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A MASTERCLASS IN EVADING THE RULE OF LAW: THE SAGA OF SCOTT MORRISON AND TEMPORARY PROTECTION VISAS

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For over a year, the then Minister for Immigration successfully avoided granting permanent protection to refugees who came by boat. His newly elected government had promised to re-introduce a temporary protection regime, but came to power without the numbers to pass necessary legislation. In order to achieve his policy objective, the Minister chose to engage in a variety of legally dubious tactics to forestall and delay granting permanent protection, as required by the law. In doing so, the Minister navigated skilfully through the holes in Australia's institutional frameworks designed to protect the rule of law and Australia's constitutional arrangements. The saga of Scott Morrison and temporary protection visas is therefore a telling story about the fragility of the rule of law in Australia and demonstrates how a determined executive can upend the constitutional order.

I INTRODUCTION

In October 2013, the then Minister for Immigration and Border Protection, Scott Morrison, asked his Department for advice on a problem. The new Coalition Government had come to power promising that refugees who came by boat would now only be entitled to temporary protection.[1] There was, however, something in

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Morrison's way – the law. There were already 7,600 unauthorised maritime arrivals ('UMAs') who had claims in progress.[2] The *Migration Act 1958* (Cth) ('*Migration Act*') required that the Minister had to consider those claims and, if the person met the visa criteria, grant the person a protection visa.[3] Although the Government had won the election in September 2013, it could not pass legislation immediately. The newly elected senators would not be sworn in until July 2014.[4] Before 1 July 2014, Labor and the Greens (both of which opposed temporary protection) had 40 votes in the Senate, sufficient to block any legislation. Even after 1 July, the balance of power would be held by independents and minority parties.[5]

Consequently, Morrison had a significant political problem on his hands. He had promised that, under his watch, no refugee who had come by boat would get permanent protection. Yet, if he waited until the following July to pass legislation to enable this, under the current law he might be compelled to grant permanent protection to thousands of people. The question Morrison posed to his Department, therefore, was: how far can a Minister go without legislative authority? And for how long? What happened next is a case study on how to evade the rule of law. It is a saga in which the then Minister for Immigration[6] manoeuvred through the gaping holes in our constitutional and legal arrangements to obstruct the granting of permanent protection visas.

The Minister succeeded almost entirely in achieving his policy objective. Legislation enabling a temporary protection visa regime came into effect on 15

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1 Liberal Party of Australia and The Nationals, 'The Coalition's Policy to Clear Labor's 30,000 Border Failure Backlog' (Report, August 2013) <https://www.aph.gov.au/~/media/Committees/fapa_ctte/estimates/bud_1415/pmc/pm34_att03.pdf>. In October 1999, the Howard Coalition Government introduced temporary protection visas for those who arrived irregularly by boat. This policy was abolished by the Rudd Labor Government in May 2008 and existing temporary protection visas were converted to permanent protection visas: Elibritt Karlsen and Janet Phillips, 'Developments in Australian Refugee Law and Policy: The Abbott and Turnbull Coalition Governments (2013–2016)' (Research Paper, Parliamentary Library, Parliament of Australia, 18 September 2017) 27. For most of the rest of Australia's history, refugees were granted permanent protection. For a detailed history of temporary protection in Australia see Mary Crock and Kate Bones, 'Australian Exceptionalism: Temporary Protection and the Rights of Refugees' (2015) 16(2) *Melbourne Journal of International Law* 522.

2 Department of Immigration and Border Protection (Cth), Submission No SM2013/03183 to the Minister, *Transitional Arrangements for Current PPV Applicants* (10 October 2013) <https://www.abc.net.au/res/sites/news-projects/narrative-cabinet-files/pdf/4709710b-4945-4c0a-bebc-3ad6519c36f4.pdf> ('*Transitional Arrangements for Current PPV Applicants*').

3 *Migration Act 1958* (Cth) ss 46 (must consider), 65 (must grant) ('*Migration Act*').

4 *Australian Constitution* s 13.

5 Martin Lumb, 'Composition of the 44th Parliament' (Research Paper, Parliamentary Library, Parliament of Australia, December 2013) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook44p/Composition44th>. Thirty-three Coalition Senators were elected. Twenty-six senators were elected from the Australian Labor Party and nine from the Greens. There were eight senators elected from minor parties or independents.

6 Formally the Minister for Immigration and Border Protection. For convenience, he is referred to as the Minister for Immigration throughout.

December 2014,[7] more than a year after the election of the Coalition Government. In this time, only one person who came by boat was granted permanent protection.[8] The most immediate consequence of the Minister's actions was to place thousands of vulnerable people into an indefinite limbo, a situation prolonged by Morrison's surprise election as Prime Minister in 2019. This article presents the sobering story of these events, revealing the ease with which the rule of law in Australia can be evaded and eroded.

A The Rule of Law

To understand the story, some brief explanation of the rule of law and our constitutional arrangements is needed. The rule of law has been defined and debated endlessly, but as Martin Krygier persuasively argues, the concept is best understood as a partial solution to the problem of arbitrary exercise of power.[9] The arbitrary exercise of power is a problem because it 'threatens the freedom, dignity and security of the lives of all who are subject to it'.[10] Krygier identifies three distinct, overlapping, senses in which power can be arbitrary. First, power can be arbitrary in that it is 'unlimited', because the person who holds the power is not accountable to 'anything other than their own will or pleasure'.[11] This state of tyranny has historically been the main meaning of arbitrary power.

The second sense in which power can be arbitrary is where power is 'unruly', because those affected 'cannot know, predict, understand or comply' with the rules set by those holding power.[12] For example, a retrospective law is unfair because an affected person cannot know or comply with the law. Theories that list formal properties of the rule of law typically focus on this aspect of arbitrary power. Most famously, Lon Fuller specifies that law must be general, public, prospective, clear, consistent, possible to obey, relatively stable over time and administered in a manner congruent with its content.[13]

The third sense in which power can be arbitrary is where those affected by law are not given a chance to be heard, or to inform or affect the exercise of power over them.[14]

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

8 Karen Barlow, 'Asylum Seeker Lawyer David Manne Hopes Permanent Protection Visa Granted for Teenage Stowaway Has Set Precedent', *ABC News* (online, 22 July 2014) <http://www.abc.net.au/news/2014-07-22/visa-for-teen-stowaway-may-have-set-precedent-says-lawyer/5614746>.

9 Martin Krygier, 'The Rule of Law: Pasts, Presents, and Two Possible Futures' (2016) 12(1) *Annual Review of Law and Social Science* 199.

10 Martin Krygier, 'On the Rule of Law: What It Is, Why It Matters, and What Threatens It', *The Monthly* (Blog Post, 20 August 2015) <https://www.themonthly.com.au/blog/martin-krygier/2015/20/2015/1440049152/rule-law>.

11 Krygier, 'The Rule of Law: Pasts, Presents, and Two Possible Futures' (n 9) 203.

12 Ibid 204.

13 Lon L Fuller, *The Morality of Law* (Yale University Press, 1967) 39.

14 Krygier, 'The Rule of Law: Pasts, Presents, and Two Possible Futures' (n 9) 204. Krygier sees this as encompassing the procedural elements of the rule of law that are emphasised by Jeremy Waldron, such as

This case study involves the use of arbitrary power in all three senses. The augurs of tyranny are strong, as the Minister exercises enormous discretionary powers and circumvents the laws that apply to him. Power is also exercised in an 'unruly' way, with laws that are retrospective in effect, laws that change constantly, and laws that are not administered in a manner congruent with their content. Finally, these laws and policies go beyond merely neglecting the voices of those affected, and instead seek to suppress those voices deliberately. The Minister's approach can be draconian precisely because refugees are without a voice in Australia's political system. They are defined by the law as 'unlawful',[15] and their presence in Australia is deeply resented. In a profound sense, the laws deny refugees their dignity as human beings, rendering them invisible and powerless in the process that will determine their fates.

B Constitutional Theory and Practice

This case study also reveals a disconnect between constitutional theory and practice. The *Commonwealth Constitution* sets out clearly the constitutional theory, in its three separate chapters identifying the legislative, executive and judicial power of the Commonwealth. The *Constitution* vests legislative power in the Australian Parliament, legitimised through the election of its members as representatives of the people. Executive power has both statutory and non-statutory sources but in either case can be constrained by the legislature. Finally, the courts are given the role of 'resolving disputes about the limits of official power'.[16] Importantly, this includes the conferral by the *Constitution* on the High Court of jurisdiction in cases where 'a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth', meaning that the Court can ensure the executive branch of government obeys the law.[17]

In Australia, as in the United Kingdom, the legislature and the executive are 'fused' because the government is determined by the composition of the lower House of Parliament. The main mechanism for ensuring the accountability of this political branch of the executive is through the Westminster system of responsible government. Under this system, ministers must be members of Parliament, and are accountable to Parliament through mechanisms such as Question Time.

At the heart of this case study is a tussle between the executive and the parliament. Under the *Constitution*, the executive is subordinate to the Parliament. Its powers are confined by the laws of Parliament, as well as by the *Constitution*. This reflects both the democratic mandate of Parliament and the rule of law. Yet

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a hearing by an impartial tribunal, a right to representation, a right to confront witnesses, and a right to hear reasons and to appeal: see, eg, Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' (2011) 50 *Nomos* 3.

15 *Migration Act 1958* (Cth) s 14.

