸³ See Matthew Groves, "The Rule Against Bias," *Hong Kong LJ* 39 (2009).; *Re Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Hot Holdings v Creasey* (2002) 210 CLR 438.

⁸⁴ Stephen H Legomsky, "Refugees, Administrative Tribunals, and Real Independence: Dangers Ahead for Australia," *Wash. ULQ* 76 (1998): 246; Bingham, "The rule of law."

2.2 METHODS OVERVIEW

2.2.1 Qualitative Methods

There have been several comprehensive qualitative assessments of migration regimes from the law and society literature⁸⁵ and from the public administration literature.⁸⁶ These studies use a combination of surveys, interviews and observation to theorise decision-making in these institutions. Some researchers in this field adopt mixed methods approach. In Hamlin's comparative study of asylum determination regimes in Australia, the USA and Canada, she conducted a content analysis of Federal Court, and High Court decisions relating to asylum law. She also triangulated this data with interviews with policy elites, refugee advocates and refugee lawyers, and collating descriptive statistics on decision-making.

The qualitative approach has clear advantages for the researcher attempting to obtain a comprehensive understanding of the factors that contribute to decision-making. It recognises that application of refugee criteria in this space is a complex negotiated and relational practice. An attempt to reduce this social interaction to a quantitative analysis of observed data runs the risk of losing the nuance and contextual specificity of the analysis.⁸⁷ However, the qualitative approach and specifically the collection of ethnographic data through interviews and surveys has significant limitations, especially when attempting to test political influence. Refugee hearings at the AAT are closed to the public to protect the anonymity of the applicant and any attempt to obtain interviews from Members or government officials would prove futile. As is noted by other researchers, decision-makers do not readily talk about their political influences.⁸⁸

⁸⁵ Tomkinson, "Who are you afraid of and why? Inside the black box of refugee tribunals."; Hamlin, "International Law and Administrative Insulation: A Comparison of Refugee Status Determination Regimes in the United States, Canada, and Australia."

⁸⁶ For Canada see Satzewich, *Points of entry: how Canada's immigration officers decide who gets in.*; for Europe see Dahlvik, "Asylum as construction work: Theorizing administrative practices."; for the United Kingdom see Robert Thomas, *Administrative justice and asylum appeals a study of tribunal adjudication* (Oxford :: Hart, 2011).

⁸⁷ Dahlvik, "Asylum as construction work: Theorizing administrative practices," 372.

⁸⁸ Sule Tomkinson, "Doing Fieldwork on State Organizations in Democratic Settings: Ethical Issues of Research in Refugee Decision Making," *Forum Qualitative Sozialforschung/Forum: Qualitative Social Research* 16, no. 1 (2015): 152.

For these reasons, interviews and surveys will not constitute a part of the methodology of this thesis. Admittedly, any research project that wishes to measure political influence, especially one that properly accounts for institutional influence, would require such qualitative data. Such a task lies outside the scope and limitations of this thesis, but would be a necessary step in further study. In order to compensate for a lack of qualitative data, I have conducted a comprehensive review of the grey literature that exists on the AAT, including on its structure, decision-making procedures, performance and budgetary measures and the recently released Callinan Report. These sources are useful in contextualising and interpreting the results of this investigation.

2.2.2 Quantitative Methods

The judicial behaviour literature primarily relies on the quantitative analysis of judicial decisions. This method developed heavily in the US, primarily due to the strength of the quantitative approach to political science in US universities. At its most basic level, the quantitative assessment of judicial cases involves the collation of written decisions, which are coded along a range of variables. The dataset is then statistically analysed (predominantly using descriptive statistics and regression) to assess whether there is a relationship between the independent variables and the outcome of the case (the dependent variable). Generally, these studies generate two datasets; the case law data and the decision-maker data, which codes the characteristics or ideology of the judge. This mode of analysis has been used in assessments of decision-makers' race, gender and sexuality on the outcomes of cases.⁸⁹ I will now proceed to outline the quantitative method of this thesis, first by considering the case sampling method and method of statistical analysis. I then proceed to identify and justify my measurement of the independent and control variables.

⁸⁹ Chew and Kelley, "Myth of the color-blind judge: an empirical analysis of racial harassment cases."; Christina L. Boyd, "She'll Settle It?," *Journal of Law and Courts* 1, no. 2 (2013); Daniel R. Pinello, *Gay rights and American law* (Cambridge: Cambridge University Press, 2003).

2.3 DATABASE DESIGN

The approach to collating cases generally falls into two categories. First, there are scholars who received their cases from an information request to the relevant authority.⁹⁰ These studies have large data sets, however their data is restricted to the information released by the authority. Second, there are scholars that collate cases of a particular type and code them manually.⁹¹ Whilst the former approach presents a dataset that may be more statistically significant, the latter allows one to code more variables by manually coding cases. For example, Chew and Kelly coded the presence of racial slurs in the cases, a variable that would not be tracked by government departments.⁹²

The method of this study generally follows the second approach. The Database was constructed by collating all publicly available asylum decisions between July 2015 and the end of 2018. July 2015 was chosen as this was the date from which the Refugee Review Tribunal (the **RRT**) was amalgamated with the AAT. Decisions are only presented in a uniform fashion from this date onwards. The decisions are available on *AustLii*, which is a community funded, public database that publishes decisions from all Australian jurisdictions.⁹³

Once all the URLs of the refugee decisions were collected, a scraping code was written that harvested the information from each case site. The code was able to collect data on the following variables: case name, Member, case outcome, country of origin (of applicant), place application was heard, and the date. Due to variations in the formatting of each website, the scraping code was not accurate in every instance. Therefore, each case was also checked individually by hand to ensure the data was correct. Additionally, the variables that were not harvested by the scraping code were manually

⁹⁰ Rehaag, "Do women refugee judges really make a difference? An empirical analysis of gender and outcomes in Canadian refugee determinations."; Rehaag, "The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment."; Ramji-Nogales, *Refugee roulette : disparities in asylum adjudication and proposals for reform*; Ramji-Nogales, Schoenholtz, and Schrag, "Refugee Roulette: Disparities in Asylum Adjudication."

⁹¹ Pinello, *Gay rights and American law*; Christina L. Boyd, Lee Epstein, and Andrew D. Martin, "Untangling the Causal Effects of Sex on Judging," *American Journal of Political Science* 54, no. 2 (2010).

⁹² Chew and Kelley, "Myth of the color-blind judge: an empirical analysis of racial harassment cases."

⁹³ See "Who We Are & What We Do," AustLii, accessed 7 October 2019 <https://www.austlii.edu.au/about.html>.

included (Party Appointing, Gender, PAM3 Policy and Freedom House Score). See Appendix 5 for a randomly selected sample of cases from the Database.

2.3.1 Sampling Considerations

The Database codes all decisions published by the AAT; however the AAT chooses to publish only a sample of all decisions made in the MRD. Because of this, the Database is subject to the Publication Policy of the AAT. By collating the caseload statistics published in the AAT Annual Reviews,⁹⁴ it was calculated that the Database represents approximately 16% of all asylum decisions made during the relevant period. Whilst this is a relatively small percentage, further statistical analysis explained below proves that it is sufficiently representative of the universe of decisions. A comparison of the Database sample and the universe of decisions is presented in Table 1.

Table 1 Comparison of cases in Database to the caseload statistics published by the AAT. Note: Percentages for AAT data are the averaged percentage as calculated using the publicly available data from 2015-2018. See Appendix 4 for a full explanation and presentation of this data.

	No. of Cases	Non-jurisdictional cases (%)	Cases overturned (%)	Cases affirmed (%)
Database	2,544	10%	16%	73%
AAT data on refugee decisions, 2015-2018	15,443	20%	11%	70%

As seen in Table 1, Members affirm decisions at similar rates in the Database (73%) as they do in the universe (70%). There is, however, a larger proportion of non-jurisdictional cases in the universe (20%) compared to the Database (10%). This statistic is difficult to explain but may be clarified by recognising the large jump in non-jurisdictional cases in 2017-18 as reported by the AAT. Nonetheless, this does not affect the validity or usefulness of the Database, as non-jurisdictional cases are excluded anyway, as explained in the next section.

There is also a 6% higher rate of overturning decisions in the Database. This may be explained by the AAT's policy on cases to be published on AustLii, which publishes a higher proportion of

⁹⁴ AAT, Annual Report 2015-16, (Canberra 2016); AAT, Annual Report 2016-17; AAT, Annual Report 2017-18, (Canberra 2018).

contentious cases such as stateless persons and visa cancellations.⁹⁵ Such cases have a higher rate of being overturned by the Tribunal. Whilst this disparity may mean that the Database is not a perfectly accurate reflection of the universe in relation to the number of cases overturned, this does *not* pose an issue for the investigation into Member bias. The representation of Members is still random (i.e. there is no preference for publishing cases decided by a Liberal- or Labor-appointed Member.)⁹⁶

2.2.3.2 Non-Jurisdictional Cases

The quantitative analysis excludes all non-jurisdictional cases. These are cases where an application has been rejected because it was made out of time, because the applicant failed to submit a document or because the applicant failed to appear at the hearing. In coming to these decisions, the Member has no discretion in how to proceed, and there is therefore no ‘space’ for political preference to interfere with the decision. Therefore, non-jurisdictional cases do not give any insights into decision-making and are therefore excluded from analysis.

2.2.3.3 Is the sample affected by the ‘Publication Policy’?

The sample in the Database is also subject to the ‘Publication Policy’ of the AAT, which determines what type and how many cases are published annually. Given the significance of this Policy on the validity of Database sample to reflect the universe of decisions, copies of the current and previous publication policies were obtained from the AAT via a private request.⁹⁷ The policy was indeterminate for the period between July 2015 and 27 November 2017, stating only that the Tribunal is required to publish decisions of particular interest.⁹⁸ From 27 November 2017, the new iteration of the publication policy was more transparent. In summary, it detailed the following guidelines for publication:

1. 25% of decisions from the 25 most common countries of origin (chosen randomly);
2. 100% of decisions from all other countries of origin (or stateless applicants);
3. 5% of cases from Malaysia;
4. 20% of cases from China;

⁹⁵ AAT, Publication of Decisions Policy, (Canberra 2019).

⁹⁶ *Ibid*, 3.

⁹⁷ See email with Keegan Hughes, Senior Reporting Officer Administrative Appeals Tribunal Principal Registry, Melbourne. Received Tuesday, 13 August 2019 9:38 AM. Available on request to author.

⁹⁸ *Migration Act (Cth)* 1958, s431.

5. Any other decisions that are of particular interest (for example, cases dealing with novel or complex issues).⁹⁹

Given that the Database codes only published decisions, it will be subject to any biases created by the selective decisions policy. For the following reasons, however, any biases created by the decision 'Publication Policy' will not have a significant effect on the data and will not invalidate the usefulness of the Database for assessing political influence.

First, the overwhelming majority of cases in the Database are those published under the first policy point mentioned above (i.e. 25% of decisions from the 25 most common countries). Decisions published under (1) are completely random and therefore constitute an accurate representation of the universe of decisions. Whilst cases published under (2) and (5) may slightly skew the data, these cases represent only a minuscule proportion of the Database. Additionally, cases from (2) are excluded from the regression analysis.¹⁰⁰ Therefore, any irregularities in decision-making patterns that arise in the cases published under policy (2) or (5) will not make a sufficient impact on the Database.

Second, the limitation of Chinese and Malaysian decisions will actually increase the utility of the Database for measuring political influence. It has been recognised in the Callinan Report and in the media that many applicants from these two countries are exploiting the asylum system to obtain bridging visas and extend their stay in Australia.¹⁰¹ Decisions for such applicants are therefore almost always affirmed, and therefore Members exercise very little discretion in such decisions. I consider this phenomenon further at section 2.4.3.1.

Third, in order to ensure that the update to the Publication Policy on 27 November 2017 did not affect the representation of cases in the Database, I conducted a basic statistical comparison of cases published before and after that data. As seen in the cross-tabulation below (Table 2), there is not a

⁹⁹ The current publication of decisions policy is publicly available from the AAT online: AAT, Publication of Decisions Policy. Historical versions that were obtained from the AT via private request and are available from the author on request.

¹⁰⁰ See the explanation at section 2.6.1.

¹⁰¹ Callinan, *Statutory Review of the Tribunals Amalgamation Act 2015*, 25-6; Jackson Gothe-Snape, "Border Force working to stop Malaysians in 'orchestrated scam' to stay in Australia," *ABC News*, 3 July 2019 2019; Jackson Gothe-Snape and Sastra Wijaya, "Malaysia says Australia's immigration system encourages visa rorting," *ABC News*, 4 July 2019 2019.

significant difference in the overturn rates before and after the new policy was published ($\chi^2(1) = .078$, $p = 0.390$). This indicates that the publication policy was not changed significantly in November 2017 but rather was simply made public.

Table 2 Cross-tabulation of Old and New Publication Policy, and Decision Outcomes.

		Affirmed	Overtured	Total
Old Policy	Count	1321	277	1598
	%	82.7%	17.3%	100.0%
New Policy	Count	547	127	674
	%	81.2%	18.8%	100.0%
Total	Count	1868	404	2272
	%	82.2%	17.8%	100.0%

Finally, and most importantly, the purpose of the Database is *not* to reflect the global statistics on decision-making of refugee decisions at the AAT. Those numbers are already published publicly by the AAT annually. This Database contributes new empirical data by coding the identity of the Member and the political party that appointed that Member. The site of analysis of this thesis is not trends in decision-making generally, but rather a comparison of how Liberal- and Labor-appointed Members make decisions. Therefore, given that the AAT does not publish certain Members' decisions at a higher proportion of other Members, the Database is a valid source for investigating the presence of political bias.¹⁰²

A possible weakness of the Database would be if the AAT assigns certain types of cases to specific Members; for example, certain Members may end up specialising in Middle Eastern cases, which have a much higher overturn rate than Asian cases. However, in the comprehensive review of the Database and other material published by the AAT, there is no evidence of such a practice occurring. Also, any potential effect of selective case assignment would be controlled for in my statistical analysis, as the model controls for 'country of origin' and the country overturn rate. Therefore, where the major factor

¹⁰² AAT, Publication of Decisions Policy.

contributing to the decision outcome is actually the country of origin (rather than the political leanings of the Member), this is accounted for in the regression analysis.

2.4 VARIABLES

This section gives an overview of how the variables are measured in the Database. I first focus on the dependent variable (decision outcome) and then the main independent variable (Party Appointing the Member), and finally the control variables: gender of the Member, place of decision, country of origin of applicant, the global overturn rate of the country of origin, the Freedom House score of the country of origin and whether the new PAM3 policy of July 2017 was relevant.

2.4.1 Dependent Variable - Decision Outcome

The primary purpose of the AAT is to either ‘affirm’ or ‘overturn’ government decisions. Where a decision has been ‘affirmed’ by the Tribunal, this indicates that an asylum applicant was denied a refugee visa at first instance by the Department and has now also been denied a visa by the AAT. Where a decision has been ‘overturned’ by the Tribunal, the Member has determined that the Department’s decision was wrong, and that the application should be allowed. The main statistic that will be reported is the ‘overturn rate’, which represents the proportion of cases each group of Members determined were wrongly decided by the Department in the first instance.

2.4.2 Independent variable: Party Appointing

The independent variable of this investigation is the political ideology of the decision-maker. Measuring political attitudes is particularly challenging as the Member is required to be independent, unbiased and apolitical.¹⁰³ Direct questioning of the decision-maker would therefore be futile. The researcher must rely on external indicators to *infer* the political leanings of each decision-maker. The school of judicial behaviour has developed several inventive methods for determining the ideological inclinations of judges. In the literature, these are classified into *ex post* and *ex ante* methods.¹⁰⁴ The

¹⁰³ AAT, Conduct Guide for AAT Members.

¹⁰⁴ Lee Epstein, *The behavior of federal judges: a theoretical and empirical study of rational choice*, ed. William M. Landes and Richard A. Posner (Cambridge, Mass: Harvard University Press, 2013).

former involves measuring political ideology from past decisions, whilst the latter looks to external indicators.

The Martin-Quinn Score is the most prominent *ex post* approach. It involves analysing the previous votes of US Supreme Court justices and assigning each characterising each decision along a liberal-conservative spectrum.¹⁰⁵ The decisions of the judges are tracked over time, allowing both a measure of their political inclination and of how it has changed over time. Despite this, an *ex post* model is not appropriate in this investigation for two reasons. First, its application is generally limited to top-tier courts, such as the US Supreme Court, in which both the cases and the judicial-appointment process is highly politicised. Whilst political decision-making in courts nonetheless exists outside Australia and in lower courts (indeed, this thesis is investigating exactly that), it is not as blatant or obvious. Second, the purpose of this thesis is not to measure decision-makers' political inclinations, but rather to find a link between the political appointment of Members and outcomes of cases. Where the *ex ante* approach assumes an inductive approach of observation, this investigation aims to deductively *test* political influence in the AAT.

An *ex ante* measure of judicial ideology uses media content analysis to generate an ideological score for each decision-maker. The Segal-Cover score, which measures the political ideology of Supreme Court nominees, is an example of this approach. It reviews editorials in four newspapers (of both conservative and liberal leanings) about a Supreme Court nominee, which are coded on a scale from -- 1 (unanimously conservative) to 0 (moderate) to + 1 (unanimously liberal).¹⁰⁶ This approach is useful in that it does not require the researcher to subjectively determine the political leaning of a judicial decision, and relies on public perception. It also allows interesting insights into the relationship between the judiciary, the media and public opinion. As with the Martin-Quinn Score, however, it is generally

¹⁰⁵ Andrew D. Martin and Kevin M. Quinn, "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court," *Political Analysis* 10, no. 2 (2002); Ward Farnsworth, "The use and limits of Martin-Quinn scores to assess Supreme Court justices, with special attention to the problem of ideological drift.(response to article by Lee Epstein and others in this issue, p. 1483)," *Northwestern University Law Review* 101, no. 4 (2007).

