

# AUSTRALIAN EXCEPTIONALISM: TEMPORARY PROTECTION AND THE RIGHTS OF REFUGEES

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*Following the passage of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth) ('Legacy Caseload Act') in December 2014, Australia once again has acquired a formal temporary protection regime for persons recognised as refugees. This article addresses the contested issue of how temporary protection as a concept squares with obligations assumed by states under the Convention relating to the Status of Refugees ('Convention'). We argue that temporary status is not inherently incompatible with the Convention. However, we note that this instrument does much more than simply create the obligation of non-refoulement. It confers a range of rights on refugees which must inform the necessary content of a temporary protection regime. Examining temporary protection in international law and practice, we compare Australia's use of the concept. The article reviews various iterations of temporary protection devised by Australia over the years. It has come not only in the form of temporary protection visas. A range of visas and other devices have been used to provide de facto temporary protection. The article concludes by reflecting on what a Convention-compliant temporary protection regime could look like, focusing on the two forms of temporary protection visa introduced by the Legacy Caseload Act. Ultimately, while the Convention may not require permanent protection, it does not license the Australian Government's plans to leave recognised refugees in a state of perpetual uncertainty.*

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I TEMPORARY PROTECTION AND THE *REFUGEE CONVENTION*

The United Nations *Convention relating to the Status of Refugees* ('*Refugee Convention*' or '*Convention*'), as modified by the *1967 Protocol* of the same name,<sup>1</sup> is a fairly unique achievement of multilateral post-conflict diplomacy. In the face of the primordial sovereign right of states to determine membership of their own societies, the *Convention* enshrined an obligation in states party not to *refouler* or send back 'refugees' (as defined) to situations where they face persecution.<sup>2</sup> For refugees on the territory or under the control of a state party, the instrument went on to create a litany of obligations for states (and corresponding rights for refugees). As we will explore, these vary according to the nature and extent of the refugee's connection with a 'receiving' state. By way of compromise, the *Refugee Convention* remained silent on the issue of the refugee's right to enter a country of asylum.<sup>3</sup> It also qualified the refugee's right to protection with provisions that acknowledge the right of states to national security and the safety of their own nationals.<sup>4</sup>

As Australia moves to reintroduce temporary protection visas ('TPVs'),<sup>5</sup> there has been a tendency for proponents on both sides of the policy debate to engage in a selective reading of the *Refugee Convention*. At one extreme are those who seem to acknowledge only the *non-refoulement* obligation, seeing refugee status as a privilege that yet confers no real 'rights' on refugees.<sup>6</sup> At the other are those who posit that the grant of temporary protection to refugees is necessarily antithetical to the protection tenets of the *Refugee Convention*.<sup>7</sup>

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<sup>1</sup> See *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ('*Refugee Convention*'); *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) ('*Protocol*'). The *Protocol* was signed by Australia on 31 January 1967 and ratified on 13 December 1973. The *Refugee Convention* covers events causing a refugee problem before 1 January 1951, while the *Protocol* extends the definition to events occurring after that date.

<sup>2</sup> See Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Daniel Bethlehem et al (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 87.

<sup>3</sup> Cf *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948) art 14. On this point, see Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3<sup>rd</sup> ed, 2007) 355.

<sup>4</sup> See *Refugee Convention* arts 9, 32, 33(2). One example of such attitudes is apparent in the decision to require asylum seekers in Australia to sign a Code of Conduct before they are released from immigration detention on bridging visas. See Minister for Immigration and Border Protection (Cth), *Code of Behaviour for Public Interest Criterion 4022*, IMMI 13/155, 13 December 2013.

<sup>5</sup> See *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) ('*Legacy Caseload Act*'); below Part III.

<sup>6</sup> In the second reading speech for the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) ('*Legacy Caseload Bill*'), the then Minister for Immigration and Border Protection ('Minister') Scott Morrison said: 'It has been a clear policy of this government to ensure that those who flagrantly disregard our laws and arrive illegally in Australia are not rewarded with a permanent protection visa'. Commonwealth, *Parliamentary Debates*, House of Representatives, 25 September 2014, 10546 (Scott Morrison).

<sup>7</sup> See, eg, Hossein Esmaeili and Belinda Wells, 'The "Temporary" Refugees: Australia's Legal Response to the Arrival of Iraqi and Afghan Boat-People' (2000) 23(3) *University of New South Wales Law Journal* 224.

In this article we advocate a middle road between these two poles. We will argue that the achievements — and limitations — of the *Convention* should serve as ‘centering’ concepts in debates about the nature of the protection that must be afforded to refugees under international law.

We acknowledge that the *Refugee Convention* creates no obligations in states party to confer either permanent residence or citizenship on refugees within their territories. There is no intrinsic impediment to states party to the *Refugee Convention* conferring temporary immigration status on refugees.<sup>8</sup> The basis for the protection of refugees in international law is that the *Convention* fills the void created when the refugee’s state of origin fails in its duty, and so refugee status inheres only while state protection is absent. This is reflected most clearly in the inclusion of the cessation clauses in art 1(C), which prescribe the circumstances in which refugee status may end.<sup>9</sup> Manuel Castillo and James Hathaway argue that

the historical willingness of the North to equate refugee status with permanent admission [has] had more to do with ideological solidarity and consistency with domestic immigration laws than with any principled view that permanent residence is the preferred answer to refugeehood.<sup>10</sup>

By the same token, the *Refugee Convention* does demand much more of states than that they desist from returning refugees to countries where they face persecution on one of the five *Convention* grounds. The entitlements of refugees under the *Convention* fall into three broad categories reflective of an individual’s status and connection with the state. These can be summarised as: physical presence, lawful presence and lawful stay. The most basic and crucial rights — including *non-refoulement* (art 33) and non-penalisation (art 31) — depend only on a refugee being physically present in a state, irrespective of domestic immigration laws.<sup>11</sup> The right to education (art 22), property rights (art 13) and the right to access the courts (art 16) likewise depend only on simple presence. Refugees who are ‘lawfully present’ in a state are entitled to further substantive and procedural protections. These include: protection against expulsion (art 32); freedom of residence and movement within the state (art 26); and the right to engage in self-employment (art 18). Once a refugee is ‘lawfully staying in’ the state, they enjoy a much broader range of rights, particularly social rights. These include the right to be issued with travel documents to enable international travel (art 28); the right to work (art 17); and rights in respect of social security (art 24) and housing (art 21).

The concept of temporary protection as it has developed in international law and the practice of other states can be instructive. In Part II of this article, we explore how the concept of temporary protection was developed and is still used

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<sup>8</sup> See Alice Edwards, ‘Temporary Protection, Derogation and the 1951 *Refugee Convention*’ (2012) 13 *Melbourne Journal of International Law* 595, 606–13.

<sup>9</sup> For a different view of how art 1(C) of the *Refugee Convention* should be read, see Susan Kneebone and Maria O’Sullivan, ‘Article 1C’ in Andreas Zimmerman (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 481.

<sup>10</sup> Manuel Angel Castillo and James C Hathaway, ‘Temporary Protection’ in James C Hathaway (ed), *Reconceiving International Refugee Law* (Martinus Nijhoff, 1997) 3.

<sup>11</sup> On being subject to a state’s jurisdiction, see James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 160–71.

in most parts of the world as a device to encourage states to comply with their *non-refoulement* obligations in mass influx situations and/or to extend protection to a broader set of people than those covered by the *Convention* refugee definition. In the Australian case, however, it has been used primarily to deter, and has served as a moat or divide between mere existence and meaningful and productive life. Both the conceptual underpinnings of the international norm of temporary protection and the body of rights that are accepted to attach to it provide a useful point of departure for evaluating Australia's use of TPVs.