16 Robert French, 'Rights and Freedoms and the Rule of Law' (2017) 13(3) *Judicial Review* 261, 264.

17 *Australian Constitution* s 75(v). According to the High Court, section 75(v) provides a textual basis for the proposition that the *Constitution* is premised on the rule of law: Jason Donnelly, 'Utilisation of National Interest Criteria in the *Migration Act 1958* (Cth): A Threat to Rule of Law Values?' (2017) 7(1) *Victoria University Law and Justice Journal* 93, 100 and cases therein cited.

there is a competing constitutional conception, where the government claims a superior mandate to Parliament. This is based on the claim that its election reflects the popular will, and that in a democracy, the majority should rule.[18] As one looks across the globe, these majoritarian concepts of democracy are reflected in increasingly broad claims of power by the executive. Newer and more mature democracies alike are finding that the institutional frameworks designed to constrain arbitrary power are creaking under the strain of this challenge.[19] Morrison's determination to end permanent protection is part of this broader trend.

II THE MIGRATION ACT REGIME

Long before Morrison occupied the role of Minister for Immigration, refugee policy had already warped the rule of law in Australia. For decades, ministers have sought ever greater freedom from the courts and from Parliament itself.[20] This long struggle has resulted in the *Migration Act* conferring on the Minister a peculiar degree of executive freedom.

A Delegated Legislation

While the *Migration Act* itself is long and complex, much is also left to delegated legislation. Such legislation is effectively under the control of the Minister, and by default comes into effect the day after it is registered.[21] While most delegated legislation can be disallowed by Parliament, it only ceases to have effect from the date of disallowance.[22] As Gabrielle Appleby and Joanna Howe have argued, this reverses the default position that legislation comes into effect upon approval by Parliament, and leaves delegated legislation open to exploitation.[23] While the legislative instrument comes into effect the day after registration, it does not need to be tabled in Parliament until six sitting days after it is registered.[24] A parliamentarian can give a notice of motion to disallow within 15 sitting days of tabling, and then there is another 15 sitting day period where the

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18 Helen Pringle and Elaine Thompson, 'Tampa as Metaphor: Majoritarianism and the Separation of Powers' (2003) 10(2) *Australian Journal of Administrative Law* 107 ('Tampa as Metaphor').

19 Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Crown, 2018); Ece Temelkuran, *How to Lose a Country: The 7 Steps from Democracy to Dictatorship* (Fourth Estate, 2019).

20 Ronald Sackville, 'Judicial Review of Migration Decisions: An Institution in Peril?' (2000) 23(3) *University of New South Wales Law Journal* 190; Helen Pringle and Elaine Thompson, 'The Tampa Affair and the Role of the Australian Parliament' (2002) 13(2) *Public Law Review* 128; Pringle and Thompson, 'Tampa as Metaphor' (n 18).

21 *Legislation Act 2003* (Cth) s 12. This provides that delegated legislation begins by default at the start of the day after it is registered, but also allows for a legislative instrument to declare that it commences retrospectively or to specify another day.

22 Ibid s 42.

23 Gabrielle Appleby, 'Challenging the Orthodoxy: Giving the Court a Role in Scrutiny of Delegated Legislation' (2016) 69(2) *Parliamentary Affairs* 269; Gabrielle Appleby and Joanna Howe, 'Scrutinising Parliament's Scrutiny of Delegated Legislative Power' (2015) 15(1) *Oxford University Commonwealth Law Journal* 3.

24 *Legislation Act 2003* (Cth) s 38.

motion can either be resolved or withdrawn. If the 15 sitting day period expires, the instrument is automatically disallowed.[25]

It is very rare for delegated legislation to be disallowed. Of around 1,500 legislative instruments that are scrutinised every year,[26] only a handful of disallowance motions are made every year.[27] Indeed, as noted by the Senate Scrutiny of Delegated Legislation Committee, only 181 have been disallowed or disapproved at all '[i]n the Senate's history up to the end of the 45th Parliament' in 2019.[28]

Further, the Senate does not sit for many days, averaging 54 days per year in the period 2000 to 2017 inclusive.[29] If the full 36-day timetable for disallowance is used, a legislative instrument can continue in force for months before being disallowed. Not all delegated legislation, however, can be disallowed. Section 44 of the *Legislation Act 2003* (Cth) also permits instruments to be exempted from disallowance, either within the Act itself or by delegated legislation.[30] This practice is common and there are no criteria or guidelines for determining when an exemption is appropriate.[31]

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25 Ibid s 42. The instrument is disallowed if the notice of motion is called on, moved and not withdrawn or disposed of, or is not withdrawn and has not been called on.

26 'Scrutiny of Delegated Legislation', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation>.

27 In 2013, the Senate disposed of 6 motions for disallowance (3 agreed to, and 3 negatived). Another 2 were withdrawn, and another 13 were still before Parliament before it lapsed: 'Notices of Motion for Disallowance', *Parliament of Australia* (Web Page, 19 May 2019), archived at <https://web.archive.org/web/20190519041732/https://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet/statements/disallowance/2013. In 2014, the Senate disposed of 23 motions for disallowance (14 agreed to, 9 negatived), with another 11 withdrawn and 1 still before the Senate at the end of the year. In 2015, the Senate disposed of 8 motions for disallowance (4 agreed to, and 4 negatived), with another 9 withdrawn and 5 still before the Senate at the end of the year: 'Notices of Motion for Disallowance', *Parliament of Australia* (Web Page, 30 June 2018) <https://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet_Classic/Consolidations/disallowance2011>.

28 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (Report, 3 June 2019) 114 [8.6] <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/DelegatedLegislation/Report>.

29 This is calculated using data from 'Number of Sitting Days per Year: Senate Statistical Information', *Parliament of Australia* (Web Page, 9 August 2020), archived at <https://web.archive.org/web/20200809153542/https://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet/General/sittingdaysyear>. The source does not include full calendar year figures for 2018 and subsequent years.

30 In 2013, specific exemptions were listed under section 44(2) of the Act. For example, legislative instruments made under schedule 4 of the *Migration Regulations 1994* (Cth) ('*Migration Regulations*') were specified to be exempt. In 2013, the *Migration Regulations* were amended to make it a condition of granting a bridging visa E that the applicant sign a code of behaviour. The code of behaviour itself was draconian but, as it was a legislative instrument made under schedule 4, it was exempt from disallowance. The Act has since been amended to enable exemptions to be listed under Regulations: *Legislation (Exemptions and Other Matters) Regulation 2015* (Cth).

31 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 28) 122–4 [8.35]–[8.39].

B Protection Visas

Most classes of visas are set out in schedule 1 of the *Migration Regulations 1994* (Cth) ('*Migration Regulations*'), and visa subclasses and the criteria for their grant in schedule 2 of those Regulations. Protection visas are one of the few types of visas specified in the *Migration Act* itself. The *Migration Act* also specifies the two main alternative criteria: that Australia must, under international law, protect the person (or a family member of the person) (1) as a refugee or (2) because of a real risk of significant harm if the person is returned.[32]

In addition to meeting one of the main criteria, a person must fulfil other conditions, which are set out in schedule 2 of the Regulations, before being granted a protection visa.

C Ministerial Discretion in the Migration *Act*

The Minister has power to direct how the Department processes visa applications.[33] Further, the *Migration Act* maximises executive discretion in its adoption of extremely broad criteria, most notably, that the Minister considers a decision to be 'in the public interest'.[34] This criterion applies to the Minister's personal powers to release a person from detention[35] or relieve a person from the statutory bars on making further visa applications.[36] The High Court has ruled that the term 'public interest' is to be interpreted broadly as a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view'.[37]

In the case of the *Migration Act*, section 4(1) provides that the statutory objective is 'to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens'. Since the 'national interest' is itself a very broadly interpreted term (see Part IV(B) below), section 4(1) is of no assistance in making arguments which seek to give 'public interest' a restrictive interpretation.

Unusually, the *Migration Act* includes a number of mandatory rules, but also grants the Minister personal and non-compellable powers to waive or exempt a

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32 *Migration Act 1958* (Cth) s 36. The first criterion gives effect to Australia's international legal obligations under the 1951 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force for Australia and generally 22 April 1954) ('*Refugee Convention*') and the 1967 *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force generally 4 October 1967 and for Australia 13 December 1973). The second criterion refers to Australia's obligations under the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force generally 23 March 1976 and for Australia 13 November 1980) and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force generally 26 June 1987 and for Australia 7 September 1989).

33 *Migration Act 1958* (Cth) ss 51, 499.

34 Ibid ss 46A, 48B, 133A, 133C, 195A, 197AB, 197AD, 198AD, 198AE.

35 Ibid s 195A.

36 Ibid s 48B.

37 *O'Sullivan v Farrer* (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson, Gaudron JJ).

person from these rules. This greatly expands the scope of ministerial discretion, while simultaneously minimising oversight by the courts. The legal effect is that the Minister does not have a duty to consider exercising those powers, and there are no requirements to ensure procedural fairness or to give reasons if the Minister does not consider exercising those powers.[38]

This structure has been used since 1992 to detain people seeking asylum. Under mandatory detention, everyone who does not have a valid visa in Australia 'must' be detained.[39] This means that the only criterion a court can review in determining whether detention is lawful is whether the person has a valid visa. The Minister can decide to release a person from detention by granting a visa, but these powers must be exercised personally and are non-compellable.[40] The liberty of the person, therefore, is largely dependent upon the will of the Minister.

This structure was also adopted in 2001 for people coming by boat who entered specified places (such as Christmas Island). All of these people were barred from making a valid claim for a protection visa.[41] They could only make a valid claim if the Minister for Immigration allowed it, again in a personal and non-compellable capacity.[42] Under the Gillard Labor Government, this rule was extended to anyone who came irregularly by boat.[43]

III MORRISON'S MASTERCLASS

The *Migration Act* section 46A application 'bar' was quickly invoked by Morrison when he came into office as Minister for Immigration. On 30 September 2013, he announced that his Department had ceased allowing permanent protection visa applications to be made by the 30,000 people seeking asylum who had come by boat during Labor's term in office.[44] However, as mentioned in Part I, 7,600 protection visa applications had already been made.