¹⁰⁶ See Jeffrey A. Segal and Albert D. Cover, "Ideological values and the votes of U.S. Supreme Court justices.," *American Political Science Review* 83, no. 2 (1989)., updated in Jeffrey A. Segal et al., "Ideological Values and the Votes of U.S. Supreme Court Justices Revisited," *The Journal of Politics* 57, no. 3 (1995).

limited to the US Supreme Court and other similar Courts, as appointments in other Courts do not gain nearly as much media attention.

The most common *ex ante* measure of judicial ideology, and most successful according to Epstein, is the political party of the appointing government.¹⁰⁷ This approach is frequently applied in attitudinal studies of courts below the Supreme Court level¹⁰⁸ and has been applied in immigration decision-making previously.¹⁰⁹ It is useful where there is little biographical information available on the political inclination of the decision-maker. However, the 'political party appointing' approach has limitations. It is a crude measure of ideology as it relies on the assumption that appointments are politicised. (Nonetheless, it can actually be used to *test* of how politicised the appointment process is.) An additional weakness is that it may not be useful when studying specialised courts that deal with technical cases that are distanced from ideological influence.¹¹⁰ To account for these failings, scholars have turned to the work-experience of the decision-maker. For example, Rehaag found that female immigration judges who had previous experience working in women's rights were more sympathetic to refugee claimants.¹¹¹ Keith et al argue that especially when looking to lower courts that exercise technically specific functions, this approach allows a nuanced account of the judge's policy preferences in a particular area.¹¹² This accounts for the fact that judges may have conservative inclinations in some areas but liberal predispositions in others.¹¹³

This study initially attempted to find biographical data on all Members. Whilst there was some publicly available work-experience information for a handful of Members, the CVs of the

¹⁰⁷ Epstein, *The behavior of federal judges: a theoretical and empirical study of rational choice*.

¹⁰⁸ Ibid.

¹⁰⁹ Rehaag, "Judicial review of refugee determinations: the luck of the draw?." Melissa G. Ocepek and Joel S. Fetzer, "The Causes of Pro-Immigration Voting in the United States Supreme Court," *The International Migration Review* 44, no. 3 (2010).

¹¹⁰ Joseph Jucewicz and Lawrence Baum, "Workload Influences on Supreme Court Case Acceptance Rates, 1975-1984," *The Western Political Quarterly* 43, no. 1 (1990); Banks Miller and Brett Curry, "Expertise, Experience, and Ideology on Specialized Courts: The Case of the Court of Appeals for the Federal Circuit," *Law & Society Review* 43, no. 4 (2009).

¹¹¹ Rehaag, "Do women refugee judges really make a difference? An empirical analysis of gender and outcomes in Canadian refugee determinations."

¹¹² Keith, Holmes, and Miller, "Explaining the Divergence in Asylum Grant Rates among Immigration Judges: An Attitudinal and Cognitive Approach."

¹¹³ Joshua B. Fischman and David S. Law, "What is judicial ideology, and how should we measure it?," *Washington University Journal of Law & Policy* 29 (2009).

overwhelming majority of Members were not publicly available. Additionally, it appears that where Members have previously had political work experience (such working in unions or as a political staffer), they have attempted to scrub this from the public record. The findings of this sample of Members are presented in Appendix 1.

Accordingly, this study uses the ‘Party Appointing’ approach. This is appropriate because the data is readily and publicly available in the AAT Annual Reports. Additionally, it allows the study to test the accusations of politicised appointments that provide the rationale for this study.¹¹⁴

2.4.3 Control Variable: Country of Origin

The country of origin of the asylum applicant is the most important control variable, as the role of the country of origin is highly important under refugee determination law and procedure. The fundamental task of an AAT Member is to assess whether the applicant will be safe in their country of origin. The importance of the country of origin is evident when assessing the decision-making process of the Member.

First, the Member states the relevant law, which is the test for meeting the criteria to be a refugee, as found in ss 5H and 36 of the *Migration Act (Cth)* 1958. Most decision-makers then lay out the applicant’s claims and evidence that supports those claims. This includes the applicant's identity and the reasons that he or she is alleged to be persecuted. The final section, entitled “Findings and Reasons” consists of first assessing the credibility of the applicant’s submissions, and then considering whether they meet the refugee test. This involves looking to evidence from credible sources on the state of affairs in the applicant’s country of origin, including government reports (primarily relying on those written by the Department of Foreign Affairs and Trade (*DFAT*)), and reports written by international organisations such as the UN, Human Rights Watch and Amnesty International. For these reasons, it is expected that the political, economic and social situation of the applicant’s country of origin will have the most significant effect on the success of an asylum application.

¹¹⁴ Whitbourn, "Federal Labor vows to end political appointments to AAT."; David Hardaker, "The Big Stack; How the government stacked the AAT."; Gribbin, "Peter Dutton blames 'politics' as bid to deport six refugees fails."

2.4.3.1 *Malaysia*

The significance of Malaysian cases in the Database must be noted. It is overwhelmingly the most represented country in the Database ($N = 421$), with the second highest being China ($N = 284$).¹¹⁵ Additionally, at 7%, Malaysia has one of the lowest rates of being overturned. When taking into account all cases from Malaysia between 2015 and 2018 (using data provided by the AAT), this figure drops to 3%.¹¹⁶ When assessing how Liberal- and Labor-appointed Members make decisions, there also appears to be only a small variation in overturn rates. This raises the question, why are there so many asylum applications from a relatively safe country with low levels of persecution?

This question was answered in the Callinan Report, in which Callinan, whilst not naming Malaysian applicants specifically, noted that there were “many instances in which applicants (including many on bridging visas) contrived or deliberately altered their circumstances in Australia for the principal purpose of renewing their visas or establishing a new pathway to a different visa.”¹¹⁷ This was labelled as an “orchestrated scam” by the Minister for Multicultural Affairs¹¹⁸ and was even acknowledged by the Malaysian Government, who stated that Malaysian applicants apply for protection visas on the pretext that their lives are in danger, but as is an excuse to stay longer in Australia.¹¹⁹ It therefore appears that a significant proportion of Malaysian applications are used as means of obtaining an automatic bridging visa pending an outcome of their application.

The high incidence of inauthentic claims from Malaysia and possibly other countries could pose an issue for the Database. The primary purpose of the Database is to measure political influence in decision-making. As discussed previously in relation to non-jurisdictional cases, such political interference can only exhibit itself where the Member has sufficient space to exercise some discretion. In cases such as an inauthentic Malaysian application, where the claim is obviously bound to fail, there

¹¹⁵ It should also be noted that the AAT publishes a lower percentage of Malaysian cases than every other country, according to their Publication Policy. AAT, Publication of Decisions Policy, 7.

¹¹⁶ See data on All AAT Decisions, collated in Appendix 4.

¹¹⁷ Callinan, *Statutory Review of the Tribunals Amalgamation Act 2015*, 25-6.

¹¹⁸ Gothe-Snape and Wijaya, "Malaysia says Australia's immigration system encourages visa rorting."

¹¹⁹ Gothe-Snape, "Border Force working to stop Malaysians in 'orchestrated scam' to stay in Australia."

is limited discretion exercised. Given that Malaysian cases constitute 18.5% of the Database, this is a significant number proportion of cases in which it is unlikely that any discretion is being used.

However, the solution is *not* to remove Malaysian cases or cases that are extremely likely to fail from analysis altogether. Given that 3% of all Malaysian cases at the AAT were overturned between 2015 and 2018,¹²⁰ there is clearly still some level of decision-making by the Member. The Malaysian cases are distinguished from the non-jurisdictional cases in which the Member has option with how to determine the case whatsoever. By removing Malaysian cases, I would be pre-judging applications as not genuine. Indeed, it is the very job of the Members to make that exact decision. Removing a selection of cases because they *may* be inauthentic would mean the Database is an inaccurate reflection of decision-making. Additionally, to just take out Malaysian cases would be arbitrary, given that applicants from other countries could also be exploiting the asylum application system.

2.4.4 Control Variable: Freedom House Score

My Database will also code the average Freedom House Score of each country of origin for the relevant period. The Freedom House score is a measure published annually by the independent ‘watchdog organisation’ Freedom House.¹²¹ The statistic measures the civil and political status of rights in most countries and territories around the globe, giving each state a score out of seven. Whilst its method has attracted some criticism in the literature,¹²² the Freedom House score is generally recognised as a useful and accurate measure of freedom and rights globally.

I code the Freedom house score because it is an additional measure that controls for the impact of the applicant’s country of origin on case outcomes. This is because an applicant from a country that has a lower freedom house score will be more likely to obtain refugee status (however, this is not always the case). The Freedom House score is also useful as it gives an insight into how international politics

¹²⁰ This figure refers to the total number of cases as published by the AAT, not the sample in the Database. 7% of Malaysian cases in the Database were overturned. See Appendix 4 for full collation of public AAT Data.

¹²¹ Freedom House, *Freedom in the World 2019*, Freedom House (2019).

¹²² Diego Giannone, "Political and ideological aspects in the measurement of democracy: the Freedom House case," *Democratization* 17, no. 1 (2010). Gerardo L. Munck and Jay Verkuilen, "Conceptualizing and measuring democracy: Evaluating alternative indices," *Comparative political studies* 35, no. 1 (2002). John Högström, "Does the choice of democracy measure matter? Comparisons between the two leading democracy indices, freedom house and polity IV," *Government and Opposition* 48, no. 2 (2013).

may affect decision making. It is expected that that applicants from countries have a low freedom rating, but are also allies or trading partners of Australia may be less likely to receive asylum. This could be because the Government does not want to offend that country by indirectly acknowledging that it is unsafe by granting humanitarian visas. Alternatively, such influence could be subconscious; countries that are our allies or partners are generally assumed to be safe. This phenomenon has been touched on by Miller, in his comprehensive study of US immigration decision-making, however, it has not been tested in Australia.¹²³

I calculate the Average Freedom House score for each country for the period of analysis (2015-2018). Further details on the method for generating the Freedom House statistic and the results for each country are reported in Appendix 3. The score is measured as a continuous variable. For this reason, its relationship with decision-outcomes is measured solely using the regression analysis (rather than using cross-tabulation, which is used for the other categorical explanatory variables).

2.4.5 Control Variable: Gender

The school of judicial behavioural studies has focussed extensively in the US on testing whether the personal attributes of judges (such as gender, race or religion) have a correlative effect on judicial outcomes. The findings on the effect of gender have been mixed. The two major studies on refugee decision-making have found that female judges make decisions differently to male judges. Ramji-Nogales' study of US immigration courts found that applicants who had their case heard before a female applicant were therefore 44.2% more likely to succeed.¹²⁴ However, Rehaag's investigation into Canadian refugee tribunals found no significant difference between the grant rates for male and female judges. He did find, however, that female adjudicators had higher grant rates where they had prior experience in women's rights, in cases involving female claimants, and in cases involving gender-based persecution.

¹²³ Miller, Keith, and Holmes, *Immigration Judges and U.S. Asylum Policy*.

¹²⁴ Ramji-Nogales, Schoenholtz, and Schrag, "Refugee Roulette: Disparities in Asylum Adjudication."

The effect of gender on decision-outcomes in asylum applications therefore appears to be unsettled in the literature. Undoubtedly, it *should not* have any impact on decision-outcomes. It would be a degradation of rule of law and the principles of justice that guide decision-making at the AAT if gender (or any other demographic feature of the Member) had an impact on decision-outcomes. For these reasons, this study will code the gender of the Member, to assess whether female decision-makers decide differently to their male counterparts. It is not expected that gender will have a significant impact on decision-outcomes, in line with the findings of Rehaag.

2.4.6 Control Variable: Place of decision

The place that the case was decided will be coded and analysed as a variable. The rationale for this is twofold. First, it is fundamental to the rule of law in Australia that the law is equally applied in all areas of its jurisdiction. An applicant in Sydney should receive the same outcome to their case if it were heard in Melbourne, Adelaide or Perth.¹²⁵ The second reason is that both US and Canadian studies found drastic variability of asylum decision making in courts around the country.¹²⁶ The authors do note that these disparities may be due to the clustering of certain types of applications in different cities. Nonetheless, place of decision is coded and controlled for in this study.

Given that the majority of decisions are heard in Sydney and Melbourne, it is expected that these cities will have similar overturn rates. However, in Brisbane, Adelaide and Perth (the only other cities where the Refugee Division sits), where the sample size is smaller, it is expected that the variability in decision rates will be higher.

2.4.7 Control Variable: Policy – PAM3

The Procedures Advice Manual 3 (**PAM3**) is a Policy Direction given under section 499 of the *Migration Act (Cth)* 1958, which allows the Minister to give guidance to persons administering the *Migration Act*. The primary purpose of the PAM3 Policy is to inform decision-makers in the Department of Home Affairs on how they should interpret and apply the Act in relation to asylum

¹²⁵ See further, Bingham, "The rule of law."

¹²⁶ Ramji-Nogales, Schoenholtz, and Schrag, "Refugee Roulette: Disparities in Asylum Adjudication," 329; Rehaag, "Judicial review of refugee determinations: the luck of the draw?."

decisions. It may, for example, direct a decision maker to give particular weight to some considerations and less to others, or express a preference for taking a certain course of action in situations where more than one option is available. The public interest justification for such Directions is that they clear up ambiguities in the legislation. This has benefits for the rule of law: it makes decisions more uniform and ensures that there is consistency in the application of the law. Members at the AAT are required to remake the decision of the Department using the same information and documents available to the original decision-maker, including the PAM3 policy.

The PAM3 policy was updated on 1 July 2017 to include updates to the law and changes in how delegates of the Minister should be assessing claims. The Policy update includes new directions that made it more difficult for certain asylum claims to be successful. The new PAM3 Policy introduced new sections on the following matters:

- (a) how serious non-political crimes are to be assessed under s5H(2)(b) of the Act;
- (b) how a negative security assessment by the Australian Security Intelligence Organisation is to be dealt with under s36(1B) of the Act;
- (c) includes more detailed guidance on how to assess whether an applicant is a danger to the Australian community under s36(1C)(b) of the Act;
- (d) more detailed advice on how to apply the subjective element of the well-founded fear test.

The increased focus on criminal assessments, security concerns and the applicant's danger to the Australian public is symptomatic of the trend towards the securitisation and criminalisation of seeking asylum.¹²⁷ Given the recognised difficulties of measuring the impact of migration policy globally,¹²⁸ this study presents a prime opportunity to quantitatively test how political debate filters into the migration regime (outside of definitive legislative change). Therefore, in order to test the effect of this change in Policy, this study will code whether each case was decided under the new or old PAM3 policy, to determine whether the change in policy has had an effect on the outcomes of cases.

Including the new PAM3 variable also tests whether Policy Directions can be used by the Minister to surreptitiously exert political influence on the Tribunal. In an extensive review of migration decisions

¹²⁷ See discussion below at section 4.2.3.

¹²⁸ Michel Beine et al., "Comparing immigration policies: An overview from the IMPALA database," *International Migration Review* 50, no. 4 (2016); Justin Gest et al., "Measuring and comparing immigration, asylum and naturalization policies across countries: challenges and solutions," *Global Policy* 5, no. 3 (2014).

at the Tribunal, Ng finds that ministerial directions “reduce the decisional independence of both the immigration tribunals and the AAT, as the directions in effect make the tribunals behave more like internal reviewers as they do not question the lawfulness of the government policy.”¹²⁹ Therefore, if the change in policy does have a statistically significant impact on how decisions are determined, it would indicate that the Direction is a significant tool for exerting *structural* political influence on the Tribunal (rather than behavioural or ideological, as is tested using the other variables). For these reasons, it is expected that there will be a lower overall grant rate after the introduction of the new PAM3 Policy for both Labor- and Liberal-appointed Members.

2.5 STATISTICAL ANALYSIS

The key empirical contribution of this thesis will be the statistical analysis of the Database. In her study of US asylum decision-making, Ramji-Nogales reported asylum grant rates mainly through the standard deviation of each asylum office or judge from the mean.¹³⁰ This was used to show how erratic and unreliable asylum decision-making is in the USA. Ramji-Nogales’ study was published in the *Stanford Law Review*, and therefore the majority of the discussion centred around the implications of the variability in decision-making on the rule of law.

My study, however, will not refer as readily to the mean as I focus on finding a correlation between the political preferences of a Member and decision-outcomes. Therefore, this thesis will primarily focus on cross-tabulation as a means of presenting and analysing the data. Contingency tables allow one to compare how two different groups (Liberal- and Labor-appointed Members) perform the same task. Double layered contingency tables also allow one to compare how the Members make decisions within different variables. For example, the next chapter includes sections on how Liberal- and Labor-appointed Members make decisions for applicants from specific regions and countries.

I also report the chi-squared value, which measures the association between two variables by comparing the expected values of a contingency table to the actual values. Where there is a significant

¹²⁹ Yee-Fui Ng, "Tribunal independence in an age of migration control," *Australian Journal of Administrative Law* 19, no. 4 (2012).

¹³⁰ Ramji-Nogales, Schoenholtz, and Schrag, "Refugee Roulette: Disparities in Asylum Adjudication."

departure from the expected values, it indicates that there may be a relationship.¹³¹ Therefore, a chi-squared (2) value of 0 indicates that the variables are independent, and an association can be inferred where 2 is larger than the chi-squared critical value. The critical value is dependent on the size of the contingency table (the degrees of freedom) and the level of statistical significance chosen. "Statistical significance" is expressed using the p value (often $p \leq .05$ or more stringently, $p \leq .01$). This expression means that the result occurs less than or equal to five times (or one time) out of a hundred. When a result occurs this seldom, statisticians assume it did not occur by chance.¹³² The chi-squared test the most appropriate test of statistical independence, as it is able to deal with categorical variables.

2.6 REGRESSION ANALYSIS

Regression analysis measures the strength and direction of a correlation between two variables, whilst controlling for one or several other variables that may affect an outcome. The majority of judicial behaviour scholars use *logistic* regression rather than standard linear regression.¹³³ In brief, logistic regression models a dependent variable using a logistic function, rather than a linear predictor function. It is used where there is a *binary* dependent variable (e.g. in this case, the decision outcome is either overturned or affirmed). Whilst the output of a logistic regression (a log-odds unit, or *logit*) is more difficult to interpret, it is generally accepted in the judicial behaviour the most appropriate statistical model for this type of analysis.¹³⁴ In order to overcome the difficulty of understanding the logit value (β), results for the regression analysis are reported as odds ratios ($Exp\beta$). Therefore, the results will state 'the odds of a decision being overturned increase by x times when the case is determined by a Labor-appointed Member, as opposed to a Liberal-appointed Member.'