In Part III of the article we examine the different iterations of temporary protection devised by Australia's policy makers over the years. We argue that temporary protection has not only come in the form of TPVs. Particularly in recent years, a range of visas and other devices have been used to provide de facto temporary protection. We outline the two forms of TPV introduced in December 2014, explaining how they continue a long line of strategies to ensure that the ability of refugees to access visas is controlled by ministerial discretions.

In Part IV we consider how a *Convention*-compliant temporary protection regime in Australia might look. We argue that the way Australia has used temporary protection is exceptional, if not unique, relative to other countries. We concur with most of the world's commentariat in arguing that Australian law and policy on more than one occasion has put it in breach of its international legal obligations as party to the *Refugee Convention* and to the various international human rights instruments. The *Refugee Convention*'s three categories of rights are of use in informing the necessary content of temporary protection, although the boundaries between the statuses that define entitlement to those rights can be contentious. Ultimately, though, it is the transience of temporary protection that is the critical issue. While the *Convention* may not require permanent protection, it does not license the Australian Government's plans to leave recognised refugees in a state of perpetual uncertainty.

## II THE DEVELOPMENT OF TEMPORARY PROTECTION IN INTERNATIONAL LAW AND PRACTICE

The concept of temporary protection, or temporary refuge, first appeared in the discourse on refugee law in the context of the mass movement of Indochinese refugees in the 1970s and early 1980s.<sup>12</sup> It was an Australian, Gervase Coles, who drove the consideration and development of the concept by the international community.<sup>13</sup> He considered that the proper function of temporary refuge is to

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<sup>12</sup> See Executive Committee of the High Commissioner's Programme, *Temporary Refuge: No 19 (XXXI)*, 31<sup>st</sup> sess (16 October 1980) b(i): '[T]hat in the case of large-scale influx, persons seeking asylum should always receive at least temporary refuge'. See also Guy S Goodwin-Gill, 'Non-Refoulement, Temporary Refuge and the "New" Asylum Seekers' in David J Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill Nijhoff, 2014) 433, 433–4; Edwards, 'Temporary Protection, Derogation and the 1951 Refugee Convention', above n 8, 5–9.

<sup>13</sup> See Gervase J L Coles, 'Temporary Refuge and the Large Scale Influx of Refugees' (1980) 8 *Australian Yearbook of International Law* 189. This is a published version of a working paper prepared for the United Nations High Commissioner for Refugees Expert Group on Temporary Refuge in Situations of Large-Scale Influx held in 1981. See also United Nations High Commissioner for Refugees, *Report of the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx, Geneva, 21–24 April 1981*, UN Doc EC/SCP/16/Add.1 (17 July 1981).

‘facilitate admission and the obtaining of satisfactory solution’ in large-scale influx situations.<sup>14</sup> He argued that it is needed because

there are situations of large-scale influx where it would be neither reasonable nor desirable in regard to the refugees themselves or to the country of refuge to consider acceptance at the frontier as entailing automatically a durable solution in the country of refuge.<sup>15</sup>

Coles added that there should not be an ‘automatic equation of admission under the principle of *non-refoulement* with the provision of a durable solution’.<sup>16</sup> He pointed out that temporary protection facilitates admission where a country may otherwise be reluctant, if admission entailed more permanent obligations which the country may not be able to feasibly provide.<sup>17</sup> Writing in the context of the refugee crisis that followed the end of the war in Vietnam, Coles’ arguments found resonance in a region where very few countries of primary refuge were parties to the *Refugee Convention*.<sup>18</sup>

Following an Australian proposal made in response to the Indochinese refugee crisis, an expert group was convened to consider the topic in 1981. This culminated in the adoption of the UN High Commissioner for Refugees (‘UNHCR’) Executive Committee (‘ExCom’) *Conclusion No 22 (XXXII) (1981) on the Protection of Asylum Seekers in Situations of Large-Scale Influx (‘Conclusion No 22’)*. It provided:

In situations of large-scale influx, asylum-seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis and provide them with protection according to the principles set out below.<sup>19</sup>

In line with ExCom *Conclusion No 19 (XXI) (1980) on Temporary Refuge* from the previous year, *Conclusion No 22* emphasised the central importance of *non-refoulement* being scrupulously observed. Setting out basic minimum standards for treatment of asylum seekers who have been admitted, *Conclusion No 22* essentially adopted Coles’ proposals<sup>20</sup> and established principles for burden-sharing between states.

By 1985, Deborah Perluss and Joan Hartman were arguing that a norm of temporary refuge had developed in customary international law.<sup>21</sup> The content of the norm was drawn as a prohibition on forcible repatriation of persons fleeing violence caused by armed conflict,<sup>22</sup> being less concerned with the treatment

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<sup>14</sup> Coles, ‘Temporary Refuge and the Large Scale Influx of Refugees’, above n 13, 191.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid 195.

<sup>17</sup> Ibid 191.

<sup>18</sup> See Mary Crock, ‘Shadow Plays, Shifting Sands and Convergences in the Asia-Pacific’ (2014) 63 *International and Comparative Law Quarterly* 247.

<sup>19</sup> Executive Committee of the High Commissioner’s Programme, *Protection of Asylum-Seekers in Situations of Large-Scale Influx: No 22 (XXXII)*, 32<sup>nd</sup> sess (21 October 1981).

<sup>20</sup> Coles, ‘Temporary Refuge and the Large Scale Influx of Refugees’, above n 13, 206.

<sup>21</sup> Deborah Perluss and Joan F Hartman, ‘Temporary Refuge: Emergence of a Customary Norm’ (1986) 26 *Virginia Journal of International Law* 551. Guy Goodwin-Gill has recently written a further elaboration and defence of that contention. See Goodwin-Gill, ‘*Non-Refoulement*, Temporary Refuge and the “New” Asylum Seekers’, above n 12, 435–9.

<sup>22</sup> Perluss and Hartman, above n 21, 554.

afforded to persons granted temporary refuge. The concept gained further prominence in the context of the conflict in the former Yugoslavia, when hundreds of thousands of people fleeing Bosnia and later Kosovo were given temporary protection in European states.<sup>23</sup>

There was much academic consideration of the concept of temporary protection around this time,<sup>24</sup> with increased discussion of the content of the rights of those displaced. The form of protection provided by different states and the rights accorded to refugees varied substantially, including on matters relating to family reunification and work rights.<sup>25</sup> In a move to harmonise practices, the European Union *Council Directive 2001/55/EC* ('EU Temporary Protection Directive')<sup>26</sup> was adopted in 2001, setting standards for temporary protection in cases of mass influx. The *EU Temporary Protection Directive* only applies where the Council of the EU determines the existence of a mass influx.<sup>27</sup> At the time of writing, its provisions had not yet been triggered.

Building on *Conclusion No 22* and regional initiatives like the *EU Temporary Protection Directive*, the UNHCR 2014 Guidelines on Temporary Protection and Stay Arrangements ('UNHCR Guidelines') elaborate a further list of minimum standards of treatment applicable to temporary protection situations.<sup>28</sup> The UNHCR Guidelines state that '[i]n cases of extended stay, or where transition to solutions is delayed, the standards of treatment would need to be gradually improved'.<sup>29</sup>

In the mainstream discourse on refugee law the notion of temporary protection has been concerned with filling gaps in the international protection

<sup>23</sup> Karoline Kerber, 'Temporary Protection in the European Union: A Chronology' (1999) 14 *Georgetown Immigration Law Journal* 35. See also the discussion of Australia's temporary Safe Haven visas: below Part III.