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38 See, eg, *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 654–5 [50] (Gummow, Hayne, Crennan, Bell JJ).

39 *Migration Act 1958* (Cth) s 189.

40 Ibid s 195A.

41 Ibid ss 46A, 46B. This version of the bar, which began in September 2001, applied to non-citizens entering Australia without a visa at a so-called 'excised offshore place'.

42 *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth). This took effect from 1 June 2013 and amended the sections 46A and 46B bars to apply to any 'unauthorised maritime arrivals' ('UMAs'). These were further amended by the *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) to apply even if the UMA or transitory person had since been granted a bridging visa, a temporary protection visa or any other kind of temporary visa prescribed by Regulations. The relevant regulations are 2.11A and 2.11B and the temporary visas prescribed by the Regulations are the temporary safe haven visa, the temporary humanitarian concern visa, the Temporary Protection Visa and the Safe Haven Enterprise Visa.

43 These provisions also extend to 'transitory persons', meaning a person who has been brought to Australia for a temporary purpose after being taken to a regional processing country (or any non-citizen child of such a person).

44 Scott Morrison (Minister for Immigration and Border Protection) and Mark Binskin, 'Operation Sovereign Borders Update' (Joint Press Conference, 30 September 2013), archived at

When the Minister asked his Department for advice, the Department advised that 'in the medium to long term' his policy objective could 'likely' only be achieved by legislative change.[45] However, it provided a menu of options that would further the objective in the 'immediate short term'.[46] The Department advised that each of these strategies was 'likely to be short lived as a consequence of decisions taken in Parliament to overturn them or in the Courts to invalidate them'.[47] However, in combination, they would achieve the policy objective of denying almost everyone a permanent protection visa for over a year.

A Delaying Tactics

An immediate strategy was to slow down processing of refugee claims. This was already in train under Labor's asylum policy. An expert panel convened by the previous Labor Government had recommended that a protection claim in Australia should not lead to refugee status faster than it would for a person waiting to be resettled from overseas. This would ensure that those who came by boat were given 'no advantage' over resettlement.[48]

The 'no advantage' policy was given effect through Ministerial Direction No 57.[49] This Direction required administrative decision makers, including the Department and the Refugee Review Tribunal, to give lower processing priority to protection visa applications by those who came without a valid visa (whether by boat or air). On 10 October 2013, the Department advised that it was tightening implementation of this Direction to avoid granting a permanent visa before any change to the Regulations.[50] In addition, according to Shaun Hanns, who was working in the refugee assessment program of the Department at the time:

> From late October 2013 we were required to 'go slow' and barely engaged in any meaningful processing of asylum seekers. We didn't really start up again until the

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<https://web.archive.org/web/20131005231647/http:/www.minister.immi.gov.au/media/sm/2013/sm208372.htm>.

45 Department of Immigration and Border Protection (Cth), Submission No SM2014/00106 to the Minister for Immigration, *Continuing to Achieve the Policy Objective of No Permanent Protection Visa Grants to IMAs* (15 January 2014) <https://www.homeaffairs.gov.au/foi/files/2015/FA141001175.pdf> ('Submission No SM2014/00106 to the Minister'). A redacted version of this submission was released under FOI Request FA 14110/01175. Some of the redacted content is quoted in Plaintiff S297/2013, 'Plaintiff's Submissions', Submission in *Plaintiff S297/2013 v Minister for Immigration and Border Protection*, 22 April 2014 <http://www.hcourt.gov.au/assets/cases/s297-2013/Plf-S297-2013_Plf2.pdf>.

46 Department of Immigration and Border Protection (Cth), Submission No SM2014/00106 to the Minister (n 45).

47 In the Department's view, the best-case scenario was that the High Court 'may do the unexpected': ibid 15.

48 Expert Panel on Asylum Seekers, Parliament of Australia, 'Report of the Expert Panel on Asylum Seekers' (Report, August 2012), archived at <http://web.archive.org/web/20140305104959/http://expertpanelonasylumseekers.dpmc.gov.au/report.html>.

49 This was authorised under section 499 of the *Migration Act 1958* (Cth). The Direction was revoked by IMMI 14/150 on 24 December 2014.

50 Department of Immigration and Border Protection (Cth), *Transitional Arrangements for Current PPV Applicants* (n 2).

> full implementation of TPVs [Temporary Protection Visas] through the 'fast-track' process in September 2015.[51]

A further delaying tactic was outlined in the Department's 10 October 2013 advice. According to the Department, about 1,700 UMAs had already been found to be owed protection obligations. However, further checks were needed before a visa was granted, including security checks.[52] The Department anticipated that the proposed change to the *Migration Regulations* would be in place before those checks were completed in all but 700 cases. These security checks were conducted by the Australian Security Intelligence Organisation ('ASIO'), which was then formally under the authority of the Attorney-General's Department but institutionally independent.[53] To minimise the risk of any of these 700 people being granted permanent protection visas,[54] the Secretary of the Department requested the Director-General of Security to delay these final security checks.[55] ASIO has confirmed that, following this request, the checks were 'at a lower priority', although it would triage cases and prioritise those where there might be a threat to the community.[56]

B Temporary Protection by Regulation

The next step was to amend the Regulations to create temporary protection visas.[57] On 18 October 2013, the *Migration Amendment (Temporary Protection Visas) Regulation 2013* ('*Migration Amendment (TPV) Regulation*') came into force. It was tabled on 12 November 2013. It created a temporary protection visa ('TPV') class, barred anyone who entered Australia without a valid visa (whether by boat or air) from permanent protection, and converted existing protection visa applications by those people into applications for a TPV. It applied retroactively to protection visa applications which had been lodged but not yet determined. As

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51 Shaun Hanns, 'Scott Morrison's Single-Mindedness When Immigration Minister Is a Frightening Trait', *The Guardian* (online, 26 April 2019) <http://www.theguardian.com/commentisfree/2019/apr/26/scott-morrisons-single-mindedness-when-immigration-minister-is-a-frightening-trait>.

52 Department of Immigration and Border Protection (Cth), *Transitional Arrangements for Current PPV Applicants* (n 2).

53 It is now part of the Department of Home Affairs portfolio and reports to the Minister for Home Affairs, although the Attorney-General retains oversight of its special powers: 'Ministerial and Parliamentary Oversight', *Australian Security Intelligence Organisation* (Web Page) <https://www.asio.gov.au/ministerial-and-parliamentary-oversight.html>.

54 At the time, the *Migration Act* included section 65A which required the Minister to decide on protection visa applications within 90 days. See further below Part V.

55 Department of Immigration and Border Protection (Cth), *Transitional Arrangements for Current PPV Applicants* (n 2).

56 Ashlynne McGhee, 'Refugee Visas a "Lower Priority" Not "Slowed down", ASIO Boss Says', *ABC News* (online, 28 February 2018) <http://www.abc.net.au/news/2018-02-28/refugee-visas-a-lower-priority-not-slowed-down-asio-boss-says/9491068>.

57 Temporary protection visas were introduced under Howard by *Migration Amendment Regulations 1999 (No 12)* (Cth).

predicted by the Department, it was disallowed by the Senate on 2 December 2013.[58] However, while it was in force, 22 people were granted TPVs.[59]

The *Migration Amendment* (*TPV) Regulation* was duly scrutinised by two parliamentary committees. The then Senate Standing Committee for the Scrutiny of Regulations and Ordinances[60] requested further information from the Minister regarding its retrospective effect, whether it unduly trespassed on personal rights including 'family considerations and rights of the child', and on the lack of consultation.[61]

The Minister responded to the Committee by indicating that applying TPVs to all those who arrived before 13 August 2013 'was important for consistency and fairness, with all relevant applications being assessed against the new criteria'.[62] In relation to the denial of family unity, the Minister responded that the 'need to discourage minors from undertaking dangerous voyages and to maintain the integrity of Australia's borders outweighs the best interests of the child to have the right to family reunification'.[63] Finally, the Minister responded that consultation was not undertaken because the *Migration Amendment* (*TPV) Regulation* was 'required as a matter of urgency', arising from its 'need to implement TPVs as a key element of the government's [border protection] policies'.[64] The Committee's response was to record its thanks for the Minister's response and conclude its interest in the Regulation.[65]

The Parliamentary Joint Committee on Human Rights tabled its report on 10 December 2013 after the *Migration Amendment* (*TPV) Regulation* had been disallowed. It expressed several concerns with the Regulation, including its application to unauthorised air arrivals, the denial of family reunion, and the effects of the Regulation on education, employment and health.[66]

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58 Senate, *Notification of Disallowance Gazette*, No C2013G01820, 2 December 2013.

59 Immigration and Border Protection Portfolio, Answers to Questions Taken on Notice, Supplementary Budget Estimates Hearing, Parliament of Australia, *Programme – 4.3: Offshore Asylum Seeker Management* (19 November 2013) Question SE13/0027 <https://www.aph.gov.au/~/media/Estimates/Live/legcon_ctte/estimates/sup_1314/DIBP/SE13-0027.ashx>.

60 This Committee has since been renamed the Senate Standing Committee on Delegated Legislation.

61 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor* (Monitor No 1 of 2014, 12 February 2014) 25–7 <https://www.aph.gov.au/-/media/Committees/Senate/committee/regord_ctte/mon2014/pdf/no1.pdf?la=en&hash=E20A1B02E3E3E90690AF55C230A7EFA8B975FDEA>.

62 Ibid 26.

63 Ibid 27.

64 Ibid.

65 Ibid.

66 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills Introduced 12 November – 5 December 2013* (10 December 2013) 109–20 <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2014/144/index>.