However, there is debate amongst scholars as to the most appropriate causative measure. Several judicial behaviour scholars criticise the use of regression analysis for implying a causal link, where one

¹³¹ W. Lawrence Neuman, *Social research methods: qualitative and quantitative approaches*, Seventh edition, Pearson New International Edition. ed. (Harlow: Pearson Education Limited, 2014), 424.

¹³² Chew and Kelley, "Myth of the color-blind judge: an empirical analysis of racial harassment cases," 1139.

¹³³ Steffensmeier and Britt, "Judges' Race and Judicial Decision Making: Do Black Judges Sentence Differently?"; Chew and Kelley, "Myth of the color-blind judge: an empirical analysis of racial harassment cases."; Pinello, *Gay rights and American law*.

¹³⁴ Epstein, *The behavior of federal judges: a theoretical and empirical study of rational choice*, 22. Sandro Sperandei, "Understanding logistic regression analysis," *Biochimica medica* 24, no. 1 (2014).

does not, in fact, exist.¹³⁵ These scholars attempt to apply other methods of statistical analysis to establish causation, such as matching analysis,¹³⁶ competing risk analysis¹³⁷ and Greiner's comprehensive 'potential outcomes' framework.¹³⁸ Whilst there may be virtue in pursuing alternate methods of proving causation, this debate is beyond the scope of the proposed project. As logistic regression is simple to apply, ubiquitous within the literature, and can deal with multiple variables, it will be used in this project.

2.6.1 Sample Size Problem

A significant problem arises when running regression and controlling for the country of origin. Whilst the most common countries have sample sizes large enough to recognise legitimate trends, there is a large proportion of countries where applications appear in the Database less than 10 times. Such a small sample size poses a problem for the regression analysis, as it would fill the model with a large number of dummy variables that are not statistically significant. Additionally, measuring the country of origin as a categorical variable creates a large number of dummy variables (91 dummy variables in the case of this Database). Logistic regression does not function well where there are too many classes in a categorical variable, especially where several have low sample sizes.¹³⁹ This problem is noted in the literature of quantitative refugee analysis. The two quantitative studies on asylum decision-making in the USA¹⁴⁰ and Canada¹⁴¹ (from which this study draws heavily), have taken different approaches to solving this problem.

Rehaag, in his studies of refugee tribunals and Courts in Canada, controls for the impact of the applicant's country by including the "yearly average grant rates by country of origin as a continuous

¹³⁵ D. James Greiner, "Causal Inference in Civil Rights Litigation," *Harvard Law Review* 122, no. 2 (2008); Boyd, "She'll Settle It?."

¹³⁶ Kastellec, "Racial Diversity and Judicial Influence on Appellate Courts."

¹³⁷ Boyd, "She'll Settle It?."

¹³⁸ Greiner, "Causal Inference in Civil Rights Litigation."

¹³⁹ Mohamad Adam Bujang et al., "Sample Size Guidelines for Logistic Regression from Observational Studies with Large Population: Emphasis on the Accuracy Between Statistics and Parameters Based on Real Life Clinical Data," *The Malaysian journal of medical sciences* 25, no. 4 (2018); Peter C. Austin and Ewout W. Steyerberg, "Events per variable (EPV) and the relative performance of different strategies for estimating the out-of-sample validity of logistic regression models," *Statistical methods in medical research* 26, no. 2 (2017).

¹⁴⁰ Ramji-Nogales, Schoenholtz, and Schrag, "Refugee Roulette: Disparities in Asylum Adjudication."

¹⁴¹ Rehaag, "Judicial review of refugee determinations: the luck of the draw?."

independent variable”.¹⁴² Each country is coded with a value of 0 to 1, determined by the percentage of cases from that country that are successfully overturned per year. Calculating the yearly average grant rate is useful as it simplifies the logistic regression model. Rather than using over 180 dummy variables representing separate countries (many of which have very small sample sizes), it uses a single continuous independent variable. However, this approach creates a cyclical measurement that loses variability in the data and risks an overfitted model. The independent variable - average grant rates for countries of origin - is calculated based on a portion of the dependent variable outcomes - decision outcomes.

Ramji-Nogales, in her study of US Immigration Judges, limited her statistical analysis to “Asylee Producing Countries (*APCs*)”: countries which appeared at least 500 times in the database, and that had a national grant-rate of 30%.¹⁴³ This limited her analysis to 15 core APCs. Whilst this approach is beneficial for the statistical rigidity of their study, its observations are only applicable to a small number of countries.

In conducting this study, I took the approach of Ramji-Nogales, and limit my regression model to countries that have a sample size of $N > 30$. This takes only the top 15 countries, and generates a dataset is 1923 cases, constituting 85% of decisions in the Database. This allows me to assess the overwhelming majority of the Database, without having the results of the logistic regression skewed by countries with a small sample size. It also avoids any risk of the model overfitting the data, as is possible under Rehaag’s approach. A minimum of 30 cases was chosen as it ensures that the logistic regression analysis is accurate. Statistical scholars dispute the minimum sample size required for logistic regression. Some abide by a rule of 10 per variable,¹⁴⁴ or even less,¹⁴⁵ whilst others advocate for higher sample sizes

¹⁴² Rehaag, "Do women refugee judges really make a difference? An empirical analysis of gender and outcomes in Canadian refugee determinations."

¹⁴³ Ramji-Nogales, Schoenholtz, and Schrag, "Refugee Roulette: Disparities in Asylum Adjudication," 18.

¹⁴⁴ Maarten van Smeden et al., "Sample size for binary logistic prediction models: beyond events per variable criteria," *Statistical methods in medical research* 28, no. 8 (2019).

¹⁴⁵ Eric Vittinghoff and Charles E. McCulloch, "Relaxing the Rule of Ten Events per Variable in Logistic and Cox Regression," *American Journal of Epidemiology* 165, no. 6 (2006).

around 50.¹⁴⁶ It is acknowledged, however, that any conclusions on political bias made from this regression analysis can only be attributed to the top 15 countries of the Database.

2.7 CONCLUSION

The method of this investigation is a significant contribution to the political science literature. Given the lack of quantitative studies of judicial behaviour of Australian courts and tribunals, progress made in method design are vitally important in order to grow the body of literature in Australia. It is hoped that the careful methodological decisions made in this thesis, which have been informed by the comprehensive methods in the US and Canada, lay the groundwork for future quantitative studies in Australia.

¹⁴⁶ Bujang et al., "Sample Size Guidelines for Logistic Regression from Observational Studies with Large Population."

3 Results

3.1 INTRODUCTION

Having outlined and justified the method of quantitative analysis that lies at the heart of this thesis, this chapter will present and analyse the Database. This chapter proceeds as follows: first, I explore the relationships between the independent variable (Party Appointing) and the dependent variable (decision-outcomes) using cross-tabulation and descriptive statistics. I then turn to the control variables (gender, place, country of origin, effect of PAM3 Policy). Finally, I report the results of the logistic regression analysis, which measures the effect of each variable whilst controlling for the others. In summary it is found that the Party Appointing the Member has a statistically significant effect on decision outcomes. The odds of a decision being overturned increase by 1.46 times when the case is determined by a Labor-appointed Member, as opposed to a Liberal-appointed Member.

It is important to note that the primary purpose of this thesis is to assess whether the personal attitudes of the Member affects decision-making for asylum applications at the AAT. Therefore, whilst there may be interesting conclusions to be drawn from this database in relation to other factors (such as patterns in the numbers and types of cases over time), this chapter will not thoroughly explore these questions. Rather, data presentation and analysis will focus on investigating relationships between the Member and decision outcomes.

3.2 INDEPENDENT VARIABLE: PARTY APPOINTING

Before testing the relationship between the Party Appointing the Member and decision outcomes, I will give a brief overview of the Members featuring in the Database. Of the 115 different Members that appear in the Database, 71 (61.7%) were appointed by a Liberal government and 44 (38.3%) were appointed by a Labor government. This ratio was generally reflected in the number of decisions made by each group. As seen in Table 3, Liberal-appointed Members accounted for 1393 (61%) of all relevant

decisions, and Labor-appointed Members accounted for 879 (38.6%).¹⁴⁷ This disparity is expected, as the relevant period (July 2015 – 2018) wholly consisted of a Liberal government, leading to a decline in the number of Labor appointees.

Table 3 Cross-tabulation of Members, showing rates of decisions affirmed and overturned by Liberal- ad Labor-appointed Members

			Affirmed	Overtured	Total
Party Appointing	Liberal	Count	1185	208	1393
		%	85.1%	14.9%	100.0%
		% of Database	52.2%	9.2%	61.3%
	Labor	Count	683	196	879
		%	77.7%	22.3%	100.0%
		% of Database	30.0%	8.6%	38.7%
Total		Count	1868	404	2272
		%	82.2%	17.8%	100.0%

The key measure in the contingency table above (Table 3) is the rate of overturned decisions for Liberal- and Labor-appointed members (in **bold**). As noted above at section 2.4.1, the overturn rate is the proportion of decisions that each group of Members determined were wrongly decided by the Department in the first instance. Whilst the overturn rate for the whole database is 17.8%, Liberal-appointed Members overturned 14.9% of decisions, whereas Labor-appointed Members overturned 22.3% of decisions. This disparity is an important finding. It indicates that Labor-appointed Members overturned decisions at a rate 1.5 times *higher* than Liberal-appointed Members. This disparity can also be expressed assessing the proportion of ‘Overtured’ cases each set of Members are responsible for: Decisions by Labor-appointed Members account for 38.6% of all decisions in the Database, but account for 48.5% of cases in which the decision was overturned.

¹⁴⁷ All further statistics mentioned in this chapter assume that non-jurisdictional cases have been removed from the data. Therefore, Liberal-appointed Members accounted for 1393 out of 2272 cases (rather than the entire database, which is 2,544 cases).

A chi-square test of independence was performed to examine the relationship between decision outcomes and the party appointing the Member. The relation between these variables was significant: $\chi^2(1) = 20.003, p < 0.001$. The null hypothesis (H_0) that decision outcome is independent of the party appointing the Member can therefore be rejected. This implies that the hypothesis that the party appointing the Member has an effect on the outcome of a case is correct. It also strongly indicates that the hypothesis that a Liberal-appointed member is more likely to deny a refugee visa than a Labor-appointed Member is correct. However, before any such conclusions can be made, the control variables and regression model must be considered.

3.3 COUNTRY OF ORIGIN

Of the variables measured, the country of origin of the applicant played the most significant role in determining the outcome of the asylum application. However, due to the large number of categories in the variable (91 countries) and the variation in sample sizes, a chi-squared test was inappropriate. The chi-square test of independence is particularly sensitive where the sample size is small and the expected cell value in the contingency table falls below 5.¹⁴⁸ This occurs for 131 cells (71%) in the contingency table comparing ‘country’ and decision outcome. For this reason (as further explained in section 2.6.1), I measured the results for only the top 15 countries in the Database using logistic regression.¹⁴⁹ These results are reported below at 3.7. In summary, however, the results show an extremely strong relationship between the applicant’s country of origin and the outcome of their case.

When measuring the country as a categorical variable, two main observations should be noted. First, there is large variation in the number of cases in the Databased from different countries. Some countries have very significant sample sizes (Malaysia, $N = 421$; China, $N = 284$; India, $N = 168$). Countries that are further from Australia, such as those in Africa and South America, have much lower representation in the Database (Zimbabwe, $N = 14$; Congo, $N = 3$, Venezuela, $N = 2$). This distribution reflects the distribution recorded in the data published by the AAT annually on all refugee cases.¹⁵⁰ The second

¹⁴⁸ Mary L. McHugh, "The chi-square test of independence," *Biochemia medica* 23, no. 2 (2013).

¹⁴⁹ See Ramji-Nogales, Schoenholtz, and Schrag, "Refugee Roulette: Disparities in Asylum Adjudication."

¹⁵⁰ Compare to data on all AAT Refugee decisions. Collated data found in Appendix 4.

noteworthy observation is the large disparity between the overturn rates of different countries. Of the countries with a sample size larger than $N = 30$, Afghanistan has the highest overturn rate (71%) whilst South Korea (the *Republic of Korea*) and Taiwan had a 0% overturn rate. It is important to note that the overturn rates for countries that have a small sample size may not be useful for extracting general rules, but rather are the result of the highly particularised situation of those applicants. For example, the sole decision in the Database for an applicant from Kyrgyzstan was successful, thus giving Kyrgyzstan a 100% overturn rate. However, the facts of this case are unique and involve a complex claim based on Christian, female and LGBT-based persecution.¹⁵¹

3.3.1 Disparity in intra-country overturn rates

An accurate means of analysing the effect of political ideology on case outcomes is to look at how Members determine cases of a similar nature from the same country. There are significant disparities between the overturn rates of Liberal- and Labor-appointed Members for some countries, however not for others. As shown in Table 4 (which only includes countries where $N > 30$), some countries (China, Malaysia, Nepal, Indonesia, Iraq, Sri Lanka, Taiwan) had very low disparity between how Liberal- and Labor-appointed Members determined cases. Other countries (Afghanistan, Iran, Lebanon, Pakistan, Vietnam) had significantly higher disparity between the overturn rates of the two groups of Members (difference $> 10\%$).

The low disparity of overturn rates for countries such as China, Indonesia, Malaysia and Taiwan could be explained by the importance of these countries as trading partners for Australia. Middle Eastern countries with highly politicised wars or that are corrupt or oppressive regimes, tend to have a higher disparity of overturn rates between Liberal- and Labor-appointed Members (for example, Iran, Lebanon, Vietnam and Afghanistan). This finding is discussed further in the proceeding sections.

¹⁵¹ 1509351 (*Refugee*) [2017] AATA 2088 (24 August 2017).

Table 4 Overturn rates for countries with a sample size of $N > 30$. Last two columns show the difference in overturn rate and which set of Members had the higher overturn rate.

Country	Liberal Overturn Rate (%)	Labor Overturn Rate (%)	Party with higher Overturn Rate	Difference (%)
Afghanistan	61.50	73.30	Labor	11.80
Bangladesh	17.90	23.30	Labor	5.40
China	6.60	4.50	Liberal	2.10
Egypt	33.30	41.70	Labor	8.40
Fiji	3.60	3.10	Liberal	0.50
India	5.10	10.00	Labor	4.90
Indonesia	8.30	5.30	Liberal	3.00
Iran	50.00	15.80	Liberal	34.20
Iraq	63.20	57.70	Liberal	5.50
Lebanon	22.50	6.90	Liberal	15.60
Malaysia	4.90	11.90	Labor	7.00
Nepal	0.00	2.30	Labor	2.30
Pakistan	23.50	52.20	Labor	28.70
Sri Lanka	14.90	18.20	Labor	3.30
Taiwan	0.00	0.00	Equal	0.00
Vietnam	20.00	38.20	Labor	18.20

Interestingly, the explanation that countries that have experienced war, violence or a breakdown in governance would have higher disparities (as Members would have more opportunity to exercise their discretion), does not appear to be true. Rather, it appears that the biggest disparity in overturn rates occurs for countries that have oppressive governments, rather than violence or civil war. For example, Iran, Pakistan and Vietnam have the highest variability of overturn rates. These countries may have pockets of unrest, however the primary threat to citizens would be from oppressive government activity rather than violent militias. The disparity in overturn rates may be because it is in *these* countries that the decision-maker has the greatest discretion. They are not completely safe, such that applications will almost always be refused, yet they are also not completely war-torn failed states, and therefore asylum

applications will not always succeed. The threat of persecution in these countries can therefore vary significantly depending on the situation of the applicant.

The also data does not evidence an impact of rising anti-Muslim sentiment in Australian politics,¹⁵² and the lack of support for multiculturalism from within the Liberal Party¹⁵³ on decision-outcomes. It is possible that Liberal-appointed Members with conservative opinions judge Muslim applicants differently to Labor-appointed Members. However, as the overturn rate for some Muslim countries is higher for Liberal-appointed Members, this hypothesis does not explain the data.

Nonetheless, the low statistical power of the intra-country comparison rates (due to the small sample size) makes it difficult to draw any certain conclusions on how Members make decisions. The finding is, therefore, limited to proving that there is a significant disparity in decision outcomes between how Labor- and Liberal-appointed Members make decisions. The Database does not clearly illuminate clearly as to *why* these disparities may be occurring. However, the results guide future investigations towards a more statistically powerful analysis of country-specific overturn rates, especially in countries where the scope for exercising discretion is wider.

3.3.2 Regional Analysis

Conducting a layered cross-tabulation allows one to assess how Liberal- and Labor- appointed Members treat applications from different regions. Due to the spread the data, only the Middle East and Asia¹⁵⁴ are given specific attention. Additionally, due to the low sample sizes of some countries, analysis is restricted to countries where $N > 30$. This sample of Middle Eastern and Asian countries represents collectively 79% of the Database.

¹⁵² Randa Abdel-Fattah, *Islamophobia and Everyday Multiculturalism in Australia* (Routledge, 2017); Scott Poynting and Victoria Mason, "The new integrationism, the state and Islamophobia: retreat from multiculturalism in Australia," *International journal of law, crime and justice* 36, no. 4 (2008).

¹⁵³ Anthony Moran, "Enduring in Practice if Not in Name?—Official Multiculturalism During and Beyond the Howard Government," in *The Public Life of Australian Multiculturalism: Building a Diverse Nation* (Cham: Springer International Publishing, 2017); Elsa Koleth, "Multiculturalism: a review of Australian policy statements and recent debates in Australia and overseas," (2010).

¹⁵⁴ For the purpose of this analysis, the Middle East includes countries from Egypt to Afghanistan. Asia includes countries from Pakistan to the eastern border of Asia.