<sup>24</sup> For an overview of relevant literature on the topic, see Donatella Luca, 'Questioning Temporary Protection' (1994) 6 *International Journal of Refugee Law* 535; 'Selected Bibliography on Temporary Refuge/Temporary Protection' (1994) 6 *International Journal of Refugee Law* 539. See also Kerber, 'A Chronology', above n 23; Karoline Kerber, 'Temporary Protection: An Assessment of the Harmonisation Policies of European Union Member States' (1997) 9 *International Journal of Refugee Law* 453; Morten Kjaerum, 'Temporary Protection in Europe in the 1990s' (1994) 6 *International Journal of Refugee Law* 444; Davor Sopf, 'Temporary Protection in Europe after 1990: The Right to Remain of Genuine Convention Refugees' (2001) 6 *Washington University Journal of Law and Policy* 109; Matthew J Gibney, 'Between Control and Humanitarianism: Temporary Protection in Contemporary Europe' (2000) 14 *Georgetown Immigration Law Journal* 689. See also United Nations High Commissioner for Refugees, *Note on International Protection*, 45<sup>th</sup> sess, UN Doc A/AC.96/830 (7 September 1994) 22–5 [45]–[51].

<sup>25</sup> Kjaerum, above n 24, 450–5; Gibney, above n 24, 696–8; Kerber, 'A Chronology', above n 23, 36–8.

<sup>26</sup> *Council Directive 2001/55/EC of 20 July 2001 on Minimum Standard for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof* [2001] OJ L 212/12 ('EU Temporary Protection Directive').

<sup>27</sup> *Ibid* art 5.

<sup>28</sup> United Nations High Commissioner for Refugees, 'Guidelines on Temporary Protection or Stay Arrangements' (Guidelines, February 2014) 1 [3] <<http://perma.cc/6RD8-G459>> ('UNHCR Guidelines'). See also UNHCR Roundtable on Temporary Protection International Institute of Humanitarian Law, 'Summary Conclusions on Temporary Protection: San Remo, Italy, 19–20 July 2012' (2013) 25 *International Journal of Refugee Law* 178.

<sup>29</sup> *UNHCR Guidelines*, above n 28, 5 [17].

architecture so as to improve protection outcomes.<sup>30</sup> One aspect of this is the breadth of coverage afforded to people in need of protection, particularly those fleeing armed conflict, who may fall outside the *Convention* definition of refugee. In relation to such situations, Coles criticised the ‘exile bias’ of international refugee law.<sup>31</sup> He complained that presumptions are made too often that the resettlement of refugees in countries of asylum or in safe third countries is the only solution. It is assumed that refugees do not want to return to their countries of origin.<sup>32</sup> He argued that this was ‘profoundly wrong’ because it failed to recognise the importance of belonging and the ‘fundamental right of the individual to return to their home’.<sup>33</sup> The increasing practice of temporary protection from the late 1980s then brought a shift to an emphasis on voluntary repatriation as the preferred durable solution and the development of the notion of safe return.<sup>34</sup>

Coles’ critique related to situations of armed conflict, serious disturbances or natural disaster, where he argued that temporary protection was appropriate. In contrast he explained that, ‘if the refugee is a victim of persecution, which is normally the deliberate and often systematic violation of the rights of the individual by a government, then the co-operation of the country of origin is either undesirable or unrealistic’.<sup>35</sup> Repatriation in this context is less likely to be an appropriate durable solution. Coles emphasised that temporary protection is about expedience, a way of dealing with a crisis situation rather than a solution. He said, ‘[i]n the refugee context solution should be considered as retaining or regaining the normal benefits of a political community or, at least, the normal conditions of long-term or permanent residence’.<sup>36</sup> If it seems unlikely that this will be feasible in the refugee’s home country, and a receiving country has capacity, then permanent settlement in the country of asylum becomes the likely appropriate solution. Coles’ rationale for temporary protection no longer applies.

Many of the countries playing host to very large numbers of refugees and displaced persons in recent years have adopted Coles’ formulation. Two examples in point that we have observed in the context of recent fieldwork are Jordan and Turkey. Both have experienced massive influxes of fugitives from the

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<sup>30</sup> See, eg, Volker Turk, Alice Edwards and Matthias Braeunlich, ‘Introductory Note to the San Remo Summary Conclusions on Temporary Protection’ (2013) 25 *International Journal of Refugee Law* 175, 177; UNHCR Roundtable on Temporary Protection International Institute of Humanitarian Law, above n 28, 179–80 [7], 185–6 [34]; *UNHCR Guidelines*, above n 28, 1 [3].

<sup>31</sup> Gervase Coles, ‘Approaching the Refugee Problem Today’ in Gil Loescher and Laila Monahan (eds), *Refugees and International Relations* (Oxford University Press, 1989) 373, 392–3.

<sup>32</sup> *Ibid* 387–90.

<sup>33</sup> *Ibid* 391. This point is underscored in countries such as Jordan, who for years have denied formal citizenship to Palestinian refugees in deference to their right to return to their homeland. On this point, see Sumit Sen, ‘Stateless Refugees and the Right to Return: The Bihari Refugees of South Asia — Part 2’ (2000) 12 *International Journal of Refugee Law* 41.

<sup>34</sup> B S Chimni makes the criticism that the shifts in preferred durable solutions are dictated by the interests of the dominant northern states: B S Chimni, ‘From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems’ (2004) 23(3) *Refugee Survey Quarterly* 55.

<sup>35</sup> Coles, ‘Approaching the Refugee Problem Today’, above n 31, 391.

<sup>36</sup> *Ibid* 405–6.

civil unrest in Syria and Iraq.<sup>37</sup> In both countries the refugees are referred to as ‘guests’ — and have been shown quite remarkable generosity. The expectation is clear, however, that the refugees will eventually either return home or find a durable solution elsewhere. In late 2015, the transience of these refugee populations found expression in the secondary movement en masse of refugees, asylum seekers and displaced persons across the European continent.

Even in situations of mass influx, temporary protection can be problematic in its application to *Convention* refugees if it is used to deny the full breadth of rights afforded by the *Convention*. As Jean-François Durieux and Jane McAdam write:

The price that States have demanded in accepting the obligation to admit large numbers of refugees and asylum seekers is a de facto suspension of all but the most immediate and compelling protections provided by the *Convention*. Thus, *non-refoulement* extends through time, so that although persons are not returned to persecution and other situations of harm, they are in essence left in a legal limbo.<sup>38</sup>

Joan Fitzpatrick has warned that temporary protection can also be a strategy to ‘de-legalize refugee protection’,<sup>39</sup> and that when offered as a ‘diluted substitute protection’ for *Convention* refugees, it can represent a threat to the international protection regime.<sup>40</sup> As we explore in the following section, this has too often been the story in Australia.

### III TEMPORARY PROTECTION AUSTRALIAN STYLE

#### A *The Evolution of Temporary Protection Schemes in Australia*

The international concept of temporary protection has had as its primary concern finding ways to fill gaps in international protection. In contrast, Australia’s approach has generally been to use temporary protection as a device for *exploiting* the lacunae in the international legal schema. Far from being a management tool for large-scale influxes, temporary protection Australian style has been designed as a measure at best to deter and at worst to punish asylum seekers. To the cynical eye, some versions of Australian policy could even be seen as rhetorical, political devices. TPVs seem to have been aimed squarely at a domestic electorate bristling with hostility towards ‘aliens’ perceived to have entered the country without permission.