The retrospective effect of the Regulation was also singled out by the Australian Law Reform Commission ('ALRC') in its inquiry into Commonwealth laws which encroached upon traditional rights and freedoms.[67]

C Setting a Cap on Permanent Protection Visas

The Minister for Immigration was clearly prepared for disallowance. On the same day as the *Migration Amendment* (*TPV) Regulation* was disallowed, the Minister made a determination that capped the number of permanent protection visas which could be granted for the 2013–14 financial year.[68] This was set at a number that had already been reached, and therefore prevented the grant of any more permanent protection visas.[69] The cap had been put in place to set quotas for the Migration and the Refugee and Humanitarian Programs, but had not previously been used in relation to onshore protection visas.

The Minister's determination was purportedly made under section 85 of the *Migration Act* and was not subject to disallowance.[70] The Greens introduced a Bill on 9 December 2013 to override this exemption from disallowance.[71] However, it was not supported by Labor as the effect of the Bill would be to override the Minister's powers to cap visa classes for other visas, including under the Migration Program.[72]

D A New Regulation

On 4 December 2013, the Department proposed a new Regulation, which would make it a condition of a permanent protection visa that the applicant was not an unauthorised maritime arrival.[73] It informed the Minister that the *Legislative Instruments Act 2003* (Cth) prevented the making of any legislative instrument that is the 'same in substance' as the disallowed instrument within six months of the disallowance.[74] However, the Minister was advised that the new Regulation could be differentiated in substance 'as it does not seek to create a new temporary visa

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67 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Report No 129, December 2015) 390 [13.147] <https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-report-129/>.

68 Scott Morrison, 'Government Acts Swiftly to Deny People Smugglers' Promise of Permanent Visas' (Media Release, 4 December 2013), archived at <https://web.archive.org/web/20140304223711/http:/www.minister.immi.gov.au/search/cache.cgi?collection=immirss&doc=2013%2Fsm210040.xml>. The determination had been made on 2 December 2013, anticipating the disallowance: Minister for Immigration and Border Protection (Cth), Determination of Granting of Protection Class XA Visas in 2013/2014 Financial Year (IMMI 13/156) 2 December 2013.

69 Karlsen and Phillips (n 1) 27.

70 The *Migration Act* section 85 enables the Minister to set limits on visas by legislative instrument. See also *Legislative Instruments Act 2003* (Cth) s 44(2), as at 12 April 2013.

71 Migration Amendment (Visa Maximum Numbers Determinations) Bill 2013 (Cth).

72 Commonwealth, *Parliamentary Debates*, Senate, 12 December 2013, 1567 (Ursula Stephens).

73 *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Cth) ('*Migration Amendment (UMA) Regulation*').

74 *Legislative Instruments Act 2003* (Cth) s 48(1). This Act was later renamed the *Legislation Act 2003* (Cth).

class or convert current permanent visa applications into temporary visa applications'.[75]

The Minister accepted the Department's proposal. The *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* ('*Migration Amendment (UMA) Regulation*') came into force on 14 December 2013. Like the *Migration Amendment (TPV) Regulation*, it applied to unauthorised boat and air arrivals, and to existing protection visa applications that had not been finally determined at the time the *Migration Amendment (UMA) Regulation* came into force. Unlike the previous Regulation, however, it did not create a new visa class of temporary protection visas.

The timing was clearly deliberate. Parliament had had its last sitting for 2013 on 12 December and the first sitting day for 2014 was two months away. The legislative instrument was not tabled until 11 February 2014.[76] The Greens immediately gave a notice of motion to disallow, but it took until 27 March 2014 before the Senate agreed on the motion.[77] This meant that the government had the benefit of the Regulation for over three months.[78]

Prior to its disallowance, the *Migration Amendment (UMA) Regulation* was challenged in court as breaching the *Legislative Instruments Act 2003*.[79] The plaintiff's written submission persuasively argued that the new Regulation was the same in substance as the *Migration Amendment (TPV) Regulation*, because both provided that unauthorised arrivals were ineligible for the grant of permanent protection visas.[80] However, this aspect of the proceedings was dropped when the *Migration Amendment (UMA) Regulation* was disallowed.[81]

The same issue was raised by the Senate Standing Committee on the Scrutiny of Regulations and Ordinances. It concluded that it could be said that 'the effect of both instruments is/was to prevent unauthorised maritime arrivals from being eligible for Subclass 866 (Protection) visas', and therefore requested further

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75 Department of Immigration and Border Protection (Cth), Submission No SM2013/03752 to Minister, *Proposed Amendment to Protection Visa Regulations* (5 December 2013) 3 <https://www.homeaffairs.gov.au/foi/files/2015/FA141001175.pdf>.

76 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor* (n 61) 6.

77 Senator Hanson-Young introduced a notice of motion on 11 February 2014 but withdrew this notice on 13 February 2014, after having introduced another motion on 12 February 2014. It was this second motion which the Senate agreed to on 27 March 2014: see 'Disallowance Alert 2014', *Parliament of Australia* (Web Page, 2014) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Alerts/alert2014>. Subsequently, at the merits review stage, those whose protection visa applications had been refused by the Department during the period that *Migration Amendment (UMA) Regulation 2013* was in force had their cases remitted to the Department for reconsideration: Crock and Bones (n 1).

78 Appleby and Howe (n 23) 22–3.

79 *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 ('*Plaintiff S297/2013*').

80 Plaintiff S297/2013, 'Plaintiff's Submissions', Submission in *Plaintiff S297/2013 v Minister for Immigration and Border Protection*, S297/2013, 3 February 2014, 4–6 [18]–[30].

81 In his judgment in *Plaintiff S297/2013* (2014) 255 CLR 179, French CJ referred to the fact that 'the legal minuet between the Minister and the Parliament was reflected in the shifting form of these proceedings': at 182 [6].

information from the Minister.[82] The 'potential inconsistency' with the requirements of the *Legislative Instruments Act 2003* was also noted by the Parliamentary Joint Committee on Human Rights, which indicated that its concerns about the *Migration Amendment* (*TPV) Regulation* applied equally to the *Migration Amendment (UMA) Regulation*.[83]

E The Return of the Cap

On 19 December 2013, the Minister's cap on protection visas was revoked as unnecessary, because the *Migration Amendment (UMA) Regulation* had come into force.[84] However, on 6 March 2014, in anticipation of this Regulation being disallowed in the Senate, the Minister again purported to cap the number of protection visas available for 2013–14.[85]

The Department had advised the Minister that a High Court challenge to the new cap could be 'expected to be lodged almost immediately'.[86] However, it had also helpfully pointed out that '[a]ny decision by the High Court that use of the cap was invalid would then be some months away'.[87] In other words, even though the strategy was legally dubious, it would be effective in delaying the grant of permanent protection visas to unauthorised arrivals.

F Using Other Temporary Visa Categories

The statement of human rights compatibility for the *Migration Amendment (UMA) Regulation* indicated that those found to be refugees and affected by this Regulation would be granted instead a bridging visa, with the same work rights and travel conditions that they currently held. However, this did not occur. Instead, on 12 December 2013, two days before the *Migration Amendment (UMA) Regulation* came into force, the Department advised the Minister that, rather than offering bridging visas, the Minister could instead offer refugees a temporary safe haven visa.[88] The Minister agreed to this option.

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82 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor* (n 61) 7. This was presumably superseded by the disallowance of the instrument, as this is not reported upon in subsequent *Delegated Legislation Monitors.*

83 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills Introduced 9 –12 December 2013* (Second Report of the 44th Parliament, February 2014) [2.136] <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2014/244/c07>.

84 Elibritt Karlsen, 'Temporary Protection by Hook or by Crook', *FlagPost* (Web Page, 5 March 2014) <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2014/March/Temporary_Protection_Visas>.

85 Crock and Bones (n 1).

86 Department of Immigration and Border Protection (Cth), Submission No SM2014/00106 to the Minister (n 45).

87 Ibid.

88 Department of Immigration and Border Protection, Submission No SM2013/03831 to the Minister, *Visa Options for IMAs and UAAs Who Cannot Be Granted Protection Visas* (12 December 2013) <https://www.homeaffairs.gov.au/foi/files/2015/FA141001175.pdf>.

The temporary safe haven visa class was created in 1999 in response to the Kosovo crisis,[89] and used later for the East Timorese.[90] Under the *Migration Regulations*, the government offers the visa, and the application is regarded as made if the person accepts that offer.[91] The criteria for this type of visa are broad, requiring essentially that a person (or their family member)[92] has been displaced and cannot reasonably return because of fears for their personal safety.[93] These temporary visas maximise executive discretion. When they were introduced, this discretion was justified because these visas were a 'short-term humanitarian measure' which enabled the government to offer visas at short notice when character checks were not feasible.[94]

The Minister can specify the period of validity of the visa, and extend or shorten the period by notice.[95] Importantly, anyone holding a temporary safe haven visa is barred from applying for any other kind of visa, unless the Minister exercises their personal and non-compellable discretion to allow the person to make an application.[96] It is also a criterion of a permanent protection visa that the person has not been offered a temporary safe haven visa, and is not a family member of someone who has been offered such a visa.[97]

In practice, the Minister specifies very short visa periods,[98] and grants anyone who needs to stay for longer a temporary humanitarian concern ('THC') visa. Under the *Migration Regulations*, the THC visa can only be granted to a temporary

89 *Migration Legislation Amendment (Temporary Safe Haven Visas) Act 1999* (Cth). See Savitri Taylor, 'Protection or Prevention? A Close Look at the Temporary Safe Haven Visa Class' (2000) 23(3) *University of New South Wales Law Journal* 75.

90 Kerry Carrington, Stephen Sherlock and Nathan Hancock, 'The East Timorese Asylum Seekers: Legal Issues and Policy Implications Ten Years On' (Research Paper, Parliamentary Library, Parliament of Australia, 18 March 2003).