3.3.2.1 Middle East

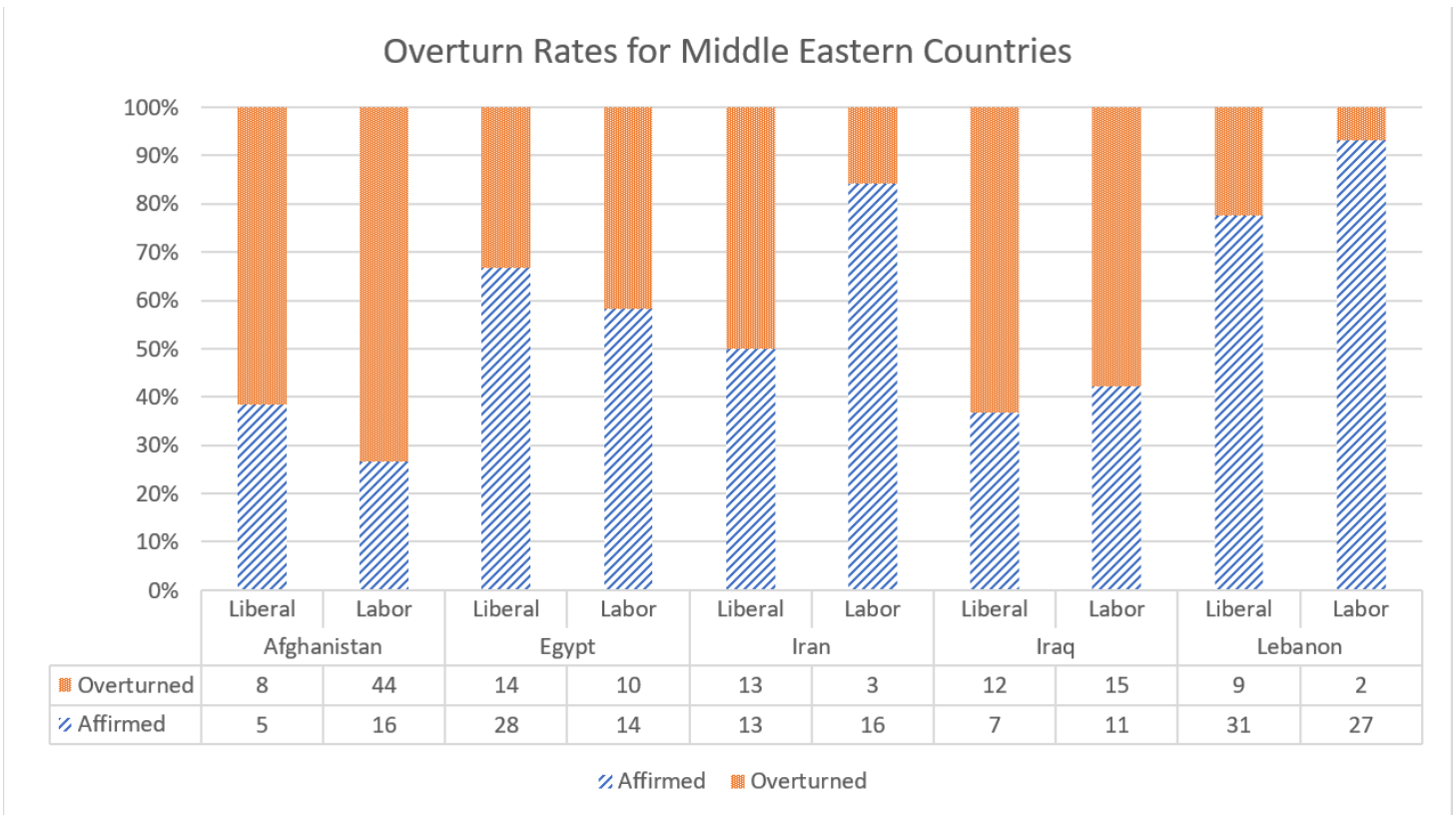
Figure 2 depicts a breakdown of overturn rates for a sample of countries from the Middle East (see Table B, Appendix 2 for a tabulation of this data). When considering the Middle East region as a whole, Liberal- and Labor-appointed members overturned cases at similar rates of 40% and 46.8% respectively. Within the Middle East, there appears to be a sectarian pattern in how Members determine applications. Sunni majority countries (Egypt and Afghanistan) had higher overturn rates by Labor-appointed Members. Iran, Iraq and Lebanon all have majority Shi'ite population (or at least a significant Shi'ite population), and had higher overturn rates by Liberal-appointed Members. These results are difficult to explain, as there is no discernible pattern that aligns with the policy preferences of either a Liberal- or Labor-aligned ideology. Indeed, given the economic and political isolation of Iran, it might have been expected that those with a right-wing ideology would be less likely to grant visas to Iranian nationals.

A possible explanation may be borrowed from US asylum trends in the 1970s, which were driven by foreign policy trends rather than human rights concerns. For example, Cuban asylum seekers were granted asylum by default in the US as they were characterised as victims of communist persecution.¹⁵⁵ This is contrasted to Haitian refugees, who were *assumed* to not have valid refugee claims, as Haiti was an ally of the US and was anti-communist.¹⁵⁶ It is therefore possible that asylum seekers from states that are politically or ideologically opposed to Australia (such as the Iranian Shi'ite influenced bloc) would be more likely to be granted asylum. However, these explanations likely do not apply to the data in the current study, as there is generally bipartisan support for international relations and national security issues in Australia. Both parties tend to align with US and NATO positions on international relations.

¹⁵⁵ Loescher and Scanlan, *Calculated Kindness*, 79.

¹⁵⁶ *Ibid.*

Figure 2 Graph showing overturn rates for Middle Eastern Countries for Liberal- and Labor-appointed Members. Data labels depict the number of cases. Table B, Appendix 2 is a tabulation of this graph.



It is most likely that there is no pattern in Middle Eastern asylum decision-making that can be explained ideologically using this data. This may simply be because decisions are not being decided along ideological lines or because the sample size for each country is too small to generate meaningful data. It may also be due to ‘country of origin’ being a variable that is inadequate at explaining the trends in asylum decisions due to the complex variations in the types of asylum claims that can emerge from the same country and region. Especially in the Middle East, where there is a plethora of different minority groups with drastic variations in levels of persecution and risk (For example, a Yazidi in Iraq would have a differing claim to a Sunni or a homosexual also from Iraq, due to the different nature, prevalence and extent of their persecution.) Measuring country of origin as a variable hides these intra-country differences. To properly assess whether Liberal- and Labor- appointed Members treat similar cases differently, the cases would also have to be coded according to the specific basis of their claim, their religion and the status of their country’s relationship with Australia. Such analysis is outside the scope of this thesis.

3.3.2.2 *Asia*

Elsewhere in Asia, there were significantly lower rates of overturning decisions; 12.1% of Asian decisions were overturned (see Figure 3 and Table C Appendix 2), whereas 43.6% of Middle Eastern decisions were overturned. This inter-regional disparity in overturn rates is explained by the different levels and types of persecution in each region. Such analysis is, however, outside the scope of this thesis, which rather focusses on the disparities between Liberal- and Labor-appointed Members.

When looking at the breakdown between Members, the overturn rate was higher for Labor-appointed Members, who overturned 15.8% of Asian cases. Liberal-appointed Members overturned 9.4%. As shown in Figure 3 (and Table 4),¹⁵⁷ there is a remarkably equal approach to decision-making amongst Liberal- and Labor-appointed Members for most Asian countries. The overturn rates for China, Taiwan, India, Bangladesh and Nepal were all within less than 3 percentage points of another. However, Labor-appointed Members overturned a significantly higher proportion of cases from Pakistan (28.7% higher) and Vietnam and (18.2% higher).

The Average Freedom House Score also does not appear to explain the disparities in overturn rates for Asian countries. As seen in Table 5, several countries with a high Freedom house Score¹⁵⁸ have low disparities between overturn rates, including China, Sri Lanka and Malaysia. This generally disproves the explanation that countries with high levels of persecution will have a higher disparity in overturn rates, as there is more space for the Member's discretion to work. Ultimately, as with the Middle Eastern regional analysis, the conclusions of this study cannot be explanatory as the Database does not code particular information on the features of the application and the motivations for the Members' decision. The finding that there is a significant disparity in how Labor- and Liberal-appointed Members determine cases from Pakistan and Vietnam (but not other Asian countries) warrants further research.

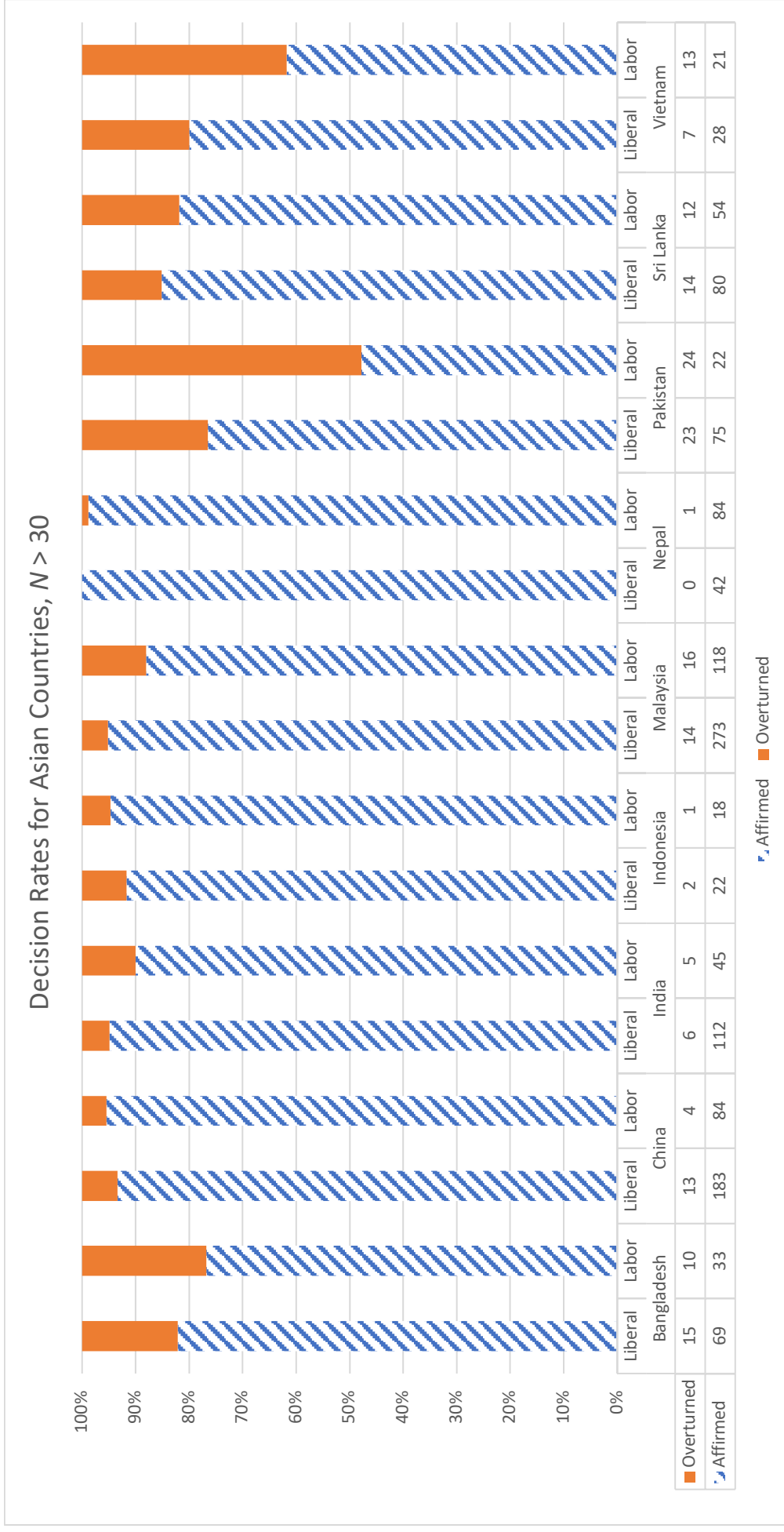
¹⁵⁷ See Table C, Appendix 2 for a tabulation of this graph.

¹⁵⁸ A high Freedom House Score connotes low prevalence of civil and political freedoms in that country.

Table 5 Average Freedom House Score for Asian Countries, $N > 30$. See Appendix 3 for further information on Freedom House data and calculation method.

<i>Country</i>	<i>Average Freedom House Score</i>
<i>Bangladesh</i>	4
<i>China</i>	6.5
<i>India</i>	2.5
<i>Indonesia</i>	3
<i>Malaysia</i>	4
<i>Nepal</i>	3.5
<i>Pakistan</i>	4.5
<i>Sri Lanka</i>	4
<i>Vietnam</i>	6

Figure 3 Graph showing overturn rates for Asian Countries for Liberal- and Labor-appointed Members.



3.4 GENDER

The Database showed a remarkably equal representation of decisions made by male and female Members. In total, 1146 (50.4%) cases were handed down by females and 1126 (49.6%) cases handed down by males. Each gender also had almost equivalent rates of affirming and overturning decisions. As seen in Table 6, female Members overturned 17.5% of decisions and male Members overturned 18% of decisions. There appears to be no relationship between the gender of the Member and decision outcomes. This is supported by the chi-squared test, which found that the two variables were independent ($\chi^2(1) = 0.093, p = 0.760$)

This finding is also significant as it is the first quantitative finding on the relationship between the decision-makers' gender on the outcome of a case in *any* Tribunal or Court in Australia. The result aligns with previous investigations in refugee decision-making in Canada¹⁵⁹ and in public administrative generally, which has found that gender has little impact on decision-making for front-line bureaucrats.¹⁶⁰ This finding is, however, out of step with findings in the US,¹⁶¹ where higher overturn rates by female Immigration Judges have been explained by theories on female decision-making, which state that female decision-makers use a type of moral reasoning that adopts an 'ethic of care', and therefore may be more sensitive to human need and suffering.¹⁶² The evidence from this Database, however, indicates that such theories do not apply to asylum decision-making at the AAT.

¹⁵⁹ Rehaag, "Do women refugee judges really make a difference? An empirical analysis of gender and outcomes in Canadian refugee determinations."

¹⁶⁰ Jessica E. Sowa and Sally Coleman Selden, "Administrative discretion and active representation: An expansion of the theory of representative bureaucracy," *Public Administration Review* 63, no. 6 (2003).

¹⁶¹ Carrie Menkel-Meadow, "Asylum in a Different Voice: Judging Immigration Claims and Gender," (2009).

¹⁶² *Ibid.*

Table 6 Cross-tabulation of decision-outcomes and gender.

		Affirmed	Overtured	Total
Female	Count	945	201	1146
	% within Gender	82.5%	17.5%	100.0%
	% within Decision Outcome	50.6%	49.8%	50.4%
Male	Count	923	203	1126
	% within Gender	82.0%	18.0%	100.0%
	% within Decision Outcome	49.4%	50.2%	49.6%
Total	Count	1868	404	2272
	% within Gender	82.2%	17.8%	100.0%

3.5 PLACE OF DECISION

Ideally, (or normatively, to ensure fair decision-making) the place of a decision should not have any impact on the outcome of the decision. The rule of law requires that the law be applied consistently across jurisdictions.¹⁶³ The Database, however, appears to demonstrate significant differences in the overturn rates for each city. A chi-squared test found that the place of decisions and the decision outcome were *not* independent variables: $\chi^2(4) = 45.438, p < 0.001$. Sydney had the lowest rate of overturning decisions at 13.5%, whilst the national average was 17.8% (See Table 7). This is contrasted to Adelaide, which had an overturning rate of 35.2%. However, one should be cautious in extrapolating any conclusions from the variation in this data. Adelaide has a significantly smaller sample size (88 decisions) compared to Sydney (1182 decisions). In fact, decisions from Sydney constitute over half of all decisions in the Database.

The disparity in overturn rates amongst cities could also be explained by different proportions of Labor- and Liberal-appointed Members. As shown above at section 3.2, Labor-appointed Members overturn cases at a rate higher than Liberal-appointed Members. Therefore, a concentration of decisions by Labor-appointed Members in one city could increase the overturn rate for that city. When assessing

¹⁶³ Bingham, "The rule of law."

the data, this hypothesis appears to hold true only for Adelaide, which overwhelmingly had decisions made by Labor-appointed Members (95.5%) and has a high overturn rate of 35.2% (See Table 7 and Figure 4). However, as noted, the low sample size from Adelaide limits the statistical power of this conclusion. Elsewhere, there appears to be little relationship between the number of Labor-appointed Members and higher overturn rates. In all other cities, Labor-appointed Members accounted for approximately one third of decisions, yet Perth had an overturn-rate that was above average (19.6%), whilst Sydney's rate was significantly lower (13.5%). It is, therefore, unclear whether the disparity in overturn rates between cities can be explained by different concentrations of Labor-appointed Members.