Temporary protection first made its appearance in Australian law in 1989. Before then, persons in Australia granted refugee status universally acquired permanent residence.<sup>41</sup> In December 1989 Australia’s migration laws underwent dramatic structural change, moving from a system characterised by sweeping

<sup>37</sup> See United Nations High Commissioner for Refugees, *Syria Regional Refugee Response* (3 November 2015) <<http://perma.cc/GE8A-XFZC>>.

<sup>38</sup> Jean-François Durieux and Jane McAdam, ‘*Non-Refoulement* through Time: The Case for a Derogation Clause to the *Refugee Convention* in Mass Influx Emergencies’ (2004) 16 *International Journal of Refugee Law* 4, 13.

<sup>39</sup> Joan Fitzpatrick, ‘Temporary Protection of Refugees: Elements of a Formalized Regime’ (2000) 94 *American Journal of International Law* 279, 281.

<sup>40</sup> *Ibid* 280.

<sup>41</sup> See *Migration Act 1958* (Cth) s 6A(1)(c) (*‘Migration Act’*), as repealed by *Migration Legislation Amendment Act 1989* (Cth).

discretions to a highly structured regulatory framework.<sup>42</sup> For refugees, temporary protection was presented as the new norm. The *Migration Regulations 1989* (Cth) were made in the context of an increasing number of ‘onshore’ refugee claims, emanating largely from Chinese students affected by the crackdown on the pro-democracy movement in China. Boats carrying asylum seekers from Cambodia — the first after a lull of eight years — and then from China induced a paroxysmal response.<sup>43</sup> A complex scheme of Refugee Temporary Entry Permits was introduced, giving form to the confusing and highly ambivalent way in which Australia’s politicians responded to the crisis unfolding in the region. On the one hand, then Prime Minister Bob Hawke broke down in tears and decreed that no Chinese student would be required to return home. This gesture alone eventually extended de facto refugee protection to nearly 30 000 people. On the other hand, the Cambodians arriving without visas were denounced as ‘economic refugees’ by then Foreign Minister Gareth Evans. Prime Minister Bob Hawke chimed in to remind these people that ‘Bob is not your uncle’.<sup>44</sup>

The initial categories of permit appear to reflect some of the thinking about temporary protection that was occurring internationally, with an emphasis on sudden and large-scale influx. They also reflected the view that the *Refugee Convention* does not require permanent asylum and that permanent asylum is not necessarily the preferable outcome for all refugees. The Refugee A Temporary Entry Permit carried the possibility of transition to a permanent permit. It could be granted where the Minister for Immigration (‘Minister’) was ‘satisfied that permanent settlement in Australia [was] the appropriate durable solution for the applicant’.<sup>45</sup> A Refugee B Temporary Entry Permit without the prospect of permanent residence was available to refugees for whom permanent settlement in Australia was ‘not the appropriate durable solution’ or where the applicant did not ‘wish to remain permanently in Australia’.<sup>46</sup> In other respects the temporary permits operated like the TPVs of more recent times. Holders were given the right to work, some access to education and medical care. However, the permits allowed no travel outside of Australia and no right to sponsor family members for entry into the country.

Between 1989 and 1993 the visa regime underwent almost continual change, with policy vacillating between allowing and forbidding the use of TPVs as vehicles for transitioning to permanence. In practice, before the first of the four-year permits had expired, the government called an amnesty for the refugees and asylum seekers in the country.<sup>47</sup> In addition to the permanent protection visa

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<sup>42</sup> See Mary Crock and Laurie Berg, *Immigration Refugees and Forced Migration* (Federation, 2011) ch 5.

<sup>43</sup> See *ibid* 338–41; Janet Phillips and Harriet Spinks, ‘Boat Arrivals in Australia since 1976’ (Background Note, Parliament of Australia, 2012) <<http://perma.cc/GK97-TUEE>>. For an account of this period, see also Roz Germov and Francesco Motta, *Refugee Law in Australia* (Oxford University Press, 2003) 40–3.

<sup>44</sup> Frank Brennan, *Tampering with Asylum: A Universal Humanitarian Problem* (University of Queensland Press, revised ed, 2007) 42–4. See also Paul Kelly, *The March of Patriots* (Melbourne University Press, revised ed, 2007) 190.

<sup>45</sup> *Migration Regulations 1989* (Cth) reg 116, as repealed by *Migration Regulations 1993* (Cth).

<sup>46</sup> *Ibid* reg 117, as repealed by *Migration Regulations 1993* (Cth).

<sup>47</sup> See Germov and Motta, above n 43, 40–3.

(now subclass 866), permits were introduced to target both highly skilled and qualified (Chinese) students and others who could show strong compassionate or humanitarian reasons for wanting to remain in Australia.<sup>48</sup>

Permanent protection remained the norm thereafter until 1999, when TPVs were reintroduced by a conservative Coalition government.<sup>49</sup> The fundamental difference with this scheme was the overt focus on deterrence rather than the management of asylum seekers. Again, the measure was a response to a sharp increase in irregular maritime migration, this time predominantly from the Middle East and South Asia.<sup>50</sup> Persons arriving in Australia without visas by boat were no longer eligible for subclass 866 protection visas, but only for three year TPVs.<sup>51</sup> After 30 months and further adjudication of ongoing protection needs,<sup>52</sup> a refugee could be granted a permanent protection visa.<sup>53</sup> The scheme initially did nothing to reduce irregular maritime migration. In fact there was an increase in boat arrivals — and in the proportion of women and children on the boats — reflecting the impediments placed on the refugees' ability to sponsor family through regular channels.<sup>54</sup> The drama surrounding the interdiction of the Tampa in August 2001 and the terrorist attacks in the United States on 9 September 2001 led to a raft of further changes. These have been well documented.<sup>55</sup> Suffice to note that these years saw the creation of the edifice of offshore processing that persists to time of writing. This was done first through the 'excision' of Australia's island territories from the migration legislation, leaving Christmas Island as a place of exception from whence non-citizens could not apply for any form of visa without an exercise of ministerial discretion. First Nauru and then Manus Island in Papua New Guinea ('PNG') were established as foreign processing centres. Persons assessed as refugees in each place became eligible for various forms of temporary visas permitting stay for either three years (onshore TPVs) or five years (regional offshore 'Secondary Movement visas'). In spite of punitive measures such as the rule banning any person from

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<sup>48</sup> *Migration (1993) Regulations (Amendment)* (Cth), as repealed by *Migration Reform (Transitional Provisions) Regulations 1994* (Cth).

<sup>49</sup> *Migration Amendment Regulations 1999 (No 12)* (Cth), as repealed by *Immigration and Border Protection (Spent and Redundant Instruments) Repeal Regulation 2014* (Cth).

<sup>50</sup> Germov and Motta, above n 43, 45.

<sup>51</sup> *Migration Regulations 1994* (Cth) sch 2 cl 866.212(a) (as at 1999) ('*Migration Regulations*'), as repealed by *Migration Amendment Regulations 2008 (No 5)* (Cth) sch 1 pt 3.

<sup>52</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 ('*QAAH*').

<sup>53</sup> *Migration Regulations* sch 2 cls 785.511, 866.228 (as at 1999), as amended by *Migration Amendment (Resolving the Asylum Legacy Caseload) Regulation 2015* (Cth) sch 3; at sch 2 cl 866.28, as repealed by *Migration Amendment Regulations 2008 (No 5)* (Cth) sch 1 pt 3.