91 *Migration Regulations 1994* (Cth) reg 2.07AC.

92 Ibid reg 2.07AC(3), sch 2 cl 449.221(3).

93 Ibid sch 2 cl 449.221(2).

94 Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1999, 5023 (Phillip Ruddock).

95 *Migration Regulations 1994* (Cth) sch 2 cl 449.511. The Minister can extend the period initially specified, but 'does not have a duty to consider whether to exercise the power': *Migration Act 1958* (Cth) ss 37A(2), (6).

96 *Migration Act 1958* (Cth) ss 91K, 91L. UMAs and transitory persons are now exempt from the application of the section 91K bar, but this exemption was only inserted in 2015: Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2014 (Scott Morrison, Minister for Immigration and Border Protection). The exemption was inserted to simplify the framework of statutory bars by making it clear that UMAs and transitory persons are barred from making visa applications under sections 46A and 46B.

97 *Migration Regulations 1994* (Cth) sch 2 cl 866.227(2).

98 The Minister has the power to shorten the period initially specified, but only if, 'in the Minister's opinion, temporary safe haven in Australia is no longer necessary for the holder of the visa because of changes of a fundamental, durable and stable nature' in their country of origin: *Migration Act 1958* (Cth) s 37A(3). Moreover, the Minister has to table in both Houses of Parliament a statement of reasons for holding this opinion: at s 37A(4). These constraints were forced on the government by the Senate. The practice of specifying visa periods of short duration is a means of sidestepping them.

safe haven visa holder in Australia.[99] A THC visa can be granted for up to three years.[100]

Offering a temporary safe haven visa was a win-win strategy for the Minister, even after the *Migration Amendment (UMA) Regulation* was disallowed. The offer could be made without a person applying for it. Those who accepted the visa would be barred from applying for a protection visa under section 91K of the *Migration Act*, while those who refused the visa could not meet the criteria for a permanent protection visa under the *Migration Regulations*. In the remainder of the 2013–14 financial year, the Department granted 253 temporary safe haven visas and 112 THC visas.[101]

The Labor Government had already used the temporary safe haven visa in similar circumstances. In the period 25 November 2011 to 25 October 2012, the then Minister for Immigration had granted 2,383 people who had entered at an 'excised offshore place' both a temporary safe haven visa and a bridging visa E.[102] The purpose of this was to enable people to be released from detention, without allowing them to make a permanent protection visa application. As noted above, the *Migration Act* requires that anyone who does not have a valid visa must be detained, but section 195A of the Act gives the Minister a personal power to release a person from detention if the Minister thinks it is 'in the public interest' to do so. This is usually done through the grant of a bridging visa E. However, at the time, if an unauthorised maritime arrival was granted a bridging visa E, the bar on applying for a protection visa under section 46A would no longer apply. The purpose of granting the combination of the temporary safe haven visa and the bridging visa E was to ensure that those released from detention would be subject to the bar that applied under section 91K of the *Migration Act*. The Minister could later exercise his personal, non-compellable discretion to lift that bar.[103]

The grant of these visas was unsuccessfully challenged in the High Court.[104] The plaintiff, M79, argued that the Minister did not have power under section 195A of the *Migration Act* to grant a temporary safe haven visa, and that the Minister had granted the visa for an improper purpose. In their majority judgment, French CJ, Crennan and Bell JJ held:

> It was open to the Minister, in this case, to grant a temporary safe haven visa by reference to its legal characteristics and consequences unconstrained by the purpose for which it was created under the Act. The purposes for which the Minister might grant such a class of visa were those purposes which would serve the public interest as the Minister judged it. In this case those purposes were not shown to be beyond

99 *Migration Regulations 1994* (Cth) sch 2 item 786.211.

100 Department of Home Affairs (Cth), 'PAM – Temporary Humanitarian Stay', *LEGENDcom* (1 July 2017) <https://immi.homeaffairs.gov.au/help-support/tools/legendcom>. Duration decided on a case-by-case basis. This set of instructions does not appear in later stacks of LEGENDcom.

101 Department of Immigration and Border Protection (Cth), 'Annual Report 2013–14' (Report, 15 September 2014) 96 <https://www.immi.gov.au/about/reports/annual/2013-14/index.htm>.

102 *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336, 341 [6], 343 [10] (French CJ, Crennan and Bell JJ).

103 Ibid 343 [11] (French CJ, Crennan and Bell JJ).

104 *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336.

> the scope and purpose of the Act, nor the power conferred by s 195A. They were not improper purposes.[105]

Their Honours were sanguine about the implications of their judgment for the rule of law, pointing out that Minister was accountable to Parliament for the exercise of the section 195A power.[106]

IV THE MINISTER AND THE HIGH COURT

A The Minister Loses on the Cap on Protection Visas

The Department's prediction that the cap on protection visas might not survive a legal challenge proved true. In *Plaintiff S297/2013 v Minister for Immigration and Border Protection* ('*Plaintiff S297*')[107] and *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection*,[108] both decided on 20 June 2014, the High Court ruled that section 85 as it then stood did not empower the Minister to cap the number of protection visas granted in a financial year. At the time, the *Migration Act* also contained section 65A, which required the Minister to decide protection visa applications within 90 days. The High Court reasoned that, if the Minister could cap protection visas under section 85, this could prevent compliance with the time limit.[109]

The plaintiff in *Plaintiff S297* also argued that the Minister had acted for an improper purpose in setting a cap on the number of protection visas. However, as the plaintiff had succeeded on the statutory interpretation argument, the High Court decided it did not need to address this argument.[110]

B Invoking the National Interest

The Minister did not give up. Instead, he turned to another strategy. One of the criteria for a protection visa is that the Minister must be satisfied that the grant of the visa is in the national interest.[111] The Minister indicated that for each protection

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105 Ibid 354 [42] (French CJ, Crennan and Bell JJ). Gageler J also held that the grant of the temporary safe haven visa was a valid exercise of the section 195A power: at 377 [126]. Hayne J held to the contrary but then found that the decision to grant the bridging visa was not severable: 365–6 [81]–[83]. This meant that the section 46A bar still applied to the plaintiff, though the section 91K bar did not.

106 Ibid 353 [40] (French CJ, Crennan and Bell JJ). *Migration Act 1958* (Cth) s 195A(6)–(8).

107 *Plaintiff S297/2013* (2014) 255 CLR 179.

108 *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 199 ('*Plaintiff M150*').

109 Jane McAdam and Fiona Chong, 'Complementary Protection in Australia Two Years On: An Emerging Human Rights Jurisprudence' (2014) 42(3) *Federal Law Review* 441, 444. See generally at 444 fn 19. As noted below, the Act creating temporary protection visas also repealed section 65A and amended section 85 to make it clear that the Minister can cap the number of permanent protection visas which can be granted in a financial year, though not the number of TPVs or SHEVs.

110 *Plaintiff S297/2013* (2014) 255 CLR 179, 182 [7] (French CJ), 184 [15] (Hayne and Kiefel JJ), 185 [23] (Crennan, Bell, Gageler and Keane JJ).

111 *Migration Regulations 1994* (Cth) sch 2 cl 866.226.

visa application he would personally consider whether granting a visa was in the national interest.[112]

Applicants were informed that the Minister 'may consider that it is not in the national interest to grant a permanent protection visa' because of reasons that applied to all unauthorised arrivals. For example, granting a visa 'would provide a product for people smugglers to market', would negatively affect 'Australia's international relationships with partner nations' in the fight against people smuggling, and would erode community confidence.[113]

Applicants were also warned that the Minister could issue a conclusive certificate preventing merits review of a refusal.[114] Anyone found to engage Australia's protection obligations who was refused a permanent protection visa in this way would instead be granted a temporary safe haven visa.[115]

One of the unlucky victims of this new strategy was *Plaintiff S297*, who had already successfully challenged the Minister's cap on protection visas.[116] The High Court had issued a writ of mandamus requiring the Minister to make a decision on the plaintiff's protection visa application. The Minister purported to comply by refusing a protection visa solely on the basis of the national interest criterion,[117] and issued a conclusive certificate preventing merits review of that decision.[118]

This sweeping interpretation of 'national interest' has a long history in migration law.[119] Yet it was obvious that the Minister's interpretation of the 'national interest' criterion was not tenable. It took no account of the fundamental principle of statutory interpretation that the *Migration Act* had to be read as a whole, and that delegated legislation had to be read in the context of the primary legislation. Under the Minister's interpretation, this single criterion could be used to undermine in effect the entire legislative scheme for dealing with the processing of unauthorised arrivals.

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112 Department of Immigration and Border Protection (Cth), 'Asylum Seeker National Interest Test: Government Fact Sheet', *The Guardian* (Web Page, 3 July 2014) <https://www.theguardian.com/world/interactive/2014/jul/03/australian-immigration-and-asylum-australian-politics>.

113 Ibid.

114 Ibid. The Minister was empowered to issue such certificates under *Migration Act 1958* (Cth) s 411(3).

115 Department of Immigration and Border Protection (Cth), 'Asylum Seeker National Interest Test: Government Fact Sheet' (n 112).

116 Plaintiff M150 was also initially refused a permanent protection visa on national interest grounds but for unknown reasons the Minister subsequently backed down: Barlow (n 8). According to the media, the grant of a permanent protection visa to M150 was the first such grant since the Coalition had taken office: ibid.

117 *Plaintiff S297/2013 v Minister for Immigration and Border Protection [No 2]* (2015) 255 CLR 231, 241 [13] (The Court).

118 Plaintiff S297/2013, 'Plaintiff's Submissions', Submission in *Plaintiff S297-2013 v Minister for Immigration and Border Protection*, 28 October 2014, 231 [12].