Table 7 Cross-tabulation showing decision outcomes for each city

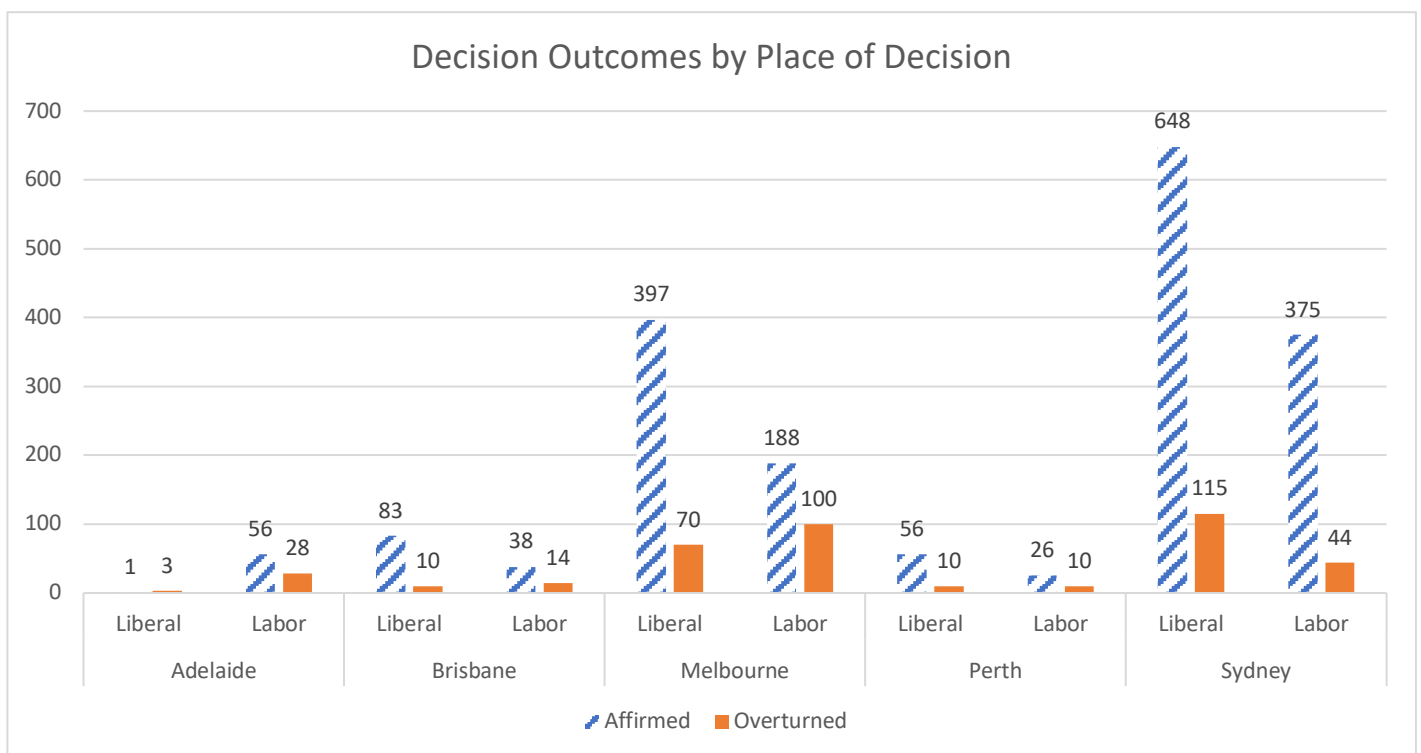
		Affirmed	Overturned	Total
Adelaide	Count	57	31	88
	%	64.8%	35.2%	100.0%
Brisbane	Count	121	24	145
	%	83.4%	16.6%	100.0%
Melbourne	Count	585	170	755
	%	77.5%	22.5%	100.0%
Perth	Count	82	20	102
	%	80.4%	19.6%	100.0%
Sydney	Count	1023	159	1182
	%	86.5%	13.5%	100.0%
Total	Total Count	1868	404	2272
	%	82.2%	17.8%	100.0%

A more likely reason for the disparity in approval rates may be the clustering of cultural and ethnic groups in certain cities. The literature on asylum seeker settlement in Australia recognises that ethnic groups of asylum seekers tend to cluster in particular areas and cities.¹⁶⁴ Given that the applicant's

¹⁶⁴ John De Maio et al., "Building a new life in Australia: introducing the longitudinal study of humanitarian migrants," *Family Matters*, no. 94 (2014); Helen L. Blake, Laura Bennetts Kneebone, and Sharynne McLeod, "The impact of oral English proficiency on humanitarian migrants' experiences of settling in Australia," *International Journal of Bilingual Education and Bilingualism* 22, no. 6 (2019).

country of origin is the most significant factor in determining decision outcomes (as discussed below), approval rates are better explained by the fact that cultural groups that are less likely to receive asylum (such as Malaysians, Chinese or Indian applicants) are overwhelmingly situated in Sydney. The data supports this inference; for example, 82% of Chinese applicants and 89% of Nepalese applicants in the Database had their decisions determined in Sydney. Higher overturn rates in cities such as Melbourne can also be explained by country clustering. For example, 60% of cases from Afghanistan (which has an extremely high overturn rate of 71%) were located in Melbourne.

Figure 4 Graph showing decision outcomes and the place that the decision was made.



3.5.1 Multicollinearity

The concentration of certain countries in particular cities creates a problem for the regression analysis as it results in multicollinearity. Multicollinearity occurs where there is a dependent relationship between explanatory variables; it has been described as “the thousand pounds monster in statistical modelling.”¹⁶⁵ The fact that applicants from the same country cluster in the same city means that the model may be unable to separate the effect of country of origin from the effect of the place of

¹⁶⁵ Habshah Midi, S. K. Sarkar, and Sohel Rana, "Collinearity diagnostics of binary logistic regression model," *Journal of Interdisciplinary Mathematics* 13, no. 3 (2010).

decision. In order to avoid these problems, the place variable is left out of the logistic regression analysis. Whilst this means that insights into regional variations in overturn rates are not measured in the model, the overall reliability of the model is increased.

3.6 POLICY – PAM3 UPDATE

There was no statistically significant change in how decisions were made after the introduction of the new PAM3 Ministerial Direction. As Table 8 shows, the overturn rate was only marginally lower after the introduction of the new Policy (1.7%). Chi-squared testing confirms that the variables are independent ($\chi^2(1) = 1.088, p < 0.297$). This indicates that the new guidelines in the PAM3 policy did *not* have an impact on the outcome of cases. Whilst it is difficult to say for certain why this is the case, several reasons can be speculated. It is possible that Members do not rely heavily on the PAM3 guidelines. Whilst most of the judgements published include some reference to the PAM3 policy, or an acknowledgement that the Member reviewed the relevant policies in coming to the decision, this may be tokenistic. Indeed, in the author's personal experience at refugee hearings at the AAT, Members have been reticent and often dismissive of Ministerial Directions altogether.¹⁶⁶ It is possible that Members see the PAM3 policy as primarily intended for non-legal administrative decision-makers in the Department, whilst they are able to interpret the legislation themselves, without the assistance of the Policy. Indeed, this is a positive trend for the rule of law, given that where a Ministerial Direction is inconsistent with the Act, it is invalid and should not be read.¹⁶⁷

This finding goes against the speculation of Ng, who asserts that the Ministerial Directions are significant vessels through which political influence can *structurally* (rather than ideologically) infect decision-making at the Tribunal.¹⁶⁸ Further possibilities for structural political influence are noted in the next chapter.

¹⁶⁶ The author has experience as a refugee case worker, and has assisted at the AAT several times.

¹⁶⁷ *Riddell v Secretary, Department of Social Security* (1993) 42 FCR 443

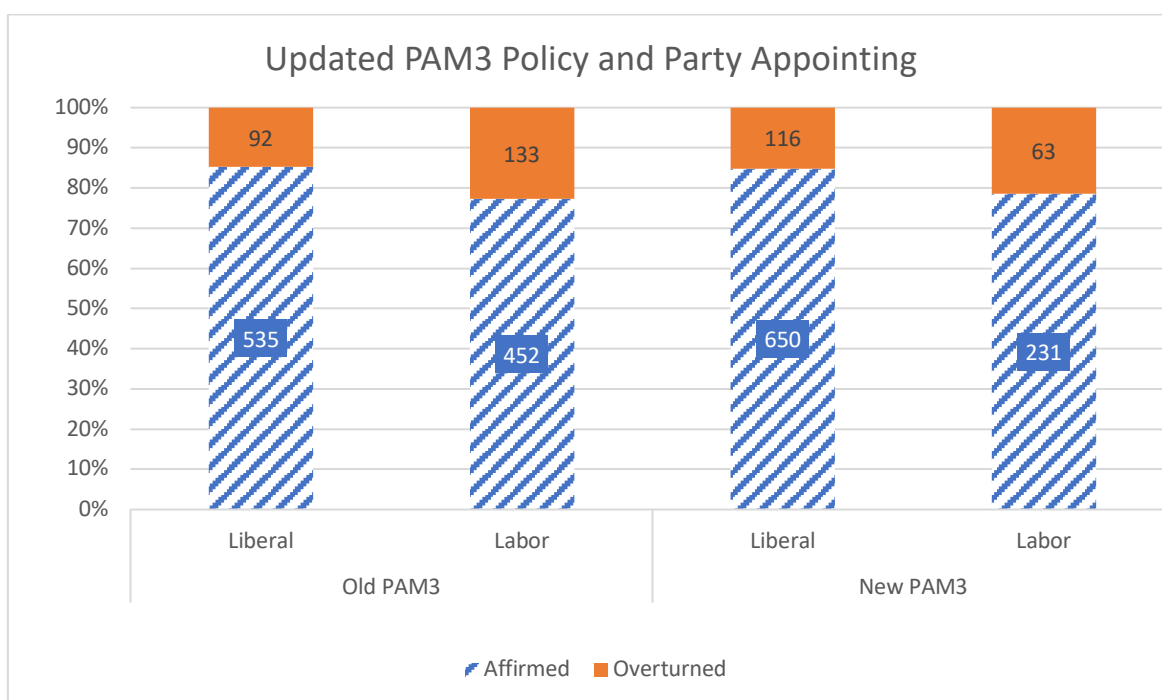
¹⁶⁸ Ng, "Tribunal independence in an age of migration control."

Table 8 Cross-tabulation of decision outcomes and the presence of the new PAM3 Policy., which came into effect on 1 July 2017.

		Affirmed	Overtured	Total
Old PAM3	Count	987	225	1212
	%	81.4%	18.6%	100.0%
New PAM3	Count	881	179	1060
	%	83.1%	16.9%	100.0%
Total	Count	1868	404	2272
	%	82.2%	17.8%	100.0%

Additionally, when assessing the ‘Party Appointing’ variable in conjunction with the PAM3 variable, there appeared to be no significant difference between how Liberal- and Labor-appointed members made decisions after the updated policy was introduced. (See Figure 5) This is promising for the rule of law and the impartiality of the Members at the AAT. The hypothesis that Liberal appointed Members would aggressively implement the wishes of the Minister by tightening security concerns and focussing on the character details of the applicants may therefore be untrue. However, it may be that ideological Members are implementing the Party’s wishes even before the policy was published.

Figure 5 Graph showing the overturn rate for Liberal- and Labor-Appointed Members under the old and new PAM3 Policy. Data labels show the number of decisions.



3.7 LOGISTIC REGRESSION

In order to test the variables simultaneously, so as to understand their significance in relation to each other, regression analysis was conducted. As explained in section 2.6.1, I take only the top 15 countries in the Database (where $N > 30$). The sample size of this dataset is 1923 cases (constituting 85% of decisions in the Database), which is sufficient for logistic regression. The binary dependent variable was the outcome of the decision (0 = *affirmed*, 1 = *overturned*). The independent variables were the Party Appointing the Member (*Party Appointing*) (0 = *Liberal*, 1 = *Labor*); the gender of the Member (0 = *female*, 1 = *male*); the presence of the new PAM3 policy (0 = *old policy*, 1 = *updated policy*); the average country overturn rate for all AAT asylum decisions (*Country Overturn Rate*) (probability between 0 and 1 measured as a continuous variable) and the freedom house score (average of 2015-2018, measured as a continuous variable between 0 and 7). As noted in section 0, the 'Place of Decision' is not included in the regression analysis due to issues of multicollinearity. The results are presented below in Table 9.

This table suggests that some variables have significant effects on decision-outcomes, including the Party Appointing. The Nagelkerke R^2 value ($R^2 = .280$) indicates that the model was reasonably well-fitted to the data.¹⁶⁹ **The Party Appointing variable is statistically significant ($p < 0.05$). The $\exp(\beta)$ value of 1.458 indicates that the odds of a decision being overturned increase by 1.458 times when the case is determined by a Labor-appointed Member.**¹⁷⁰ These results imply that politicised appointments of Members at the AAT are having an effect on decision-outcomes, at least for countries that appear frequently at the Tribunal. They are also in line with the findings on political decision-making in the US and Canada.¹⁷¹

¹⁶⁹ The Nagelkerke R^2 value attempts to generate a goodness of fit statistic for logistic regression. It cannot be interpreted as a proportion of variance explained by the model (as in ordinary least squares regression). Whilst it is a generally accepted method of calculating goodness of fit in the statistical literature, it has also been criticised for being an ad hoc method of evaluating a model, and should be interpreted with caution. See, Allison, P. (2012). *Logistic regression using SAS: theory and application* (2nd ed.). Cary, NC: SAS Pub. 68-72.

¹⁷⁰ Results are expressed in terms of 'odds ratios' because this is the most intuitive way of reporting results of logistic regression. For further discussion see section 3.7.

¹⁷¹ Ramji-Nogales, Schoenholtz, and Schrag, "Refugee Roulette: Disparities in Asylum Adjudication."; Miller, Keith, and Holmes, *Immigration Judges and U.S. Asylum Policy*; Rehaag, "Judicial review of refugee determinations: the luck of the draw?."

Table 9 Regression results for countries where $N > 30$. Nagelkerke $R^2 = .278$. $N = 1923$; $SE =$ standard error; $df =$ degrees of freedom; $Wald =$ Wald chi-square test; $Sig. =$ p value; $Exp(\beta) =$ exponential of β . **Note:** As the model is a logistic regression, the β coefficient represents the change in log odds for each unit change. This is not intuitive to interpret. Therefore, the exponential of β will be reported ($exp(\beta_k)$), which represents the odds ratio for each unit change.

	β	SE	Wald	df	Sig.	Exp(β)
Party Appointing	0.377	0.148	6.526	1	0.011	1.458
Gender	-0.111	0.144	0.589	1	0.443	0.895
New PAM3	-0.014	0.156	0.008	1	0.931	0.986
Average Freedom House Score	4.269	1387.805	0.000	1	0.998	71.446
Country:						
<i>Vietnam</i>			185.262	14	0.000	
<i>Afghanistan</i>	2.221	173.476	0.000	1	0.990	9.214
<i>Bangladesh</i>	8.066	2775.610	0.000	1	0.998	3184.469
<i>China</i>	-3.965	693.902	0.000	1	0.995	0.019
<i>Egypt</i>	1.960	520.427	0.000	1	0.997	7.096
<i>Fiji</i>	9.314	3816.463	0.000	1	0.998	11091.671
<i>India</i>	13.235	4857.317	0.000	1	0.998	559711.0
<i>Indonesia</i>	11.080	4163.414	0.000	1	0.998	64853.428
<i>Iran</i>	0.337	0.414	0.661	1	0.416	1.400
<i>Iraq</i>	2.878	520.427	0.000	1	0.996	17.772
<i>Lebanon</i>	5.139	1908.232	0.000	1	0.998	170.516
<i>Malaysia</i>	6.924	2775.609	0.000	1	0.998	1016.882
<i>Nepal</i>	7.104	3469.512	0.000	1	0.998	1217.118
<i>Pakistan</i>	6.626	2081.707	0.000	1	0.997	754.248
<i>Sri Lanka</i>	7.792	2775.610	0.000	1	0.998	2421.799
Constant	-26.629	8326.828	0.000	1	0.997	0.000

As expected, the country of origin variable is statistically significant, as shown in the ‘Vietnam’ row ($p < 0.05$), as Vietnam is the reference category.¹⁷² The high Wald value ($Wald = 185.26$) also indicates

¹⁷² When testing categorical variables in logistic regression, one category is chosen to be the reference category, and therefore is not included in the regression model. The overall significance of that variable on the model is shown in the Vietnam row.

that the impact of the country of origin variable on decision-outcomes is very high. The high p value for each of the other countries ($p \approx 1$) is because when testing categorical dependent variables in logistic regression, the β coefficient represents the difference between the reference category (Vietnam) and the other category. Such considerations are not applicable to this data, as an analysis of the comparative effects of each country of origin on decision-outcomes when compared to Vietnam is both irrelevant and not meaningful. Rather, only the overall effect of the variable as a whole (as shown in the Vietnam row) is useful.

The effect of Gender and the new PAM3 policy were, however, insignificant ($p > .05$). This confirms the chi-squared testing of these variables, which found that they had no relationship with decision-outcomes. The effect of the Freedom House score was also insignificant ($p > .05$). This indicates that there is not necessarily a correlation between whether a country is considered sufficiently dangerous for a successful refugee claim, and the Freedom House score. For example, China had a very high Freedom House score average (6.5 out of 7), but had a very low overturn rate (6% of Chinese applicants at the AAT were successful).

3.8 CONCLUSION

The regression results indicate that there *is* a relationship between the political party appointing the Member and the decision-outcome for the 15 countries that appear most frequently in the Database (where $N > 30$). I can therefore state that H_1 ('*Liberal-appointed Members will overturn cases at a lower rate than Labor-appointed Members*') can be accepted. The odds of a decision being overturned increase by 1.46 times where determined by a Labor-appointed Member (controlling for other variables). Returning to the research question, this indicates that Member's political influences *do* have an impact on decision outcomes for asylum outcomes at the AAT between 2015 and 2018. This finding affirms the fears mentioned above and is an indictment on the independence of the AAT and the system of appointment, which appears to be politicised. The finding indicates that the outcome of an asylum seekers' case is determined *not* by the merits of their case, but by the Member that is allocated to their case and the political party that appointed that Member. The significance of this finding in relation to the literature will be discussed in the subsequent chapter.

4 Conclusions and Discussion

4.1 INTRODUCTION

This study has found that the political preferences of Members at the AAT have a statistically significant effect on refugee decision outcomes. When controlling for other variables, the odds of a Labor-appointed Member overturning a case were 1.46 times higher than those of a Liberal-appointed Member, for the top 15 countries in the Database. This finding is important because it proves that the outcome of a case is not solely dependent on the merits of the asylum seeker's application, but also on the political affiliations of the Member that happens to be assigned to the case. This undermines the rule of law and endangers the reliability and validity of decisions at the AAT, therefore diminishing the quality of justice. From an asylum decision-making perspective, it proves that the personal preferences of the decision-maker influence their reasoning process and the decision-outcome. Additionally, the results of this study indicate that governments will override fundamental principles of the Westminster system of government (such as an independent justice system, the rule of law and the separation of powers) in order to achieve their policy goals, at least in relation to asylum policy. Finally, from a methodological perspective, this study has contributed a new means of measuring the presence of political bias in the 'black box' of administrative tribunals. This is a fundamentally difficult task. Barriers of privacy, security and impartiality render assessment of refugee decision-making challenging for researchers.¹⁷³

This Conclusion discusses the results of this thesis in order to understand the findings and locate them within the literature on asylum decision-making, judicial behaviour and administrative studies. I address possible reasons for why Liberal-appointed Members overturn cases at a lower rate than Labor-appointed Members and then explain *why* asylum decision-making at the AAT is politicised. Finally, I outline my general contributions to the literature, summarise the limitations of this study and note opportunities for further study.