<sup>54</sup> See Mary Crock, 'In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows' (2003) 12 *Pacific Rim Law and Policy Journal* 49, 91.

<sup>55</sup> See, for example, the articles on the Tampa Affair in: (2002) 13(2) *Public Law Review*; Savitri Taylor, 'Sovereign Power at the Border' (2005) 16 *Public Law Review* 55, 56; Tania Penovic and Azadeh Dastyari, 'Boatloads of Incongruity: The Evolution of Australia's Offshore Processing Regime' (2007) 13 *Australian Journal of Human Rights* 33; Jane McAdam and Kate Purcell, 'Refugee Protection in the Howard Years: Obstructing the Right to Seek Asylum' (2008) 27 *Australian Yearbook of International Law* 87; Michelle Foster and Jason Pobjoy, 'A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia's "Excised" Territory' (2011) 23 *International Journal of Refugee Law* 583.

permanent stay who had spent seven days or more in a country where they could have sought protection,<sup>56</sup> most of the refugees who arrived during these years were eventually granted permanent residence in Australia.<sup>57</sup>

The post-Tampa TPVs were overtly discriminatory and punitive in their effect, creating immediate concerns that the measures offended against art 31 of the *Refugee Convention*.<sup>58</sup> Asylum seekers arriving by plane or with valid visas continued to be eligible for immediate permanent residence if found to be refugees. Moreover, these people were afforded access to superior status determination procedures, including appeals on the merits of their claims. It is a measure of the historical strength of the protection needs of asylum seekers presenting as irregular maritime migrants that so many were ultimately determined to be refugees.<sup>59</sup> TPVs carried rights to work, medical care and primary and secondary education. However, TPV holders were treated as foreign students for the purpose of tertiary studies. They were denied access to the language training and settlement programs devised for 'regular' refugees admitted through organised programs. They were banned from sponsoring family for migration and could not travel outside Australia.

### B *Controlled Protection: The 'Temporary Safe Haven' Concept*

Around the same time that TPVs were reintroduced in 1999, another genus of temporary protection permit was devised for persons brought into the country through Australia's 'safe haven' program. These visas are worthy of mention because they illustrate another central motivation for Australian governments in granting temporary stay: the desire to assert and maintain complete control over the humanitarian migration process. Temporary Safe Haven ('TSH') visas were introduced first to provide for the temporary stay of persons evacuated from crises in Kosovo<sup>60</sup> and, later, East Timor.<sup>61</sup> Key features of the TSH visas were that a person had to be offered the visa — they could neither apply nor be nominated by family.<sup>62</sup> Holders were then barred from applying for further visas while in Australia without the exercise of a 'non-reviewable, non-compellable'

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<sup>56</sup> *Migration Regulations* sch 2 cl 866.215 (as at 2001), as repealed by *Migration Amendment Regulations 2008 (No 5)* (Cth) sch 1 pt 3.

<sup>57</sup> Approximately 90 per cent of temporary protection visa ('TPV') holders were granted permanent protection: Phillips and Spinks, above n 43, 15. Seventy per cent of those detained on Nauru and Manus between 2001–08 were found to be refugees: Janet Phillips, 'Asylum Seekers and Refugees: What Are the Facts?' (Research Paper, Parliament of Australia, 11 February 2013) 9 <<http://perma.cc/3YHT-T8SX>>. Of those who arrived by boat between 1999–2002 and applied for protection within Australia, 90 per cent were determined to require protection: Department of Immigration and Multicultural and Indigenous Affairs, 'Annual Report 2002–03' (Annual Report, 2003) 53.

<sup>58</sup> Guy Goodwin-Gill, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention, and Protection' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 185, 209.

<sup>59</sup> See above n 57 and accompanying text.

<sup>60</sup> *Migration Amendment Regulations 1999 (No 2)* (Cth) sch 1 cl 3, as repealed by *Immigration and Border Protection (Spent and Redundant Instruments) Repeal Regulation 2014* (Cth). This established the Kosovar Safe Haven (Temporary) Visa, subclass 448.

<sup>61</sup> *Migration Amendment Regulations 1999 (No 7)* (Cth) sch 1 cl 2, as repealed by *Immigration and Border Protection (Spent and Redundant Instruments) Repeal Regulation 2014* (Cth). This established the Humanitarian Stay (Temporary) Visa, subclass 449.

<sup>62</sup> *Migration Regulations* reg 2.07AC.

ministerial discretion.<sup>63</sup> The duration of the TSH visa was set by the Minister, and could be altered by Gazette notice.<sup>64</sup>

The Temporary Humanitarian Concern ('THC') visa (subclass 786) was created in 2000 to provide for the further stay of TSH visa holders who required medical treatment or trauma counselling, for a maximum period of three years. There were 5900 TSH visas granted in 1999.<sup>65</sup> Most had returned home by 2002.<sup>66</sup> However the subclasses remained in the regulations and have recently been revived as a device for providing a very controlled version of TPVs, as we explain below.

### C *Playing Games with Names: Recent Initiatives to Reintroduce Temporary Protection*

At the federal election in September 2013, the conservative Coalition made the reintroduction of TPVs a core election promise.<sup>67</sup> Since that time a number of attempts have been made to amend the migration legislation, using both the conventional TPV model and the more anomalous TSH visas. Ironically, these initiatives have been resisted by the now opposition Labor Party ('Labor'), as well as by most of the minority parties. The irony stems from the fact that while in government, Labor instituted policy measures that amounted in practice to the reinstatement of temporary protection. In fact, we would argue that temporary protection under Labor was more punitive for asylum seekers than the more formal iterations of TPVs preferred by the Coalition. The best that can be said of the various policies is that they are dizzying in complexity.

Under Labor, temporary protection was achieved in periodic decisions to suspend the processing of asylum claims made by persons presenting as irregular maritime arrivals.<sup>68</sup> Following the appointment of an 'expert panel' to advise on the management of the burgeoning flow of boats carrying undocumented asylum seekers,<sup>69</sup> the Labor government instituted a 'no advantage test'.<sup>70</sup> This nebulous

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<sup>63</sup> *Migration Act* ss 91K–91L. A provision was also inserted in the criteria for a protection visa that the applicant had not been offered temporary stay under reg 2.07AC (sch 2 cl 866.227). Amendments in 2001 inserted a provision for the Minister to waive this requirement and also added a requirement that if the applicant had been offered a 786 visa, the offer must have been made more than 30 months before the time of decision, unless the Minister specified a shorter period.

<sup>64</sup> *Migration Act* s 37A; *Migration Regulations* sch 2 cls 448.511, 449.511, as repealed by *Migration Amendment (Redundant and Other Provisions) Regulation 2004* (Cth) sch 1 pt 1; at sch 2 cl 449.511, as amended by *Migration Amendment Regulations 1999 (No 7)* (Cth).

<sup>65</sup> Department of Immigration and Multicultural and Indigenous Affairs, 'Population Flows: Immigration Aspects' (Report, 2000) 25.

<sup>66</sup> Department of Immigration and Multicultural and Indigenous Affairs, 'Annual Report 2001–02' (Annual Report, 2002) 60.

<sup>67</sup> See Liberal Party and The Nationals, 'The Coalition's Policy to Clear Labor's 30 000 Border Failure Backlog' (August 2013) <<http://perma.cc/7B62-C7AY>>.