119 For a discussion of the many public interest/national interest powers conferred on the executive by the *Migration Act*, see Donnelly (n 17); Gabrielle Appleby and Alexander Reilly, 'Unveiling the Public Interest: The Parameters of Executive Discretion in Australian Migration Legislation' (Research Paper No 43, University of New South Wales Law Research Series, 2018); Liberty Victoria's Rights Advocacy Project, 'Playing God: The Immigration Minister's Unrestrained Power' (Report, Liberty Victoria's Rights Advocacy Project, 4 May 2017) <http://libertyvic.rightsadvocacy.org.au/wp-content/uploads/2017/05/YLLR_PlayingGod_Report2017_FINAL2.1-1.pdf>.

The outcome, when *Plaintiff S297* returned to the High Court, was predictable. In February 2015, the High Court ruled that, since the *Migration Act* itself exhaustively prescribed the consequences of being a UMA, the national interest criterion could not be construed as allowing the Minister to attach a further consequence to the fact of being a UMA. It therefore did not need to consider whether the criterion itself was valid.[120]

This time, even the Court's patience was exhausted. Instead of requiring the Minister to make a decision again, it took the extraordinary step of issuing a writ of peremptory mandamus requiring the Minister to grant the plaintiff a permanent protection visa, saying that the Minister should not be 'given any further opportunity to identify a reason for refusing the plaintiff's application'.[121] The High Court had not taken such a step since 1938.[122]

C The Minister Loses on the Grant of a Temporary Safe Haven Visa

The Department's prediction that there was a risk that it might be forced to grant some people a visa also came true. A stateless person, who had been found to be owed protection on 13 April 2012,[123] had not been granted a visa because ASIO was conducting a security assessment. As noted above, these assessments were required before a permanent protection visa could be granted. On 21 January 2014, however, ASIO issued a non-prejudicial (clear) security assessment.[124] This meant that the person now met all the relevant criteria for a permanent protection visa.

In response, on 4 February 2014, the Minister for Immigration decided to imitate Labor's gambit. Instead of deciding whether to exercise his power under section 46A to allow the person to apply for a permanent protection visa, the Minister instead purported to exercise his powers under section 195A to release the person from detention by granting the plaintiff a seven-day temporary safe haven visa and also a THC visa.[125]

In contrast to its earlier decision in *Plaintiff M79/2012 v Minister for Immigration and Citizenship* ('*Plaintiff M79/2012*'), however, in September 2014 the High Court in *Plaintiff S4/2014 v Minister for Immigration and Border Protection* ('*Plaintiff S4/2014*') held that the Minister's decision was invalid. Its

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120 *Plaintiff S297/2013 v Minister for Immigration and Border Protection [No 2]* (2015) 255 CLR 231.

121 Ibid 248 [41] (The Court). The High Court was here exercising its power under *Judiciary Act 1903* (Cth) section 32 to grant whatever remedy is necessary to finally determine 'all matters in controversy between the parties' and to avoid a 'multiplicity of legal proceedings' concerning such matters. Interestingly, an alternative to seeking peremptory mandamus that the plaintiff's counsel considered but did not pursue was to commence proceedings against the Minister for contempt of court in failing to comply with the original writ of mandamus: Transcript of Proceedings, *Plaintiff S297/2013 v Minister for Immigration and Border Protection* [2014] HCATrans 276.

122 Robin Creyke et al, *Control of Government Action: Text Cases and Commentary* (LexisNexis Butterworths, 5th ed, 2019) 1061.

123 Plaintiff S4/2014, 'Plaintiff's Chronology', Submission in *Plaintiff S4/2014 v Minister for Immigration and Border Protection*, S4/2014, 3 June 2014.

124 Ibid.

125 Ibid.

reasoning was one of statutory interpretation. Section 46A set out a two-step process under which the Minister could 'lift the bar' for a protection visa application. The first step was for the Minister to consider exercising the power to lift the bar, which had already occurred. The second step was for the Minister to permit the making of a valid application.[126] In this case, the Minister had already completed the first step, by making the necessary inquiries as to whether the person fulfilled the relevant criteria. Once this process had begun under section 46A, the Minister could not then circumvent it by using his powers under section 195A. Doing so would in effect prevent the second step of the process under section 46A, namely the making of a valid visa application.[127]

In coming to this conclusion, the Court relied on standard principles of statutory interpretation. The *Migration Act* had to be read as a whole, so that both sections 46A and 195A could operate harmoniously. The interpretation by the government, that section 195A was not constrained by the process under section 46A, would effectively deprive section 46A of its purpose.[128]

Further, the Court reasoned that the plaintiff had only been lawfully detained because the Department was deciding whether to grant him a visa under section 46A. To allow the exercise of section 195A in such a way would therefore deprive that (lengthy) detention of its purpose.[129] The decision to grant the temporary safe haven visa was therefore invalid. As the two grants were inextricably linked, the grant of the THC visa was also invalid.[130]

The Court therefore decided it did not need to consider the argument that the Minister had acted for an improper purpose and emphasised that '[nothing] in these reasons should be understood as assuming or deciding that the grant of [the temporary safe haven] visa was for a proper purpose'.[131]

The High Court in *Plaintiff S4/2014* did not discuss the difference between this outcome and its earlier decision in *Plaintiff M79/2012*. However, in *Plaintiff M79/2012*, the Minister had not taken the first step of considering a protection application under section 46A. Rather, the Minister had purported to assess the person's claim under a non-statutory assessment process, which had in fact been largely completed. The grant of the two visas therefore had the main consequence of releasing the person from detention and replicating the existing statutory bar to prevent the person from applying for protection. In contrast, in *Plaintiff S4/2014*, the main legal consequence was to defeat the purpose of considering a protection visa application under section 46A. The use of the power under section 195A in this case in effect subverted the incomplete process of consideration under section 46A.

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126 *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219, 236 [44] (The Court) ('*Plaintiff S4/2014*').
127 Ibid 237 [46]–[47] (The Court).
128 Ibid 236 [42], 237 [47] (The Court).
129 Ibid 235 [41] (The Court).
130 Ibid 239 [54]–[55] (The Court).
131 Ibid 227 [10] (The Court).

V TEMPORARY PROTECTION BECOMES LAW

As the Department indicated to the Minister, its interim strategies were unlikely to survive the scrutiny of the courts. However, they were just plausible enough to buy months of time that enabled the government to pursue its primary objective: legislation. The legislative path was not straightforward. In the new Senate, the Coalition controlled 33 votes, and Labor and the Greens 35 votes between them. Thirty-nine votes were needed to pass legislation. An unusually high number of independent and minor party senators therefore held the balance of power.[132]

Of these, the Palmer United Party, which held two Senate votes, had previously indicated it was opposed to temporary visas.[133] However, the Palmer United Party was prepared to compromise. One of the sticking points was that, in contrast to the previous iteration of the temporary protection visa regime, this time there would be no pathway to permanent residency. Instead, people would have to continue to re-apply for protection for the rest of their lives.

The Palmer United Party negotiated a deal to create a new form of visa, the Safe Haven Enterprise Visa ('SHEV'), which could provide a pathway to permanent residence. Under this arrangement, refugees could move to a regional area to work or study, and if they could manage to avoid recourse to social security benefits for three and a half of the five years that the SHEV was valid, they could apply for visa classes other than the protection visa, including permanent visas.[134] In practice, however, refugees would not be eligible for most of these other visas.[135]

The deal allowed the government to introduce the Migration and Maritime Powers (Legacy Caseload) Bill on 25 September 2014. This Bill provided for temporary protection visas and also the regime of 'fast tracking' refugee decisions that the government had promised.[136] The Bill, like the *Migration Amendment*

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132 Lumb (n 5). There were eight independent or minor party senators.

133 Lauren Wilson, 'Palmer to Oppose PM's Plan for Reintroducing Temporary Visas', *The Australian* (online, 5 December 2013) <https://www.theaustralian.com.au/national-affairs/immigration/palmer-to-oppose-pms-plan-for-reintroducing-temporary-protection-visas/news-story/889a503341f236e38b1e19299aaca037>.

134 Michelle Grattan, 'Government-Palmer Deal Would Give Some Refugees a Stony Road to Possible Permanency', *The Conversation* (online, 25 September 2014) <http://theconversation.com/government-palmer-deal-would-give-some-refugees-a-stony-road-to-possible-permanency-32184>.

135 Law Institute Victoria, 'Migration Pathways for SHEV Holders' (Fact Sheet, 27 July 2017) <https://www.refugeecouncil.org.au/wp-content/uploads/2018/12/21070727_LIV_MigrationPathwaysSHEVHolders_Final.pdf>.

136 *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) sch 5. The 'fast tracking' process applied a truncated form of refugee status determination, removing the right to a hearing before the then Refugee Review Tribunal (now merged into the Administrative Appeals Tribunal). Instead, those 'fast tracked' would only have access to the Immigration Assessment Authority, which mostly dealt with the cases on papers and had much more limited powers to receive evidence.

(TPV) Regulation, automatically converted existing applications for protection visas into applications for temporary protection visas.[137]

The government also took the opportunity to reverse the effect of several court decisions in this omnibus Bill.[138] Among these, it repealed section 65A, which had required protection visa decisions to be made within 90 days.[139] This in effect negated the High Court's interpretation that the Minister did not have power to place a cap on protection visas. To make this even clearer, section 85 was amended to apply expressly to protection visas.[140]

The path to a Senate majority was not, however, entirely smooth. The Parliamentary Joint Committee on Human Rights identified many concerns with the Bill,[141] which led the Palmer United Party to request further advice.[142] The government also had to convince another four senators to vote for the law.