¹⁷³ Tomkinson, "Who are you afraid of and why? Inside the black box of refugee tribunals."

4.2 UNDERSTANDING THE FINDINGS

4.2.1 What explains the overturn rate disparity?

The Liberal Party policy on refugees can be characterised as restrictive. As noted in section 1.4, the Liberal Party has a strong deterrence approach to asylum seekers¹⁷⁴ and a clear, strict and longstanding policy of restricting Australia's refugee intake.¹⁷⁵ Additionally, the Party does not like decisions of the Department being overturned at the AAT, as shown by the public criticism from Liberal MPs of several AAT decisions that overturned visa denials from the Department.¹⁷⁶ The finding that Liberal-appointed Members overturn cases at a lower rate could therefore be explained by their tendency to prioritise party policy over the humanitarian concerns of the asylum seeker or international law. This is in line with the realist school of asylum decision-making theory.¹⁷⁷ How this phenomenon actually occurs though, is unknown. It is possible that Liberal-appointed Members actively and consciously make decisions with the Party policy in mind. However, it is more likely that political preferences influence decision-making subversively or subconsciously. This would mean that Members with Liberal Party-aligned policy preferences are more likely to have a stricter approach to assessing asylum claims, as this is in line with their personal views on how Australia should determine refugee claims.

The high overall overturn rate of Labor-appointed Members (22.3%) is more difficult to explain. It could indicate that decision-makers who are politically opposed to the Party in power may make decisions in a manner that disrupts their policy goals. Therefore, Labor-appointed Members overturn more refugee cases in order to both push back against the Liberal Party's restrictive asylum policies and achieve the domestic policy goals of the Labor Party of expanding the refugee intake. This explanation aligns with realist conceptions of asylum decision-making. However, it is also possible that the high overturn rate is driven by a higher regard for human rights norms and an altruistic concern for the

¹⁷⁴ Gammeltoft-Hansen and Tan, "The end of the deterrence paradigm? Future directions for global refugee policy."; Sharon Pickering and Leanne Weber, "New deterrence scripts in Australia's rejuvenated offshore detention regime for asylum seekers," *Law & Social Inquiry* 39, no. 4 (2014).

¹⁷⁵ See Phillips, *A comparison of Coalition and Labor government asylum policies in Australia since 2001*.

¹⁷⁶ Gribbin, "Peter Dutton blames 'politics' as bid to deport six refugees fails."

¹⁷⁷ Rosenblum and Salehyan, "Norms and interests in US asylum enforcement," 681. See section 1.3.1.3 for further discussion.

applicant.¹⁷⁸ Labor-appointed Members may be more receptive to the principles of international human rights law (such as the right to freedom from arbitrary detention) and refugee law (such as the principle of *non-refoulement*), and therefore be more sympathetic to asylum claims. Such an explanation aligns with constructivist theories of asylum decision-making, which emphasise the ‘normative concerns’ of the humanitarian needs of asylum seekers and international human rights principles.¹⁷⁹

Further evidence of politicised decision-making is seen when comparing intra-country disparities in how Liberal- and Labor Members overturn decisions. As noted at section 3.3.1, there was a low disparity between overturn rates for East Asian countries (including Bangladesh, China, India, Indonesia and Nepal). The apparent bipartisan approach to major trading partners such as China, India and Indonesia (which all had very low overturn rates of around 6%) indicates that both Liberal- and Labor-appointed Members may be unwilling to offend the governments of those countries, in fear of endangering diplomatic or trade relations. Whilst it could be said that the low grant rates for these countries are simply due to a high proportion of weak refugee claims, this is unlikely to be true when considering that other host countries, such as Canada and the USA have high acceptance rates for Chinese and Indian applicants.¹⁸⁰

In contrast, there was a wide disparity in how Labor- and Liberal-appointed Members determined applications from Middle Eastern countries (see section 3.3.1 and Figure 2). The disparity indicates that personal preferences have an influence on outcomes. As noted by Thomas, country information and country status reports can be subject to biased interpretation, influenced by the political preferences of the decision-maker.¹⁸¹ Due to the unstable nature of many of these countries and their sometimes-fraught relationship with Australia, the possibility for politicised decision-making is even higher. However, when assessing the countries with high disparities against the Parties’ policies on

¹⁷⁸ Risse-Kappen et al., *The power of human rights: International norms and domestic change*, 66; Keck and Sikkink, *Activists beyond borders: Advocacy networks in international politics*.

¹⁷⁹ Ibid.

¹⁸⁰ Hamlin reports that in 2009 the acceptance rates for the US, Canada and Australia were as follows: China: 35% (US), 58% (CAN), 14% (AUS); India: 27% (US), 33% (CAN), 2% (AUS). See further Hamlin, "International Law and Administrative Insulation: A Comparison of Refugee Status Determination Regimes in the United States, Canada, and Australia," 935.

¹⁸¹ Robert Thomas, "Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom," *International Journal of Refugee Law* 20, no. 4 (2008).

international relations, no clear decision-making pattern emerged that could be explained. Further study is therefore required to confirm these findings with larger sample sizes and to better assess whether the international relations policies of appointing parties affects asylum decision-making at the AAT.

Ultimately, an accurate theorisation of asylum decision-making is unlikely to be singular. Recent studies from US asylum literature indicate that decisions are likely shaped by both normative and national interest concerns, which interplay with the personal policy preferences of the decision-maker.¹⁸² Additionally, the design of this study does not allow for definitive conclusions that confirm whether Liberal-appointed Members prioritise Party interests over the rights of asylum seekers. This study, therefore, gives a strong rationale for further quantitative investigation that codes and measures the motivations behind asylum decisions, as has been conducted recently by Miller et al.¹⁸³

4.2.2 What the results tell us about administrative decision-making?

How does the result of this study challenge understandings of decision-making in general? Through the lens of judicial behaviour and administrative studies literature, the results of this study are important at both a national level and as evidence of politicised decision-making at an *administrative* tribunal.

When talking about corruption and a politicised judicial system, countries that come to mind are politically turbulent, ruled by despots or have weak protections of the separation of powers and the rule of law. Australia is not one of them. Whilst there is a comprehensive literature on politicised decision-making in US Courts and Tribunals, such studies are extremely uncommon in European and Australian courts.¹⁸⁴ It is generally assumed that the decision-making bodies in the European and Westminster judicial systems are sufficiently unbiased and depoliticised.¹⁸⁵ This thesis, however, indicates that the opposite is true, at least for asylum decision-making at the AAT; an expressly politicised appointment

¹⁸² See Keith, Holmes, and Miller, "Explaining the Divergence in Asylum Grant Rates among Immigration Judges: An Attitudinal and Cognitive Approach."; Miller, Keith, and Holmes, *Immigration Judges and U.S. Asylum Policy*; Andy J. Rottman, Christopher J. Fariss, and Steven C. Poe, "The Path to Asylum in the US and the Determinants for Who Gets In and Why," *International Migration Review* 43, no. 1 (2009); Rosenblum and Salehyan, "Norms and interests in US asylum enforcement."

¹⁸³ Miller, Keith, and Holmes, *Immigration Judges and U.S. Asylum Policy*.

¹⁸⁴ See the Theory review at section 1.3.1.

¹⁸⁵ See Bleich, "Historical Institutionalism and Judicial Decision-Making."; Dyevre, "Unifying the field of comparative judicial politics: towards a general theory of judicial behaviour."

process is not a prerequisite for politicised decision-making. It also demonstrates that politicisation of decision-making can occur even in countries that have a historically strong respect for an independent justice system, in line with the Westminster tradition;¹⁸⁶ a point that could be tested across other venues of administrative and judicial review. Given that the justice system hinges on the impartiality and independence of our decision-makers, this concern is significant. Whilst the results of this thesis do not indicate that all decision-makers or decision-making venues are politicised, it gives a strong rationale for the further investigation into this understudied topic.

This study is one of the first studies into an administrative Tribunal, rather than into judicial Courts. Politicised decision-making is well established in Courts, especially the higher-level courts such as the US Supreme Court¹⁸⁷ and to a lesser extent at the Australian High Court,¹⁸⁸ which primarily deal with abstract legal questions for which there is a great variability in how the reasoning may proceed. These courts also generally hear controversial constitutional issues, which are often inherently political. Finding that there is political bias in refugee decision-making at a Tribunal level, however, means that judicial behaviour theories may also be applied in administrative contexts, where the decision-maker is dealing primarily with factual questions that are not necessarily in the public eye. In line with the administrative studies literature, this study indicates that Tribunal Members can be conceptualised as front-line bureaucrats, such as social-workers or border control officers.¹⁸⁹ This study confirms the findings of the administrative studies literature, which has long recognised the influence of personal preferences on the exercise of discretion in immigration and social-security scenarios.¹⁹⁰

¹⁸⁶ On the importance of judicial independence in Australia, see Gerard Carney, "The Separation of Powers in the Westminster System," *Queensland Chapter of the Australasian Study of Parliament Group, Speech given at Parliamentary Annexe, Brisbane* 13 (1993).

¹⁸⁷ Segal, *The Supreme Court and the attitudinal model*. h

¹⁸⁸ Smyth, "The role of attitudinal, institutional and environmental factors in explaining variations in the dissent rate on the High Court of Australia."

¹⁸⁹ Lipsky, *Street-level bureaucracy : dilemmas of the individual in public services*.

¹⁹⁰ Søren C. Winter, "Explaining street-level bureaucratic behavior in social and regulatory policies" (2002); Norma M. Riccucci and Marcia K. Meyers, "Linking passive and active representation: The case of frontline workers in welfare agencies," *Journal of Public Administration Research and Theory* 14, no. 4 (2004); Helena O. Stensöta, "Political influence on street-level bureaucratic outcome: Testing the interaction between bureaucratic ideology and local community political orientation," *Journal of public administration research and theory* 22, no. 3 (2011); Lael R. Keiser, "Understanding street-level bureaucrats' decision making: Determining eligibility in the social security disability program," *Public Administration Review* 70, no. 2 (2010).

4.2.3 Causes of political influence at the AAT

The finding that political preferences of decision-makers affect asylum outcomes at the AAT challenges the conventional understanding of decision-making held by the public. As an independent Tribunal, decisions at the AAT should not be determined by political inclinations of the Member, but by the objective application of law to facts. This is fundamental to the rule of law and to the AAT's purpose, which is to provide access to justice for persons aggrieved by a government decision. This section attempts to explain how refugee decisions at the AAT have become politicised. I argue it is due to both the institutional nature of the AAT as an avenue of administrative review (as opposed to judicial review) and also the recent politicisation and securitisation of refugee issues in Australia and globally.

One cause is the design of the AAT. It is a quasi-judicial decision-making body that is controlled by the executive, and is therefore particularly vulnerable to being exposed to political manipulation. From an institutional perspective, the AAT is not insulated from political criticism and manipulation. Unlike the judiciary, the AAT is unable to recommend the criminal prosecution of persons who criticise it.¹⁹¹ Additionally, non-lawyers may be appointed to the Tribunal as Members. The only requirement is that the Member "in the opinion of the Governor-General, has special knowledge or skills relevant to the duties of a ... member."¹⁹² This means that political parties are less constrained in who they may appoint to tribunals than to courts. Outside of institutional protections, the discourse of independence and impartiality that surrounds the judiciary is not as strong or widespread for the AAT. Whilst the media and civil society generally appreciate the importance of an independent judiciary, and are quick to defend the courts from public criticism or political pressure, the same backlash has not occurred for criticism of the AAT.¹⁹³ Politicians may therefore be less hesitant to exert influence over the AAT, as it does not result in a loss of favour in the eyes of voters. The lack of these institutional and cultural

¹⁹¹ The judiciary is protected from criticism via the common law offence of 'contempt by scandalising the court', which allows the prosecution of an individual for 'any act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority.' See also *R v Gray* [1900] 2 QB 36; A. Caillard, "Scandalizing the Court," *Melbourne University Law Review* 14 (1983); Oyiela Litaba, "Does the 'offence' of contempt by scandalising the court have a valid place in the law of modern day Australia?," *Deakin Law Review* 8, no. 1 (2003).

¹⁹² *Administrative Appeals Tribunal Act (Cth)* 1975, s 6(3)(b).

¹⁹³ Note the recent attention received by the AAT since July 2019, which corresponds with the publication of the Callinan Report.

protections, coupled with recognised trends towards the expansion and concentration of executive power,¹⁹⁴ has meant that the AAT is more open politicisation.

Also underpinning the politicisation of refugee decisions at the AAT is the trend towards reframing political discourse on refugees through a paradigm of securitisation and criminalisation.¹⁹⁵ Gale recognises that post 9/11, asylum policy in Australia has been implemented through the lens of ‘border protection’ rather than humanitarian concern.¹⁹⁶ Under this new paradigm, the Australian government is able to justify asylum policies that breach international law and the human rights of detainees, such as offshore detention and boat turn-backs.¹⁹⁷ Van Berlo notes that the implementation of asylum policy is justified using a discourse of sovereignty and crime.¹⁹⁸ For example, ‘Operation Sovereign Borders’, which created a militarised coast guard, is required for “protecting Australia’s borders and national sovereignty against transnational crime.”¹⁹⁹ By reframing refugee issues in language of national security, preventing crime and protecting Australia’s sovereignty, governments are able to implement and justify policies that would otherwise be unpalatable. The high stakes of national security and effectiveness of asylum policy in garnering votes has meant that political parties are prepared to break from traditional norms of privacy and human rights in order to achieve their policy goals.²⁰⁰

¹⁹⁴ See Phil Larkin and John Uhr, "Bipartisanship, partnership and bicameralism in Australia's 'war on terror': forcing limits on the extension of executive power," in *The War on Terror and the Growth of Executive Power?* (Routledge, 2010).

¹⁹⁵ On national security, Richard Devetak, "In fear of refugees: The politics of border protection in Australia," *The International Journal of Human Rights* 8, no. 1 (2004).; On crimmigration, Peter Billings, "Regulating crimmigrants through the 'character test': exploring the consequences of mandatory visa cancellation for the fundamental rights of non-citizens in Australia," *Crime, Law and Social Change* 71, no. 1 (2018).

¹⁹⁶ Peter Gale, "The refugee crisis and fear: Populist politics and media discourse," *Journal of sociology* 40, no. 4 (2004).

¹⁹⁷ See Helen Davidson and Saba Vasefi, "UN body says Australia breached human rights laws and needs to review Migration Act," *The Guardian* (Australia) 2018; Natalie Klein, "Assessing Australia's push back the boats policy under international law: Legality and accountability for maritime interceptions of irregular migrants," *Melb. J. Int'l L.* 15 (2014).

¹⁹⁸ Patrick van Berlo, "Australia's Operation Sovereign Borders: Discourse, Power, and Policy from a Crimmigration Perspective," *Refugee Survey Quarterly* 34, no. 4 (2015).

¹⁹⁹ *Ibid.*, 85.

²⁰⁰ Andrew Lynch, Nicola McGarrity, and George Williams, *Counter-terrorism and beyond: the culture of law and justice after 9/11* (Routledge, 2010); Lisa Burton, Nicola McGarrity, and George Williams, "The extraordinary questioning and detention powers of the Australian Security Intelligence Organisation," *Melb. UL Rev.* 36 (2012); Nicola McGarrity and Jessie Blackburn, "Anti-terrorism laws and human rights," *The Routledge International Handbook of Criminology and Human Rights* (2016).

Returning to the results of this thesis, it appears that a similar phenomenon is occurring in the AAT. The government can justify its politicisation of the appointment process as means of ensuring that decisions of the Department are not overturned, despite its denigrating effect on the fundamental norms of the Westminster system of government (i.e. the separation of powers and the rule of law. From a behavioural perspective, the results also indicate that the reframing of asylum issues has changed the way that Members evaluate competing considerations in deciding claims. The lower overturn rate by Liberal-appointed Members could be explained by their increased emphasis on national security concerns over the humanitarian rights of asylum seekers. As noted above, however, such conclusions would require more specific analysis of the motivations Members' decisions in order to be verified.

4.3 OPPORTUNITIES FOR FURTHER RESEARCH

This thesis opens the opportunities for future research in several ways. First, the finding that decision-making varies significantly between Liberal- and Labor-appointed Members leads to the question of why? Whilst some attempts were made to theorise the cases of high and low overturn rates in this thesis, further research is required. Future investigations could introduce new variables into the Database, including basis of each applicant's claim (e.g. based on gender, ethnicity or religion etc) and the factors considered by each Member in coming to their decision. This would also allow similar cases to be grouped together to more accurately test differences in how the personal characteristics of Members affect case outcomes, without differences in cases skewing the data.

Future research could also collect biographical information on Members, to more accurately indicate their political preferences. The Party Appointing is not a perfect indicator of political ideology. It assumes the appointment process to be highly and reliably politicised. Whilst attempts to find biographical information on the Members were not fruitful (See Appendix 1), recent media investigations have placed public pressure on decision-makers to be transparent in their political inclinations.²⁰¹ It is therefore possible that more biographical data will come to light as judicial bias is questioned by the media and in politics.

²⁰¹ David Hardaker, "The Big Stack; How the goernment stacked the AAT."

The third and most significant area of future investigation is into structural or institutional avenues of political influence. A limitation of this quantitative study is that it only considered the effects of effects of the attitudes of decision-makers and of one policy (New PAM3). The AAT, as a hybrid executive-judicial body, has unique institutional features that make it prone to political influence unlike in judicial contexts. For example, future qualitative research could look into the influence of bureaucratic considerations, such as number of cases finalised, financial performance, total revenue, expenditure, assets and liquidity, which are all required to be reported annually.²⁰² Another possible area of analysis is the effect of the political attitudes of registry and support staff at the AAT. The size and influence of the support staff at the AAT was heavily criticised in the Callinan Report, which stated “[r]egrettably, the Registry staff are more numerous than they could and should be, and their relationship with the Members is unduly managerial, on occasions even overbearing, and not as conducive as it should be to the Members’ independence and efficiency in carrying out their hard duties.”²⁰³ There are, however, significant methodological challenges in measuring the effect of the registry on decision-outcomes, either using quantitative or qualitative methods, that would need to be overcome.