<sup>68</sup> See Chris Evans, Stephen Smith and Brendan O'Connor, 'Joint Press Conference' (Press Conference, 9 April 2010). This announcement led to the suspension of processing of applications made by Afghani nationals for six months and Sri Lankans for three months. The gesture marked the beginning of a series of policies that resulted in the creation of a substantial backlog and a sense of paralysis within the administration generally.

<sup>69</sup> See Angus Houston, Paris Aristotle and Michael L'Estrange, 'Report of the Expert Panel on Asylum Seekers' (Report, Australian Government, August 2012) <<http://perma.cc/2HPU-HCDU>>.

concept was used to justify an indeterminate suspension of status processing. The effect was to create a backlog of some 30 000 unresolved asylum claims. In refusing to process refugee claims, the government was granting an effective right to remain in the country. The policy was one that left a great number of people in closed immigration detention or in ‘community’ detention, both in Australia and on Christmas Island. Others were released on bridging visas, granted together with TSH visas — a creative strategy to ensure these people continued to be barred from applying for a protection visa.<sup>71</sup> Those released on bridging visas were not given work rights and were afforded minimal support in terms of income supplementation, access to health care, or other government support.<sup>72</sup> This de facto temporary protection placed asylum seekers in a significantly worse situation than if they had been granted a TPV.

Labor’s frequent policy changes between 2010–13 reflected the growing panic that attended the surge in irregular maritime arrivals during this period. While in government Labor (re)introduced in practice virtually every element of the punitive regime constructed by its conservative predecessors. This included the revival of the interdiction and deflection policies known as the ‘Pacific Solution’ after a failed attempt to institute ‘regional processing’ arrangements with Malaysia.<sup>73</sup> In fact, Labor would ultimately go beyond the former Coalition practice by decreeing that refugees deflected to Nauru and PNG would never be admitted to Australia.<sup>74</sup> By September 2013, asylum seekers in Australia fell into a highly complicated set of categories in terms of their procedural and substantive entitlements, depending on their time and method of arrival.<sup>75</sup>

It was against this background that the *Migration Amendment (Temporary Protection Visas) Regulation 2013* (Cth) (‘TPV Regulation’) was made by the incoming Coalition government on 18 October 2013. Unlike most earlier

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<sup>70</sup> See *ibid* 47 [3.41]. See also Amber Jamieson, *No Advantage: Nobody Knows What That Means* (13 September 2012) Crikey <<http://perma.cc/NU57-EMHC>>.

<sup>71</sup> *Migration Act* s 91K. See also the discussion below of: *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336 (‘*Plaintiff M79/2012*’).

<sup>72</sup> United Nations High Commissioner for Refugees, ‘Asylum Seekers on Bridging Visas in Australia: Protection Gaps’ (Consultation Report, 16 December 2013) <<http://perma.cc/94CB-CZWX>>.

<sup>73</sup> The ‘arrangement’ with Malaysia involved sending 800 irregular maritime arrivals to that country in exchange for 4000 refugees from Malaysia. See *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement*, signed 25 July 2011 <<http://perma.cc/76FT-KNN8>>. This was ruled unlawful by the High Court in: *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.

<sup>74</sup> Kevin Rudd, ‘Transcript of Joint Press Conference with PNG Prime Minister Peter O’Neill: Brisbane: 19 July 2013: *Regional Resettlement Agreement*’ (Press Conference, 19 July 2013) <<http://perma.cc/G3HB-A8GJ>>.

<sup>75</sup> The biggest divide was between asylum seekers who arrived by plane and those who arrived by boat without visas. Thereafter, different rules applied for irregular maritime arrivals who landed at an ‘excised offshore place’ before 24 March 2012; between 24 March and 13 August 2012; between 13 August 2012 and 19 July 2013; and after 19 July 2013. Within each of the final two time brackets, there was a further distinction between those who remained in Australia; those transferred to Nauru or Manus Island for processing; and those who were then returned to Australia from Nauru or Manus Island. See Mary Crock and Hannah Martin, ‘Finding Refuge in Australia: How Law and Policy Affect the Entitlements of Children Entering as Refugees and Humanitarian Migrants’ in Mary Crock (ed), *Creating New Futures: The Settlement of Children and Youth from Refugee Backgrounds* (Federation, 2015) 49, 56, 59, 64–8.

versions of TPVs, no provision was made for a TPV holder to transition to permanent protection — ever. This was achieved by making it a requirement, both in order to validly apply for and to be granted a subclass 866 protection visa, that the person: did not hold a TPV and had not held one since last entering Australia; held a visa that was in effect on their last entry into Australia; was not an unauthorised maritime arrival ('UMA'); and was cleared by immigration on their last entry to Australia.<sup>76</sup> The changes applied retrospectively to protection visa applications already lodged but not finalised.<sup>77</sup>

The *TPV Regulation* was disallowed by the Senate on 2 December 2013, on a motion supported by the Greens, Labor and some members of the crossbench. Disallowance does not affect the validity of a regulation before the date of disallowance. Accordingly, the 22 TPVs that were granted between 18 October and 2 December 2013<sup>78</sup> remained in effect. The Minister responded to the disallowance by placing a cap on the number of protection visas that could be granted in that financial year at 1650.<sup>79</sup> This was the number of visas that had already been granted by that date. The cap was revoked on 20 December 2013,<sup>80</sup> after proceedings were commenced in the High Court.<sup>81</sup>

A second attempt to reinstitute TPVs was made on 14 December 2013 through the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Cth) ('*UMA Regulation*'). This amended the *Migration Regulations 1994* (Cth) to again prevent a person arriving without a visa from being eligible for permanent protection.<sup>82</sup> It would seem that the *UMA Regulation* was inconsistent with the requirement that the same regulation may not be introduced twice within six months.<sup>83</sup> The *UMA Regulation* was again disallowed by the Senate on 27 March 2014. Asylum seekers who were refused protection visas on the basis of

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<sup>76</sup> See *Migration Regulations* sch 1 cl 1401(3)(e), sch 2 cl 866.222 (as at 2007), as repealed by *Migration Amendment Regulations 2009 (No 13)* (Cth). Cf *Migration Regulations* sch 2 cl 866.228 (as at 2007). Note that while the 'seven day rule' of 2001 had meant that many asylum seekers could never be eligible for a permanent protection visa, this was not enforced in practice.

<sup>77</sup> Because the requirements in *Migration Regulations* sch 2 cl 866.222 were time of decision criteria, existing applicants became ineligible for a protection visa. Regulation 2.08H was inserted to deem any protection visa application made but not finally determined before 18 October 2013 to also be a valid application for a TPV.

<sup>78</sup> Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Fourth Report of the 44<sup>th</sup> Parliament* (2014) 113 ('*Fourth Report*').

<sup>79</sup> Minister for Immigration and Border Protection (Cth), *Granting of Protection Class XA Visas in 2013/2014 Financial Year*, IMMI 13/156, 2 December 2013.

<sup>80</sup> Minister for Immigration and Border Protection, *Revocation of Immi 13/156 'Granting of Protection Class XA Visas in 2013/2014 Financial Year'*, IMMI 13/159, 19 December 2013.

<sup>81</sup> *Plaintiff S297/2013 v Minister for Immigration and Border Protection* [2013] HCATrans 329.

<sup>82</sup> The changes were made to *Migration Regulations* sch 2 cl 866.222.