In exchange for support, the government offered to:

- increase the number of places in the Refugee and Humanitarian Program to 18,750 in two years' time;
- allow people holding temporary protection visas to leave and return to Australia on compassionate grounds;
- allow people seeking asylum on bridging visas to work; and
- ensure all children in detention on Christmas Island would be removed from detention by Christmas Day.[143]

Notably, all of these measures could already be achieved by the government, without any further legislation. However, it was enough to convince the Palmer United Party and three other senators to vote for the Bill.[144]

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137 *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), inserting *Migration Act 1958* (Cth) s 45AA and *Migration Regulations 1994* (Cth) r 2.80F.

138 For example, schedule 1 of the Bill amended the *Migration Act* to undermine legal arguments made in *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514. Schedule 5 of the Bill removed references to the *Refugee Convention* (n 32), apparently in response to *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505. For discussions of these, see Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 40 of 2014–15, 23 October 2014).

139 *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) sch 7 item 4.

140 Ibid sch 7 item 12.

141 Parliamentary Joint Committee on Human Rights, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills Introduced 30 September – 2 October 2014* (Fourteenth Report of the 44th Parliament, 28 October 2014) [1.345]–[1.427] <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2014/Fourteenth_Report_of_the_44th_Paliament>.

142 Lenore Taylor, 'Clive Palmer Sends "Please Explain" Note over Temporary Protection Visa Deal', *The Guardian* (online, 2 November 2014) <http://www.theguardian.com/australia-news/2014/nov/02/clive-palmer-please-explain-temporary-protection-visa-deal?CMP=share_btn_tw>.

143 Paul Farrell, 'Ricky Muir Vote Reinstates TPVs and Hands Coalition Hollow Asylum Victory', *The Guardian* (online, 5 December 2014) <https://www.theguardian.com/australia-news/2014/dec/05/ricky-muir-vote-reinstates-tpvs-and-hands-coalition-hollow-asylum-victory>.

144 Shalailah Medhora and Daniel Hurst, 'Palmer United Party Backs Asylum Bill after Scott Morrison Concessions', *The Guardian* (online, 4 December 2014) <https://www.theguardian.com/australia-news/2014/dec/04/palmer-united-party-asylum-bill-scott-morrison>.

In the end, the decision came down to a single senator, Senator Ricky Muir of the Australian Motoring Enthusiast Party. His vote was secured with a further promise that 31 babies born in Australia would be allowed to stay in Australia while their claims were processed.[145]

A The Rule of Law, Subverted

The question Scott Morrison asked his Department was how far he could go without having to comply with the law. The answer, it appears, was very far indeed. At its most basic, the rule of law requires that decisions are made in accordance with the law, not at the whim of the person holding power. It is fundamental to the rule of the law that it applies even if a minister or government disagrees with the law. This case study demonstrates that a determined minister can subvert this most fundamental aspect of the rule of law and get away with it.

The rule of law is not, of course, a necessary consequence of laws themselves. As this case study shows, the *Migration Act* provides in crucial respects for a form of 'unlimited' and arbitrary power. The *Migration Act* already allows the Minister to determine two of the most important life questions for any person seeking asylum: whether the person can apply for protection, and whether the person must stay in detention. The extent and breadth of these powers is indicated in a former Minister for Immigration's reference to these powers as 'playing God'.[146] Although some delegated legislation may be disallowed by Parliament, disallowance is very rare, and, as in the present case study, the delegated legislation can achieve its purpose even if it is later disallowed.[147] In some other cases, such as with the cap on protection visas, disallowance is not even a possibility.[148]

Expert drafting has also largely excluded the courts from any substantive review of the executive's decisions. There are many tricks here, repeated throughout the *Migration Act*. Personal and non-compellable powers are conferred on the Minister and legal accountability is transformed into (ineffective) political accountability by requiring that Ministerial decisions need to be tabled in Parliament. Further, the *Migration Act* uses extremely broad 'public interest' or 'national interest' criteria to provide maximum flexibility.

When all this fails, the Minister can buy time by running specious legal arguments that flout basic principles of statutory interpretation. The Minister can use many of his extraordinary powers, such as deciding whether children are detained on Christmas Island, to pressure independent senators into supporting legislation. These powers strike at the heart of the rule of law.

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145 Andrew Greene and Staff, 'Dozens of Asylum Seeker Babies Allowed to Stay in Australia for Refugee Processing', *ABC News* (online, 18 December 2014) <https://www.abc.net.au/news/2014-12-18/dozens-of-asylum-seeker-babies-allowed-australia-processing/5977310>.

146 Mark Metherell, 'I Should Not Play God: Evans', *Sydney Morning Herald* (online, 20 February 2008) <https://www.smh.com.au/national/i-should-not-play-god-evans-20080220-gds1tt.html>.

147 Appleby (n 23).

148 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (Report, 3 June 2019).

The Minister's power is also 'unruly' in the second sense identified by Krygier. Migration laws fail Fuller's requirements of the rules of law in that they are almost impenetrable, frequently changed, allow enormous discretion at the expense of consistency, and retrospectively affect existing applications. This retrospective effect could hardly be justified by (as the government suggested) removing 'an incentive for asylum seekers to use irregular channels including dangerous journey to Australia by sea to seek protection'.[149] As the Refugee Council of Australia pointed out in a submission to the Australian Law Reform Commission:

> [I]t makes little sense to apply these changes to people who could not possibly have known that they would be eligible for temporary protection only should they arrive without a visa and thus could not possibly have been deterred …[150]

This is also a story of arbitrary power in the third sense identified by Krygier, in its utter failure to allow those affected to be heard or to inform or affect the law. As demonstrated in this narrative, the *Migration Amendment* (*TPV) Regulation* and *Migration Amendment (UMA) Regulation* were introduced without any consultation. Similarly, the Migration and Maritime Powers (Legacy Caseload) Bill was also introduced without any consultation.

B Constitutional Theory and Practice Revisited

This case study reveals specific flaws in our institutional and constitutional designs. One by one, the checks and balances in the Australian federal system were tested and found wanting. These included:

- the dubious ethics of a public service that was prepared to give advice which it knew would not survive the scrutiny of the courts;
- the acquiescence in, or ignorance of, the Minister's actions by other members of government;
- the failure of Parliament to scrutinise the legality of the Minister's actions or to hold the Minister to account effectively;
- the difficulty of courts holding politicians to account effectively because of the time needed for litigation; and
- the failure of the media or the public to hold the Minister to account for these actions.

Indeed, this case study in some ways paints a more flattering picture of the state of our democracy than is truly warranted. For example, it is relatively rare that the Senate composition is as finely balanced as it was in this period. It is unlikely there will be such a high number of independents given the legal changes

149 Explanatory Statement, Migration Amendment (Conversion of Protection Visa Applications) Regulation 2015.

150 Refugee Council of Australia as quoted in Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) 385 [13.127] <https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_129_final_report_.pdf>.

made to Senate voting rules as a result of the preference deals that led to this particular Senate.[151]

Further, three of the High Court cases[152] relied upon a feature of the *Migration Act* that cannot be taken for granted: the fact that provision is made for protection visas in the primary legislation itself.

VI CAN WE DO BETTER?

A Improving Delegated Legislation

The case study exposes some design features that can and should be improved. For example, there are measures that could improve the effectiveness of parliamentary committee scrutiny of delegated legislation. Many of these are canvassed in the Senate Standing Committee on Regulations and Ordinances' own report on parliamentary scrutiny of delegated legislation.[153] For example, the Committee has recommended that the *Legislation Act 2003* (Cth) should be amended to provide that most delegated legislation commence 28 days from registration.[154] Other options include: requiring that a Regulation only comes into force after the period for disallowance has passed; requiring that both Houses approve the Regulation; or confining the delegated rule-making power to specific content.[155]

The report also recommended changes that would improve the flow of information from the Committee to the Senate and to ministers' offices to draw more attention to its substantive concerns. This would include ways to refer to the relevant parliamentary committees delegated legislation that requires scrutiny at a policy level, ensuring tabling statements are made at the time the report is tabled, and reducing the detail in its scrutiny reports to focus on substantive concerns.[156]

The report identified recurring concerns about parliamentary scrutiny of Bills, such as the passage of Bills that the Scrutiny of Bills Committee had not yet reported on.[157] Much the same has been said of the Parliamentary Joint Committee on Human Rights, which has often not had time to comment before legislation has

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151 Damon Muller, 'The New Senate Voting System and the 2016 Election' (Research Paper, Parliamentary Library, Parliament of Australia, 25 January 2018) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/SenateVotingSystem>.

152 *Plaintiff S297/2013* (2014) 255 CLR 179; *Plaintiff M150* (2014) 255 CLR 199; *Plaintiff S4/2014* (2014) 235 CLR 219.

153 Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation* (n 148).

154 Ibid xiv.

155 See, eg, Appleby and Howe (n 23); Appleby (n 23); Ernst Wilhelm, 'Government by Regulation: Deficiencies in Parliamentary Scrutiny?' (2004) 15(1) *Public Law Review* 9.

156 Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation* (n 148) xiii, xv–xvi.

157 Ibid 82 [5.5]. According to this report, 11% of legislation passed before the Scrutiny of Bills Committee had finished its report.

passed.[158] That Committee's capacity to review delegated legislation is also a concern.[159] These defects could be amended through changes to the standing orders of Parliament, to suspend the debate of Bills until the parliamentary committees have had time to report.[160]

Other concerns included the almost routine exemption of delegated legislation from disallowance or sunsetting, without clear criteria or guidelines.[161] The Scrutiny of Bills Committee is currently inquiring into this practice, after the government's package on COVID-19 included 32 laws that were exempt from disallowance.[162]

It is difficult to tell if the proposed changes would have prevented the rather limp response of the Committee on the Scrutiny of Regulations and Ordinances to the Minister's response to their concerns about the *Migration Amendment* (*TPV) Regulation*. It appeared all too easily satisfied by this wholly inadequate response, yet it would appear that the Committee might well have considered this to have been a successful outcome. By its own criteria of effectiveness, the Minister responded to its concerns in writing (which, to be fair, at the time was relatively unusual), and there appears to be no metric for gauging the adequacy of the response to its concerns.[163]

A clear question that arises is the effectiveness of the legislation designed to prevent the re-making of the same statutory instrument in substance within the next six months. This was far too easily defeated by the creativity of lawyers and by the simple expedient of revoking the Regulation when it faced legal challenge.