²⁰² *Public Governance, Performance and Accountability Act (Cth) 2013*, s 39(1)(a).

²⁰³ Callinan, *Statutory Review of the Tribunals Amalgamation Act 2015*, 47.

4.4 CONCLUSION

[T]here is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

Montesquieu (1748) *The Spirit of the Laws*, Book XI

Whilst Montesquieu's warning is dramatically phrased, the findings of this study confirm concerns over the fusion of the executive and judicial function in administrative refugee decision-making in Australia. This thesis has used an innovative method in order to measure and prove that political preferences of Members have a statistically significant effect on decision outcomes at the AAT. Given the vulnerability of many asylum seekers this finding should not be taken lightly. This study provides further evidence for the reform of the appointment process at the AAT and for new means of ensuring that political bias does not afflict decisions. Such measures have already been called for in legal circles.²⁰⁴ Beyond this call for reform, however, this thesis has made the following empirical, methodological and theoretical contributions:

From an empirical perspective, this study makes a significant contribution: the research underpinning it has created, for the first time, a comprehensive Database of all refugee cases published by the AAT between 2015 and 2018. Methodologically, it has developed a solution to the recognised problem of gaining reliable and valid information on the influence of political bias in decision making.²⁰⁵ Drawing off studies in the US and adapting them to the context of an Australian Tribunal, this thesis develops a method that is able to compare how Members of different political preferences determine cases.

The analysis of the Database also leads to clear and important findings: Controlling for the effects of the applicant's country of origin and its political status, the gender of the Member, the place the decision was made and the effect of a change in policy, this thesis found that the odds of a Labor-appointed Member overturning a case were 1.46 times higher than those of a Liberal-appointed

²⁰⁴ James Morgan, "Securing the Administrative Appeals Tribunal's independence: Tenure and mechanisms of appointment," *Alternative Law Journal* 43, no. 4 (2018).

²⁰⁵ Tomkinson, "Who are you afraid of and why? Inside the black box of refugee tribunals."

Member. The study also found that whilst Labor- and Liberal-appointed Members determine cases in a similar manner for some regions, other regions (the Middle East in particular) were treated very differently by Members. Finally, analysis of the data constructed for this thesis indicates with a statistically reliable degree of confidence that the gender of the Member and the new PAM3 Policy had no significant effect on decision-outcomes. This Database can be further analysed using additional variables or alternate techniques to give a deeper understanding to asylum decision-making.

The thesis also enhances our theoretical understanding of decision-making. It provides evidence for the attitudinal school of judicial behaviour theory and indicates realist explanations of refugee decision-making may be correct. Additionally, it indicates that phenomenon occurs in Australia and in an administrative tribunal setting.

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Appendices

APPENDIX 1: SAMPLE STUDY OF MEMBERS WITH PARTY LINKS

As noted in chapter 2, other scholars have measured the political attitudes of judges and decision-makers by collecting biographical information and data on their previous work experience. I attempted to conduct similar data in this study, however, was only able to find information on a small handful of Members. These results are presented here.

A thorough investigation of all Members revealed that only the Members noted in Table A below had publicly available evidence of previous political activity. I only recorded biographical information or work experience that had a clear link to either the Liberal or Labor Parties. This included being a member of a Party, working for a Party or running for election for either Party. Interestingly, and despite the author's best efforts to find publicly available information, only evidence of Liberal-appointed Members was found. This is in line with accusations in the media, and indicates that the Liberal Party has used the appointment process to appoint Members with links to the Party. Whilst it is possible that the Labor Party has taken a similar approach, the investigation found no such evidence of ex-Labor Party members sitting at the AAT.

When collating all the decisions made by these Members, it creates a sample set of only 140 cases. The overturn rate for these Members was only 10% (whereas the average was 17.8%, and the average for Labor-appointed appointees was 22.3%). Whilst this sample is too small to draw definite conclusions on how Members with clearly evidenced political attitudes make decisions, it is indicative of ideological decision-making and provides a rationale for further study using biographical data.

In searching for biographical data, I used only publicly available online resources. This primarily involved using Google. My search term was as follows for each Member: “**Member Name*, *Party Appointing*, *Administrative Appeals Tribunal/LinkedIn**.” The primary source of information was news articles.

Table A Members with known associations with Political Parties.

Member Name	Associated with Political Party	Explanation of link to Political Party
Dr Denis Dragovic	Liberal	Failed in bid for Liberal preselection in the Victorian seat of Goldstein. ²⁰⁶
Saxon Rice	Liberal	Served as a Queensland LNP MP for three years before losing seat at the 2015 state election. ²⁰⁷
Brendan Darcy	Liberal	Served as adviser to former Liberal defence minister Kevin Andrews. ²⁰⁸
David McCulloch	Liberal	Worked as a policy adviser to Liberal MP Paul Fletcher and as a staffer to former Liberal immigration minister Amanda Vanstone – and Michael Cooke, who was an adviser to Tony Abbott. ²⁰⁹
Ann Brandon-Baker	Liberal	Scott Morrison's chief of staff during his time as immigration minister. ²¹⁰
Judith Troeth	Liberal	Was a Liberal Senator for Victoria from 1993 – 2011. ²¹¹
Justin Meyer	Liberal	Was an adviser to former Victorian Liberal premiers Ted Baillieu and Dennis Napthine. Electoral records show that he donated more than \$11,000 to the Liberal party in 2010-11. ²¹²
Nicholas McGowan	Liberal	Ran as the Liberal candidate for the Victorian seat of Jagajaga in 2013. ²¹³

²⁰⁶ <https://www.smh.com.au/politics/federal/tim-wilson-heading-to-canberra-after-winning-safe-liberal-seat-of-goldstein-20160319-gnmcmc.html>

²⁰⁷ <https://www.parliament.qld.gov.au/members/former/bio?id=2282839184>

²⁰⁸ <https://www.buzzfeed.com/markdistefano/a-brandis-stack>

²⁰⁹ <https://www.theaustralian.com.au/nation/immigration/liberals-order-purge-of-refugee-review-body/news-story/0e931937e67011a123897ea235461bb9>

²¹⁰ <https://www.theaustralian.com.au/news/tony-abbott-lures-more-women-to-join-peta-credlin-as-political-advisers/news-story/8f1d173fe5dd2e0975a31c59dab522fe>

²¹¹ https://www.aph.gov.au/Senators_and_Members/Parliamentarian?MPID=GX5

²¹² <https://periodicdisclosures.aec.gov.au>Returns/48/OMOC2.pdf>

²¹³ <https://www.smh.com.au/politics/federal/mammoth-task-for-nick-mcgowan-to-topple-jenny-macklin-in-jagajaga-20130906-2t9hh.html>

APPENDIX 2: REGIONAL DECISION RATES

Middle East

Table B Layered cross-tabulation showing the overturn rates for Labor- and Liberal-appointed Members for Middle Eastern Countries, $N > 30$.

Country				Affirmed	Overtured	Total
Afghanistan	Party Appointing	Liberal	Count	5	8	13
			%	38.5%	61.5%	100.0%
		Labor	Count	16	44	60
			%	26.7%	73.3%	100.0%
	Total		Count	21	52	73
			%	28.8%	71.2%	100.0%
Egypt	Party Appointing	Liberal	Count	28	14	42
			%	66.7%	33.3%	100.0%
		Labor	Count	14	10	24
			%	58.3%	41.7%	100.0%
	Total		Count	42	24	66
			%	63.6%	36.4%	100.0%
Iran	Party Appointing	Liberal	Count	13	13	26
			%	50.0%	50.0%	100.0%
		Labor	Count	16	3	19
			%	84.2%	15.8%	100.0%
	Total		Count	29	16	45
			%	64.4%	35.6%	100.0%
Iraq	Party Appointing	Liberal	Count	7	12	19
			%	36.8%	63.2%	100.0%
		Labor	Count	11	15	26
			%	42.3%	57.7%	100.0%
	Total		Count	18	27	45
			%	40.0%	60.0%	100.0%
Lebanon	Party Appointing	Liberal	Count	31	9	40
			%	77.5%	22.5%	100.0%
		Labor	Count	27	2	29
			%	93.1%	6.9%	100.0%
	Total		Count	58	11	69
			%	84.1%	15.9%	100.0%
Total	Party Appointing	Liberal	Count	84	56	140
			%	60.0%	40.0%	100.0%
		Labor	Count	84	74	158
			%	53.2%	46.8%	100.0%
	Total		Count	168	130	298
			%	56.4%	43.6%	100.0%

Asia

Table C Layered cross-tabulation showing the overturn rates for Labor- and Liberal-appointed Members for Middle Eastern Countries, $N > 30$.

Country				Affirmed	Overtured	Total
Bangladesh	Party Appointing	Liberal	Count	69	15	84
			%	82.1%	17.9%	100.0%
	Labor	Count	33	10	43	
		%	76.7%	23.3%	100.0%	
Total		Count	102	25	127	
		%	80.3%	19.7%	100.0%	
China	Party Appointing	Liberal	Count	183	13	196
			%	93.4%	6.6%	100.0%
	Labor	Count	84	4	88	
		%	95.5%	4.5%	100.0%	
Total		Count	267	17	284	
		%	94.0%	6.0%	100.0%	
India	Party Appointing	Liberal	Count	112	6	118
			%	94.9%	5.1%	100.0%
	Labor	Count	45	5	50	
		%	90.0%	10.0%	100.0%	
Total		Count	157	11	168	
		%	93.5%	6.5%	100.0%	
Indonesia	Party Appointing	Liberal	Count	22	2	24
			%	91.7%	8.3%	100.0%
	Labor	Count	18	1	19	
		%	94.7%	5.3%	100.0%	
Total		Count	40	3	43	
		%	93.0%	7.0%	100.0%	
Malaysia	Party Appointing	Liberal	Count	273	14	287
			%	95.1%	4.9%	100.0%
	Labor	Count	118	16	134	
		%	88.1%	11.9%	100.0%	
Total		Count	391	30	421	
		%	92.9%	7.1%	100.0%	
Nepal	Party Appointing	Liberal	Count	42	0	42
			%	100.0%	0.0%	100.0%
	Labor	Count	42	1	43	
		%	97.7%	2.3%	100.0%	
Total		Count	84	1	85	
		%	98.8%	1.2%	100.0%	
Pakistan	Party Appointing	Liberal	Count	75	23	98
			%	76.5%	23.5%	100.0%
	Labor	Count	22	24	46	
		%	47.8%	52.2%	100.0%	
Total		Count	97	47	144	

			%	67.4%	32.6%	100.0%
Sri Lanka	Party Appointing	Liberal	Count	80	14	94
			%	85.1%	14.9%	100.0%
	Labor	Count	54	12	66	
		%	81.8%	18.2%	100.0%	
Total	Count	134	26	160		
			%	83.8%	16.3%	100.0%
Vietnam	Party Appointing	Liberal	Count	28	7	35
			%	80.0%	20.0%	100.0%
	Labor	Count	21	13	34	
		%	61.8%	38.2%	100.0%	
Total	Count	49	20	69		
			%	71.0%	29.0%	100.0%
Total	Party Appointing	Liberal	Count	884	94	978
			%	90.4%	9.6%	100.0%
	Labor	Count	437	86	523	
		%	83.6%	16.4%	100.0%	
Total	Count	1321	180	1501		
			%	88.0%	12.0%	100.0%

APPENDIX 3: FREEDOM HOUSE SCORE

Method

To calculate the average Freedom House Score, I used the Freedom House data, which presents each countries' score on Civil and Political rights from 1973-2018. The raw Freedom House Data is publicly available online.²¹⁴ I then added the Civil and Political rights scores for the years in question (2015-2018) and took their average. This was the score used in the regression. The scores for each country are presented below.

Table of Scores

Table D Average Freedom House Scores for each country in the database, as calculated using the method above.

<u>Country</u>	<u>Freedom House Score Average</u>
Afghanistan	5.875
Albania	3
Algeria	5.5
Bahrain	6.5
Bangladesh	4
Botswana	2.5
Brazil	2
Burma (Myanmar)	5.375
Burundi	6.25
Cambodia	5.5
Cameroon	6
Chad	6.5
China	6.5
Colombia	3.25
Cote D'Ivoire	4.125
Cuba	6.5
Czech Republic	1
Democratic Republic of Korea	2
Egypt	5.625
El Salvador	2.5
Eritrea	7
Estonia	1
Ethiopia	6.375
Fiji	3.25

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<https://freedomhouse.org/sites/default/files/Country%20and%20Territory%20Ratings%20and%20Statuses%20FIW1973-2018.xlsx>

Finland	1
Georgia	3
Germany	1
Ghana	1.5
Greece	2
India	2.5
Indonesia	3
Iraq	5.625
Ireland	1
Israel	1.625
Italy	1
Japan	1
Jordan	5.25
Kenya	4
Korea, Democratic People's Republic of	7
Kyrgyzstan	5
Laos, Peoples Democratic Rep	6.5
Lebanon	4.625
Liberia	3.375
Libya	6.25
Macedonia, Fmr Yugo Rep of	3.5
Malawi	3.125
Malaysia	4
Mauritius	1.5
Mexico	3
Mongolia	1.5
Nepal	3.5
New Zealand	1
Nigeria	4.25
Pakistan	4.5
Palestinian Terr. (W.Bank/Gaza)	6
Papua New Guinea	3.25
Peru	2.5
Philippines	3
Poland	1.25
Russian Federation	6.25
Samoa	2
Saudi Arabia	7
Serbia	2.25
Sierra Leone	3
Singapore	4
Solomon Islands	2.75
South Africa	2

South Sudan	6.75
Sri Lanka	4
Stateless	
Sudan	7
Sweden	1
Syria	7
Taiwan	1.25
Tajikistan	6.375
Thailand	5.5
Tonga	2
Turkey	4.25
Uganda	5.375
Ukraine	3
United Kingdom	1
United States of America	1.25
Uzbekistan	7
Vanuatu	2
Venezuela	5.25
Vietnam	6
Zimbabwe	5.25

APPENDIX 4: OVERALL COUNTRY OVERTURN RATES

Table E: Universal data on overturn rates for all decisions between mid-2015 to mid-2019. This data has been collated from data published by the AAT online, and also through data collected through correspondence with the AAT.

	2015-2016		2016-2017		2017-2018		2018-2019		TOTAL AFFIRMED	TOTAL ASIDE	TOTAL	Overturn Rate
	Set Aside	Affirmed	Set Aside	Affirmed	Set Aside	Affirmed	Set Aside	Affirmed				
<i>Afghanistan</i>	93	46	22	4	15	7	13	3	143	60	203	70.44%
<i>Albania</i>	0	5	0	7	0	2	2	5	2	19	21	9.52%
<i>Algeria</i>	1	0	0	1	0	2	0	2	1	5	6	16.67%
<i>Bahrain</i>	0	0	1	1	0	0	0	0	1	1	2	50.00%
<i>Bangladesh</i>	23	175	27	107	5	21	12	78	67	381	448	14.96%
<i>Botswana</i>	0	0	0	0	0	1	0	0	0	1	1	0.00%
<i>Brazil</i>	0	3	0	3	0	3	0	0	0	9	9	0.00%
<i>Myanmar</i>	2	8	4	2	1	0	5	3	12	13	25	48.00%
<i>Burundi</i>	3	1	2	1	0	1	0	0	5	3	8	62.50%
<i>Cambodia</i>	0	4	3	3	1	2	6	6	10	15	25	40.00%
<i>Cameroon</i>	0	1	4	5	1	0	0	0	5	6	11	45.45%
<i>Chad</i>	0	0	0	2	0	0	1	0	1	2	3	33.33%
<i>China</i>	48	386	47	349	15	278	16	253	126	1266	1392	9.05%
<i>Colombia</i>	1	5	4	1	2	5	0	1	7	12	19	36.84%
<i>Congo (DRC)</i>	0	1	0	1	2	1	4	3	6	6	12	50.00%
<i>Cote D'Ivoire</i>	0	0	0	0	0	1	0	0	0	1	1	0.00%
<i>Cuba</i>	0	0	0	1	0	0	0	0	0	1	1	0.00%
<i>Czech Republic</i>	0	0	0	0	0	1	0	0	0	1	1	0.00%
<i>North Korea</i>	0	0	0	0	0	0	0	3	0	3	3	0.00%
<i>Egypt</i>	24	58	22	59	8	20	4	3	58	140	198	29.29%
<i>El Salvador</i>	0	1	1	0	0	0	0	5	1	6	7	14.29%
<i>Eritrea</i>	0	0	1	0	3	0	1	0	5	0	5	100.00%
<i>Estonia</i>	0	1	0	0	0	1	0	0	0	2	2	0.00%
<i>Ethiopia</i>	3	7	17	1	7	2	4	2	31	12	43	72.09%
<i>Fiji</i>	4	108	12	83	2	50	2	79	20	320	340	5.88%
<i>Finland</i>	0	0	0	0	0	0	0	1	0	1	1	0.00%
<i>Georgia</i>	0	4	0	1	0	3	0	0	0	8	8	0.00%