<sup>83</sup> *Legislative Instruments Act 2003* (Cth) s 48; *Fourth Report*, above n 78, 130.

sub-cl 866.222 during this time generally had their cases remitted for reconsideration on appeal to the Refugee Review Tribunal.<sup>84</sup>

It is difficult to see this legislative battle of wits as anything other than political theatrics. In practice, both Labor and Coalition governments reverted to safe haven visas as a mechanism for maintaining vice-like control over the temporary protection process. The grant of a TSH visa has the effect of banning future applications for any form of visa in perpetuity, unless the Minister intervenes to ‘lift the bar’. Under Labor, an attempt to challenge the use of TSHs for asylum seekers recognised as *Convention* refugees failed.<sup>85</sup>

After the Coalition came to power, the subclass 786 THC visa was used during the *UMA Regulation* phase as a mechanism for providing structured temporary protection for a maximum period of three years. As noted earlier, a THC visa can only be granted to a person who holds a TSH visa. So, the practice was to grant a subclass 449 TSH visa simultaneously with a THC visa. The strategy was used to provide a form of temporary protection without a right to transition to any permanent visa.<sup>86</sup> The Minister ceased granting THC visas when the *UMA Regulation* was disallowed.<sup>87</sup> By that time, 59 THC visas had been granted to people whose protection visa application was refused on the basis of sub-cl 866.222.<sup>88</sup>

Those offered THC visas faced a conundrum. The THC visa would provide them with work rights, access to Medicare and Centrelink, and the security of a substantive visa, if only for three years. Yet they would be barred from applying for a permanent visa because of the operation of the TSH visa.<sup>89</sup> They were forced to gamble on what the next developments in government policy would be — a near impossible task in light of the mess of changes in the preceding months.

In September 2014, the High Court upheld a challenge to the validity of the TSH/THC visa schema.<sup>90</sup> It ruled that the Minister could not use the power in s 195A of the *Migration Act 1958* (Cth) (*Migration Act*) to grant the visas where it would foreclose the Minister’s exercise of the power in s 46A before he

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<sup>84</sup> Refugee Advice and Casework Service, ‘Chronology of Recent Changes Affecting Asylum Seekers’ (Report, 8 July 2014) 3 <<http://perma.cc/3F78-AZPU>> (*Changes Affecting Asylum Seekers*). Refugee Advice and Casework Service reports that ‘some have appealed the refusal to the RRT, some have accepted temporary safe haven visas, and some have done both’. A challenge was made in to the validity of cl 866.222 during that period, yet the proceedings were dismissed by consent on 13 August 2014: *Plaintiff S89/2014 v Minister for Immigration and Border Protection* [2014] HCATrans 91.

<sup>85</sup> See *Plaintiff M79/2012* (2013) 252 CLR 336.

<sup>86</sup> A person who has held a Temporary Safe Haven (‘TSH’) visa is barred by s 91K of the *Migration Act* from making a valid application for another visa, unless the Minister exercises the power in s 91L to ‘lift’ that bar. It is also a criterion for a subclass 866 permanent protection visa that the applicant has not been offered a TSH visa, or that the Minister has determined under s 91L that the s 91K bar does not apply to the person.

<sup>87</sup> *Changes Affecting Asylum Seekers*, above n 84, 5. The disallowance of *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Cth) (*MA Regulation 2013*) was reported as being a rejection of the use of Temporary Humanitarian Concern (‘THC’) visas: Sarah Whyte, ‘Senate Rejects Scott Morrisons’s Temporary Visa Attempt’, *The Sydney Morning Herald* (online), 27 March 2014 <<http://perma.cc/488P-8DQK>>.

<sup>88</sup> *Fourth Report*, above n 78, 120 [3.160].

<sup>89</sup> See Asylum Seeker Resource Centre, ‘FAQ for Registered Migration Agents & Community Workers’ (Information Sheet, 17 February 2014) <<http://perma.cc/6VHA-4S9G>>.

<sup>90</sup> *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219.

had made a decision whether to lift the bar. To do so would deprive the plaintiff's prior detention of its purpose.<sup>91</sup> The case meant that any refugees granted TSH and THC visas would not be barred from applying for a protection visa by virtue of having held a TSH visa. However, as the THC visa was also held to be invalidly granted, they returned to being UMAs, a status that prevented a valid visa application in the absence of the Minister lifting the s 46A bar.

Pre-empting the disallowance of the *UMA Regulation*,<sup>92</sup> another cap was placed on protection visas on 4 March 2014.<sup>93</sup> The High Court determined the cap to be invalid on 20 June 2014.<sup>94</sup> The two cases on point (instituted in Melbourne and Sydney respectively) were concerned essentially with statutory interpretation. The Court held that the Minister's power in s 85 of the *Migration Act* did not extend to protection visas. The implication for persons determined to be refugees was that their applications for protection visas had to be processed. The catch was that the win applied only to those in respect of whom the Minister had decided to lift the s 46A bar.<sup>95</sup> Indeed, s 65A of the *Migration Act* required the Minister to decide a valid protection visa application within 90 days.<sup>96</sup>

The Minister responded to the High Court's ruling by announcing that he would personally consider each case and use the 'national interest' criterion in sub-cl 866.226 to deny a protection visa to anyone who arrived without a visa, including the boy at the centre of *Plaintiff M150*.<sup>97</sup> The Minister opined that national interest grounds included consideration of matters that could 'erode the community's confidence in the effective and orderly management of Australia's migration program, that it could undermine the integrity of Australia's visa systems and also Australia's sovereign right to protect its borders'.<sup>98</sup> With the threat of further legal action, the Minister eventually granted Plaintiff M150 a

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<sup>91</sup> Ibid 235 [41].

<sup>92</sup> The disallowance motion in respect of *MA Regulation 2013* was scheduled to be moved on 5 March 2014 but was then postponed: Parliament of Australia, *Disallowance Alert 2015* <<http://perma.cc/G6BB-SQWR>>.

<sup>93</sup> The number was capped at 2773: Minister for Immigration and Border Protection, *Granting of Protection Class XA Visas in 2013/2014 Financial Year*, IMMI 14/026, 4 March 2014.

<sup>94</sup> *Plaintiff M150/2013 v Minister for Immigration and Border Protection* (2014) 309 ALR 225; *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 309 ALR 209.

<sup>95</sup> At the time, some 1400 people who had been permitted to lodge applications had been found to be refugees: Elizabeth Byrne, 'Protection Visa Cap Ruled Invalid by High Court, Immigration Minister Scott Morrison Ordered to Reconsider Asylum Seekers' Application', *ABC News* (online), 21 June 2014 <<http://perma.cc/DUZ9-MEHM>>. These were people who had arrived before 13 August 2013. Minister Scott Morrison stated in December 2013 that he had 'no intention of lifting the bar' until TPVs were available: Jonathan Swan, Mark Kenny and Michael Gordon, 'Scott Morrison Being "Mean for the Hell of It" to Asylum Seekers: Labor', *The Sydney Morning Herald* (online), 4 December 2013 <<http://perma.cc/35LZ-2KPJ>>.

<sup>96</sup> As repealed by *Legacy Caseload Act* sch 7 pt 1.

<sup>97</sup> Michael Gordon, 'Scott Morrison Looks to "National Interest" Test to Circumvent High Court Ruling on Permanent Protection Visas', *The Sydney Morning Herald* (online), 3 July 2014 <<http://perma.cc/92FE-T754>>.

<sup>98</sup> Naomi Woodley, 'High Court Challenge Possible as Scott Morrison Flags Test for Permanent Protection Applications', *ABC News* (online), 4 July 2014 <<http://perma.cc/4BWJ-DW5U>>.

protection visa.<sup>99</sup> As we explain below, the Minister chose instead to introduce further, omnibus, legislation that would address each of the issues raised in these cases, and more.