A preferable option is to ensure the enforceability of the provision through a mechanism of enabling the relevant Scrutiny Committee to suspend the operation of a legislative instrument that breaches this (and other) scrutiny principles. For example, the Victorian Scrutiny Committee can choose to suspend a legislative

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158 George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469, 501. According to this article, there had been 66 occasions on which the law was passed before the Committee had time to report.

159 Shawn Rajanayagam, 'Does Parliament Do Enough? Evaluating Statements of Compatibility under the *Human Rights (Parliamentary Scrutiny) Act*' (2015) 38(3) *University of New South Wales Law Journal* 1046.

160 A similar provision exists already in standing orders for standing or select committees: Senate, Parliament of Australia, *Standing Orders and Other Orders of the Senate*, O 115 <https://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/standingorders/b00>. See also Legislative Assembly, Australian Capital Territory, *Standing Orders and Continuing Resolutions of the Assembly* (3 April 2019) O 175 <https://www.parliament.act.gov.au/parliamentary-business/in-the-chamber/standing-orders/standing_orders>.

161 Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation* (n 148) 86 [5.20].

162 Karen Middleton, 'Parliament Bypassed for Covid-19 Legislation', *The Saturday Paper* (online, 16 May 2020) <https://www.thesaturdaypaper.com.au/news/politics/2020/05/16/parliament-bypassed-covid-19-legislation/15895512009842>.

163 Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation* (n 148) 11 [1.32]. According to this report, it received only 22 ministerial responses in 2013.

instrument that breaches the scrutiny principles for most of the period where the instrument could be disallowed.[164]

B Deeper Constitutional Issues

Most of the failures identified in this case study, however, require more substantial reform. For example, there are larger questions about the increasingly tight party discipline that renders backbenchers ineffective in providing scrutiny.[165] There are also systemic considerations which give both major parties incentives, while in power, to maximise the freedom of the executive. This enables very broadly framed legislation to pass Parliament more easily. In a two-party Westminster system of government, the opposition is also a government-in-waiting, so may also benefit from broad rules when they are in office.[166]

Lying at the heart of this case study, however, is a conflict between the theory that underpins our constitutional arrangements, and its practice. In theory, the executive abuses its delegated rule-making power when it uses that power in a way that conflicts with the will of the Parliament. In this case, the Minister knew that if he put the content of the Regulations before Parliament as legislation prior to 1 July 2014, it would not pass.[167] Yet he used his delegated power, knowing he could play the game of disallowance to achieve his object,[168] and in the process upended the principle of the supremacy of Parliament over the executive.

The theory of the supremacy of Parliament over the executive reflects the standard theory that it is Parliament, not the executive, that represents the will of the people. Its composition and different voting rules are designed to balance the principle of majoritarian rule with other principles of representation, such as the representation of State and minority interests.

Yet this constitutional theory has one rather large defect: in practice, the effect of party discipline has inverted this power relationship, so that 'parties control the Executive, and the Executive the Parliament'.[169] In Australia, party government has long supplanted parliamentary government. Governments of both major parties have reflected this dominance in their expression of views that the winning party has not merely the responsibility, but also the right, to enact policies brought

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164 *Subordinate Legislation Act 1994* (Vic) s 22.

165 Deirdre McKeown and Rob Lundie, 'Crossing the Floor in the Federal Parliament 1950–April 2019' (Research Paper, Parliamentary Library, Parliament of Australia, 12 March 2020).

166 There is a long history of both Labor and Liberal governments passing extremely broadly worded migration legislation and combining to do so: see, eg, *Migration Amendment (Regional Processing Arrangements) Act 2015* (Cth). For a discussion on the incentives, see Stanley Bach, *Platypus and Parliament: The Australian Senate in Theory and Practice* (Department of the Senate, 2003) 355–7 <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/platparl>.

167 Appleby and Howe (n 23) 19.

168 Appleby (n 23) 276.

169 Jim Chalmers and Glyn Davis, 'Relations Between the Parliament and the Executive' (Research Paper No 14 2000–01, Parliamentary Library, Parliament of Australia, 7 November 2000)

before the election, and it is therefore undemocratic for Parliament to frustrate the mandate given to that party.[170]

For example, then Prime Minister Tony Abbott said when the first cap on protection visas was announced: 'The parliament should sit and do its job and doing its job means supporting the policies the people voted for'.[171] Then Prime Minister Abbott spoke of the Senate as being 'feral', while a former Labor Prime Minister spoke of the Senate as 'unrepresentative swill'.[172]

This rhetoric that an elected executive is the constitutional branch that is most democratically legitimate has also been practised for decades by ministers with respect to the courts and tribunals.[173] Perhaps it was most clearly expressed in an Explanatory Memorandum for a Bill sponsored by Scott Morrison, justifying why the Minister should be able to exclude a tribunal from reviewing his decision:

> As an elected Member of Parliament, the Minister represents the Australian community and has a particular insight into Australian community standards and values and what is in Australia's public interest. As such, it is not appropriate for an unelected administrative tribunal to review such a personal decision of a Minister on the basis of merit, when that decision is made in the public interest.[174]

In this metaphysical approach, the Minister is transformed into a divine vessel for the wider Australian community and its interests. It reminds us of the traditional theories of kings and queens being anointed by heaven, and of authoritarian leaders who claim themselves as uniquely representative of their people.

This is profoundly wrongheaded, in both theory and in practice. Representative democracy and the rule of law are both deliberately opposed to a model of leadership that vests all power in a single, all-knowing figure. Instead, these constitutional principles are premised on the distribution and separation of powers, on providing institutional checks and balances to temper tyranny.

In practice, too, this mystical claim disintegrates upon closer inspection. An 'electoral mandate' is claimed despite the difficulty of knowing what precisely a voter might be voting for, and despite the fact that political research demonstrates

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170 Bach (n 166) 276.

171 Lenore Taylor, 'Scott Morrison Uses Ministerial Decree to Halt Permanent Protection Visas', *The Guardian* (online, 4 December 2013) <https://www.theguardian.com/world/2013/dec/04/scott-morrison-uses-ministerial-decree-to-halt-permanent-protection-visas>.

172 Matthew Doran, 'Glenn Lazarus Takes Prime Minister Tony Abbott to Task for "Feral" Senate Comment', *ABC News* (online, 18 March 2015) <https://www.abc.net.au/news/2015-03-18/glenn-lazarus-says-abbott-feral-senate-comment-disrespectful/6330114>; Joey Watson and Kerri Phillips, 'Unrepresentative Swill or Vital for Democracy? Australia's Upper Houses', *ABC News* (online, 9 May 2019) <https://www.abc.net.au/news/2019-05-09/is-the-senate-upper-house-still-vital-for-australian-politics/11082730>.

173 See, eg, Benjamin Haslem and Amanda Keenan, 'Butt Out, Ruddock Tells Judges', *The Australian* (Sydney, 4 June 2002) 1; M Hardy, 'Court Chief Out of Touch, Says Bolkus', *Courier-Mail* (Brisbane, 20 July 1995) 6; 'Justice Einfeld and Mr Hand', *Sydney Morning Herald* (Sydney, 8 December 1992) 12.

174 Explanatory Memorandum, Australian Citizenship and Other Legislation Amendment Bill 2014 (Cth) 61 [445].

that most voters do not vote on the basis of any policy at all.[175] Further, the mystical claim is difficult to support in an age where the membership of political parties is dwindling rapidly.[176] In practice, the most important stakeholders for a political representative in a safe seat are now within the party, rather than outside of it.

The mystical claim also betrays a denial of the constitutional theory. The government's 'electoral mandate' does not allow other parliamentarians to abdicate their own electoral mandate, or Parliament's constitutional function to represent the whole of the Australian electorate, not merely the majority.

VII CONCLUSION

The rule of law arose, in part, to temper the exercise of arbitrary power and the 'tendency to oligarchy by executive power-holders'.[177] Yet, as this case study has shown, the institutions that supposedly entrench the rule of law can also be used by a determined Minister to subvert the rule of law. The system can be 'gamed', and the fate of lives can be determined at the will and pleasure of a minister-king.

As Martin Krygier has observed, 'the success of the rule of law as a restraint on power has indispensable social conditions'.[178] One of the most important is that its norms need to be internalised as a source of self-restraint by the powerful.

While this narrative account of Morrison's masterly manipulation of parliamentary process has revealed multiple institutional deficiencies, it has also revealed the decay of these democratic norms in our political practices. When norms are breached and nothing happens, what is internalised by those in power is that these are new rules of the game.

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175 Christopher Achen and Larry Bartels, *Democracy for Realists: Why Elections Do Not Produce Responsive Government* (Princeton University Press, 1st ed, 2017).

176 Cathy Alexander, 'The Party's Over: Which Clubs Have the Most Members?', *Crikey* (online, 18 July 2013) <https://www.crikey.com.au/2013/07/18/the-partys-over-which-clubs-have-the-most-members/>.

177 John Uhr, 'Parliament and the Executive' (2004) 25(1) *Adelaide Law Review* 51, 60.

178 Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology' in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart Publishing, 2008) 45.