<i>Germany</i>	0	1	0	0	0	0	0	0	2	0	0	0	0	0	0	0	0	3	3	0.00%
<i>Ghana</i>	0	5	0	0	6	0	0	0	9	2	5	2	2	25	27	7.41%				
<i>Greece</i>	0	0	0	0	0	0	0	0	0	0	5	0	5	5	5	0.00%				
<i>India</i>	14	296	15	184	9	85	14	138	52	703	755	6.89%								
<i>Indonesia</i>	3	36	4	49	2	20	0	23	9	128	137	6.57%								
<i>Iran</i>	78	79	81	73	17	30	26	16	202	198	400	50.50%								
<i>Iraq</i>	20	10	18	16	12	18	26	17	76	61	137	55.47%								
<i>Ireland</i>	0	3	0	6	0	3	0	1	0	13	13	0.00%								
<i>Israel</i>	0	0	0	3	0	1	0	2	0	6	6	0.00%								
<i>Italy</i>	1	1	0	1	0	2	0	1	1	5	6	16.67%								
<i>Japan</i>	0	1	0	2	0	0	0	0	0	3	3	0.00%								
<i>Jordan</i>	4	17	5	9	1	9	0	5	10	40	50	20.00%								
<i>Kenya</i>	5	6	1	7	1	2	1	6	8	21	29	27.59%								
<i>South Korea</i>	0	16	0	14	0	9	1	16	1	55	56	1.79%								
<i>Kyrgyzstan</i>	1	2	0	0	1	0	0	1	2	3	5	40.00%								
<i>Laos</i>	0	1	0	0	1	0	0	0	0	1	2	50.00%								
<i>Lebanon</i>	8	62	17	64	2	18	3	27	30	171	201	14.93%								
<i>Liberia</i>	1	2	0	1	2	0	0	2	3	5	8	37.50%								
<i>Libya</i>	9	0	7	0	7	0	4	2	27	2	29	93.10%								
<i>Macedonia</i>	0	1	0	0	0	0	0	1	0	2	2	0.00%								
<i>Malawi</i>	0	0	0	0	1	0	0	0	1	0	1	100.00%								
<i>Malaysia</i>	9	417	44	1894	71	2000	37	773	161	5084	5245	3.07%								
<i>Mauritius</i>	0	1	0	2	0	0	0	3	0	6	6	0.00%								
<i>Mexico</i>	2	0	0	0	0	0	0	0	2	0	2	100.00%								
<i>Mongolia</i>	0	6	0	14	0	1	4	7	4	28	32	12.50%								
<i>Nepal</i>	1	89	2	110	3	33	1	24	7	256	263	2.66%								
<i>New Zealand</i>	0	1	0	4	1	0	0	1	1	6	7	14.29%								
<i>Nigeria</i>	7	13	3	17	4	4	2	9	16	43	59	27.12%								
<i>Pakistan</i>	59	138	85	208	16	38	41	82	201	466	667	30.13%								
<i>Palestinian Territories</i>	0	0	0	0	1	2	0	0	1	2	3	33.33%								
<i>Papua New Guinea</i>	3	14	11	19	8	23	3	7	25	63	88	28.41%								
<i>Peru</i>	0	3	0	3	0	0	2	2	2	8	10	20.00%								
<i>Philippines</i>	1	10	4	10	1	9	1	0	7	29	36	19.44%								
<i>Poland</i>	0	0	0	1	0	0	0	2	0	3	3	0.00%								

<i>Russian Federation</i>	1	5	0	2	0	1	1	1	3	2	11	13	15.38%
<i>Samoa</i>	0	0	0	2	0	1	0	0	0	0	3	3	0.00%
<i>Saudi Arabia</i>	0	1	0	5	0	4	1	1	1	1	11	12	8.33%
<i>Serbia</i>	0	0	0	1	0	0	0	0	0	0	1	1	0.00%
<i>Sierra Leone</i>	2	1	0	0	1	1	1	0	0	4	2	6	66.67%
<i>Singapore</i>	0	0	0	1	0	0	0	1	1	0	2	2	0.00%
<i>Solomon Islands</i>	1	1	3	3	0	6	0	3	3	4	13	17	23.53%
<i>South Africa</i>	1	2	0	4	0	6	1	3	3	2	15	17	11.76%
<i>South Sudan</i>	0	0	0	0	1	0	1	0	0	2	0	2	100.00%
<i>Sri Lanka</i>	100	388	30	117	14	39	20	35	164	579	743	22.07%	
<i>Stateless</i>	15	17	12	15	9	7	19	6	55	45	100	55.00%	
<i>Sudan</i>	0	0	2	0	1	3	3	1	6	4	4	10	60.00%
<i>Sweden</i>	0	0	0	0	0	0	0	0	0	0	0	0	0.00%
<i>Syria</i>	1	2	2	0	0	0	0	0	0	3	2	5	60.00%
<i>Taiwan</i>	0	2	0	18	0	68	1	28	1	116	117	0.85%	
<i>Tajikistan</i>	0	0	0	0	0	1	0	0	0	1	1	1	0.00%
<i>Thailand</i>	0	4	0	6	2	16	1	3	3	29	32	9.38%	
<i>Tonga</i>	0	15	0	10	0	6	0	2	0	33	33	0.00%	
<i>Turkey</i>	9	11	7	13	0	12	4	10	20	46	66	30.30%	
<i>Uganda</i>	0	0	3	1	1	2	0	0	4	3	7	57.14%	
<i>Ukraine</i>	0	7	0	4	1	10	2	5	3	26	29	10.34%	
<i>United Kingdom</i>	0	0	0	2	0	6	0	5	0	13	13	0.00%	
<i>United States of America</i>	0	1	0	1	0	1	0	1	0	4	4	0.00%	
<i>Uzbekistan</i>	1	0	1	1	0	1	0	0	2	2	4	50.00%	
<i>Vanuatu</i>	0	0	0	0	0	0	0	1	0	1	1	0.00%	
<i>Venezuela</i>	0	2	2	0	0	0	2	0	4	2	6	66.67%	
<i>Vietnam</i>	9	41	14	125	2	59	13	30	38	255	293	12.97%	
<i>Zambia</i>	1	3	0	1	0	4	0	0	1	8	9	11.11%	
<i>Zimbabwe</i>	8	13	4	16	11	2	2	2	25	33	58	43.10%	

APPENDIX 5: ADDITIONAL METHODOLOGICAL CONSIDERATIONS AND SAMPLE OF DATA

The method for collating the database is described in detail in section 2.3. In addition to that description the following considerations should be noted.

Collecting Cases from AustLii

The AustLii database enables you to search cases from particular Tribunals and Courts. In my search, I included the following parameters:

- Jurisdiction: Commonwealth
- Court/Tribunal: Administrative Appeals Tribunal
- Year: 2015-2018
- Search Term: ‘*Refugee*’ in *Case Name*

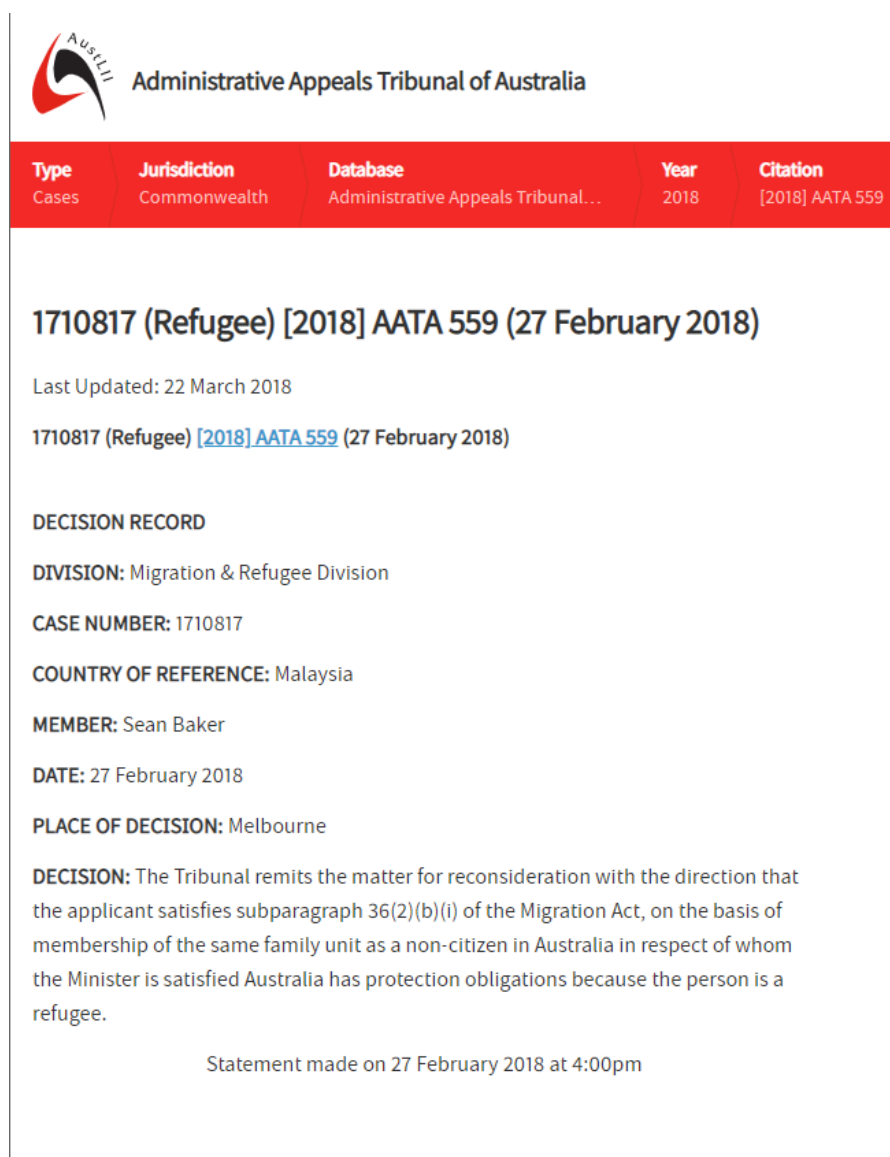
Each refugee case published on AustLii has the same naming convention, which includes the word ‘Refugee’ in the Case Name. For example: “*1710817 (Refugee) [2018] AATA 559*”. Therefore, this search string allowed me to collect all refugee decisions at the AAT between 2015 and 2019. The URLs to all the cases were copied into an Excel spreadsheet. Then, a scraping code written on Google Chrome used the list of URLs to generate an additional spreadsheet of the following elements of each decision:

(See Figure A for an example of a case on AustLii)

- Case Number
- Country of Reference
- Member
- Date
- Place of Decision
- Decision

However, as each Member entered the information differently (especially for the ‘Decision’ section), all cases had to be checked by hand, to ensure the coding was reliable and consistent.

Figure A Screenshot of an example of a refugee case as it appears on AustLii. <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2018/559.html>



Administrative Appeals Tribunal of Australia

Type	Jurisdiction	Database	Year	Citation
Cases	Commonwealth	Administrative Appeals Tribunal...	2018	[2018] AATA 559

1710817 (Refugee) [2018] AATA 559 (27 February 2018)

Last Updated: 22 March 2018

1710817 (Refugee) [\[2018\] AATA 559](#) (27 February 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1710817

COUNTRY OF REFERENCE: Malaysia

MEMBER: Sean Baker

DATE: 27 February 2018

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies subparagraph 36(2)(b)(i) of the Migration Act, on the basis of membership of the same family unit as a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee.

Statement made on 27 February 2018 at 4:00pm

Appointing Party of Each Member

In order to determine the Appointing Party for each Member, I used the AAT Annual Reports. Each report includes an Appendix listing all Members and the year they were initially appointed. By cross-referencing this information with the Political Party in power in power for that year, I was able to determine which Party appointed each Member.

There were, however, several cases in which the Member sat on the Refugee Review Tribunal (**RRT**) before being appointed to the Administrative Appeals Tribunal. (The Tribunals were merged in July 2015, at which point all Members were freshly appointed.) For these Members, I took the Party that initially appointed them to the RRT.

Sample Data

The following Table presents 50 randomly selected cases from the Database, as an example of how the raw data appeared. Access to the full Database is available on request from the author.

Table F. Random sample of raw data, as collected after the scraping, checking and coding process. The coding guide is as follows: Gender (Male =

	<u>Year</u>	<u>Country</u>	<u>Country Overturn Rate</u>	<u>Case number</u>	<u>Member</u>	<u>Gender</u>	<u>Party Appointing</u>	<u>Date</u>	<u>Place</u>	<u>Decision</u>	<u>New PAM3</u>	<u>Freedom house Score Average</u>
1.	2015	China	0.090517	1414153	Antoinette Younes	0	0	17-Jul-15	5	0	0	6.5
2.	2015	Sri Lanka	0.220727	1419662	Mara Moustafine	0	0	21-Jul-15	5	0	0	4
3.	2015	Nepal	0.026616	1412281	David McCulloch	1	0	28-Jul-15	5	0	0	3.5
4.	2015	Afghanistan	0.704433	1408815	Christopher Smolicz	1	1	31-Aug-15	1	1	0	5.875
5.	2015	Egypt	0.292929	1416067	Antoinette Younes	0	0	21-Sep-15	5	0	0	5.625
6.	2015	Vietnam	0.129693	1413097	Sean Baker	1	1	5-Oct-15	3	0	0	6
7.	2015	Sri Lanka	0.220727	1310061	Nicole Burns	0	0	30-Nov-15	3	1	0	4
8.	2015	China	0.090517	1419093	Penelope Hunter	0	0	22-Dec-15	5	0	0	6.5
9.	2016	Afghanistan	0.704433	1313821	Shahyar Roushan	1	0	7-Jan-16	5	0	0	5.875
10.	2016	China	0.090517	1419957	Tania Flood	0	0	18-Mar-16	5	0	0	6.5
11.	2016	India	0.068874	1504601	Nicola Findson	0	0	29-Mar-16	4	0	0	2.5
12.	2016	Malaysia	0.030696	1602987	Sean Baker	1	1	10-May-16	3	0	0	4
13.	2016	Bangladesh	0.149554	1421124	Gabrielle Cullen	0	0	2-Jun-16	5	0	0	4
14.	2016	Fiji	0.058824	1414679	Louise Nicholls	0	0	3-Jun-16	3	0	0	3.25
15.	2016	China	0.090517	1500275	David McCulloch	1	0	7-Jun-16	5	0	0	6.5
16.	2016	Sudan	0.6	1420089	David Corrigan	1	1	4-Jul-16	3	1	0	7
17.	2016	Egypt	0.292929	1502364	Antoinette Younes	0	0	19-Aug-16	5	0	0	5.625
18.	2016	Nepal	0.026616	1502004	Suhad Kamand	0	1	21-Sep-16	5	0	0	3.5
19.	2016	China	0.090517	1415435	Josephine Kelly	0	1	17-Oct-16	5	0	0	6.5
20.	2016	Bahrain	0.5	1502751	James Silva	1	0	25-Oct-16	5	0	0	6.5
21.	2016	Bangladesh	0.149554	1507912	Tania Flood	0	0	2-Dec-16	5	1	0	4
22.	2016	Indonesia	0.065693	1505429	Louise Nicholls	0	0	9-Dec-16	5	0	0	3

23.	2016	Pakistan	0.301349	1507469	Bruce Henry	1	1	1	21-Dec-16	2	1	0	4.5
24.	2017	Lebanon	0.149254	1502863	Rodger Shanahan	1	1	1	3-Jan-17	5	0	0	4.625
25.	2017	China	0.090517	1503666	Rachel Homan	0	1	1	2-Feb-17	5	0	0	6.5
26.	2017	India	0.068874	1503945	Meena Sripathy	0	1	1	16-Feb-17	5	0	0	2.5
27.	2017	China	0.090517	1505644	Linda Holub	0	0	0	6-Mar-17	5	0	0	6.5
28.	2017	Pakistan	0.301349	1512111	Rachel Westaway	0	0	0	7-Mar-17	3	1	0	4.5
29.	2017	Bangladesh	0.149554	1509778	Gabrielle Cullen	0	0	0	22-Mar-17	5	0	0	4
30.	2017	Taiwan	0.008547	1510345	Christine Cody	0	1	1	7-Jun-17	5	0	0	1.25
31.	2017	Albania	0.095238	1600397	Christopher Smolicz	1	1	1	16-Jun-17	1	0	0	3
32.	2017	Egypt	0.292929	1606196	Sean Baker	1	1	1	20-Jul-17	3	0	1	5.625
33.	2017	Kenya	0.275862	1504524	Jane Marquard	0	0	0	25-Jul-17	5	1	1	4
34.	2017	Malaysia	0.030696	1615398	K. Chapman	1	0	0	9-Aug-17	2	0	1	4
35.	2017	Afghanistan	0.704433	1606800	Christopher Smolicz	1	1	1	15-Aug-17	1	1	1	5.875
36.	2017	Malaysia	0.030696	1706712	Tania Flood	0	0	0	30-Aug-17	5	0	1	4
37.	2017	Malaysia	0.030696	1609589	Rachel Westaway	0	0	0	28-Sep-17	3	0	1	4
38.	2017	Malaysia	0.030696		Tania Flood	0	0	0	6-Oct-17	5	1	1	4
39.	2017	Palestinian Territories	0.333333	1512002	Denis Dragovic	1	0	0	9-Oct-17	3	0	1	6
40.	2017	Sri Lanka	0.220727	1616365	Nicole Burns	0	0	0	20-Oct-17	3	1	1	4
41.	2018	Nepal	0.026616	1517190	Linda Symons	0	0	0	15-Jan-18	5	0	1	3.5
42.	2018	China	0.090517	1601716	Melissa McAdam	0	1	1	9-Feb-18	5	0	1	6.5
43.	2018	Iran	0.505	1700999	Denis Dragovic	1	0	0	18-Apr-18	3	0	1	6
44.	2018	China	0.090517	1515452	David McCulloch	1	0	0	30-Apr-18	5	0	1	6.5
45.	2018	Algeria	0.166667	1509054	Louise Nicholls	0	0	0	25-Jun-18	3	0	1	5.5
46.	2018	Malaysia	0.030696	1719037	Paul Noonan	1	0	0	22-Aug-18	3	0	1	4
47.	2018	Bangladesh	0.149554	1511735	Angela Cranston	0	0	0	17-Sep-18	5	0	1	4
48.	2018	Pakistan	0.301349	1514165	Luke Hardy	1	1	1	16-Oct-18	5	0	1	4.5
49.	2018	Iraq	0.554745	1611773	Roslyn Smidt	0	0	0	5-Nov-18	5	1	1	5.625
50.	2018	China	0.090517	1613423	Roslyn Smidt	0	0	0	10-Dec-18	5	0	1	6.5

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