In spite of the back down for Plaintiff M150, the Minister still refused to grant a protection visa to the second (Pakistani) refugee in the same litigation. The Minister's refusal was based solely on it being never in the national interest to grant permanent protection to a UMA. In a brief and pointed judgment in February 2015, the High Court unanimously ruled this to involve an error of law.<sup>100</sup> The Court noted that the *Migration Act* prescribes exhaustively the consequences that attach to the status of UMAs. It found that sub-cl 866.226 does not permit the Minister to ascribe additional consequences to that status.<sup>101</sup> The Court took the unusual step of issuing a writ of preremptory mandamus, commanding the Minister to grant the plaintiff a permanent protection visa. The case represents a victory for the rule of law in the face of serial attempts to deny permanent protection to UMAs caught in a web of political game playing.

#### D *The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth)*

In December 2014 the government succeeded in its attempt to reintroduce TPVs following a complicated deal that involved undertakings with a series of minority parties in the Senate. The final vote hung on the vote of Senator Ricky Muir of the Motoring Enthusiasts Party. Visibly moved he said: 'I am forced into a corner where I have to decide between a bad decision or a worse decision — a position I would not wish on my worst enemies'.<sup>102</sup>

It was claimed that the then Minister, Scott Morrison, used the detention of children on Christmas Island and on mainland Australia as a bargaining chip, stating that they would be released only if the Bill was passed. It was reported that the Minister encouraged the children to call Senator Ricky Muir to beg him to support the Bill and set them free.<sup>103</sup>

Introduced alongside two other measures,<sup>104</sup> the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth)* ('*Legacy Caseload Act*') makes sweeping changes to Australian asylum law, altering the place of international law in the overall framework.<sup>105</sup> The *Legacy Caseload Act* reintroduces TPVs in largely the same form as envisaged in the *TPV Regulation* of October 2013,<sup>106</sup> again denying refugees any

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<sup>99</sup> Michael Gordon, 'Scott Morrison Backflips and Grants Visa to Boy Who Arrived by Boat', *The Sydney Morning Herald* (online), 22 July 2014 <<http://perma.cc/L8DW-T46S>>.

<sup>100</sup> *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2015) 316 ALR 161.

<sup>101</sup> *Ibid* 163 [5], 165–6 [20]–[21].

<sup>102</sup> Commonwealth, *Parliamentary Debates*, Senate, 4 December 2014, 10307 (Ricky Muir).

<sup>103</sup> *Ibid* 10329–33 (Sarah Hanson-Young).

<sup>104</sup> See the *Migration Amendment (Protection and Other Measures) Act 2015 (Cth)*, which was passed on 25 March 2015 and the Australian Citizenship and Other Legislation Amendment Bill 2014 (Cth). The latter remained before the Senate in October 2015, its fate uncertain.

<sup>105</sup> See Mary Crock and Kate Bones, 'Refugee Plan an Affront to Rule of Law', *ABC News* (online), 30 September 2014 <<http://perma.cc/NR82-23R8>>; Department of Parliamentary Services (Cth), *Bills Digest*, No 40 of 2014–15, 23 October 2014.

<sup>106</sup> *Migration Act* s 35A(3), as amended by *Legacy Caseload Act*; *Migration Regulations* sch 1 pt 1403, sch 2 pt 785, as amended by the *Legacy Caseload Act*.

prospect of transition to a permanent visa.<sup>107</sup> One potentially significant difference is that this time, TPVs are created as a separate class of visa (Class XD — Temporary Protection)<sup>108</sup> rather than as another subclass within the protection visa Class XA. This is facilitated by amendments to the *Migration Act* defining ‘protection visa’ to mean certain classes of visas.<sup>109</sup>

Another difference between the *Legacy Caseload Act* and the *TPV Regulation* is that the exclusions from eligibility to apply for a permanent protection visa are broader. They encompass anyone who has ever held a TSH visa or a THC visa,<sup>110</sup> reflecting the messy aftermath of the various visa strategies used in the intervening year.

The *Legacy Caseload Act* inserts a new s 45AA, enabling ‘conversion regulations’ to be made. Regulation 2.08F converts existing applications for protection visas into applications for TPVs. This includes many asylum seekers who arrived prior to August 2012 and were permitted to make applications, were interviewed, and have been waiting since then for a decision. It appears that over 1400 applicants had been found to be refugees by the Department of Immigration and Border Protection, after which processing on their cases was paused until TPV legislation was passed.<sup>111</sup>

As part of the deal with Clive Palmer MP and Senator Nick Xenophon concluded to secure support for the Bill in the Senate, TPVs are accompanied by the creation of a new type of visa. The subclass 790 Safe Haven Enterprise Visa (‘SHEV’) is a five-year visa requiring refugees to indicate an intention to live in designated regional areas and includes the prospect of transitioning to most of the mainstream family, economic and study visas.<sup>112</sup> It is interesting that the words ‘Safe Haven’ have been included in the visa name. In fact, the SHEV has not been created as a genus of temporary safe haven visa within s 37A of the *Migration Act*, with its special application provisions. It was created instead as a type of protection visa.<sup>113</sup> Yet it is noteworthy that the visa relies on the government gazetted areas as ‘regional’ for the purpose of the visa.<sup>114</sup> This means that the government retains control over the availability of the visa.

Further, the Minister decides what class of visa to allow an UMA to apply for when ‘lifting the bar’ in s 46A. He or she is able to nominate a TPV rather than a SHEV. Following the passage of the *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) on 25 March 2015, the s 46A bar applies to

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<sup>107</sup> *Migration Regulations* sch 1 cl 1401(3)(d), sch 2 cl 785.611.

<sup>108</sup> *Migration Act* s 35A(3); *ibid* sch 1 pt 1403.

<sup>109</sup> *Migration Act* ss 5(1), 35A.

<sup>110</sup> *Migration Regulations* sch 1 cl 1401(3)(d).

<sup>111</sup> Elizabeth Byrne, ‘Protection Visa Cap Ruled Invalid by High Court, Immigration Minister Scott Morrison Ordered to Reconsider Asylum Seekers’ Application’, *ABC News* (online), 21 June 2014 <<http://perma.cc/AE4V-UXAN>>. Freedom of Information requests on client files viewed by author Kate Bones reveal that after the case officers made a positive decision, nothing further was done to process the grant of a visa.

<sup>112</sup> See *Migration Act* s 46A(1A); *Migration Regulations* reg 2.06AAB; sch 1 pt 1404, sch 2 pt 790.

<sup>113</sup> *Migration Act* s 35A(3A).

<sup>114</sup> *Migration Regulations* sch 1 cl 1404(3)(e), 1404(4). An instrument commencing on 1 July 2015 specified certain areas in New South Wales: Minister for Immigration and Border Protection, *Specification of Regional Area 2015*, IMMI 15/0755, 17 June 2015. At time of writing, no other areas had been gazetted for this purpose.

UMAs not only while they are unlawful, but also if they hold a bridging visa, TPV or other prescribed visa.<sup>115</sup> This means that even after a person is granted a TPV, the bar must be lifted to allow them to apply for a SHEV.<sup>116</sup> For anyone granted a TPV who then gains a SHEV, the 8503 ‘No Further Stay’ condition attached to the TPV would continue to prevent the person from applying for a mainstream (non-protection) visa unless the Minister waived the condition.<sup>117</sup> Refugees in the ‘legacy caseload’ who had an outstanding protection visa application have all had their applications transformed to TPV applications.<sup>118</sup> Despite assurances that they may later apply for a SHEV,<sup>119</sup> our reading of the legislation is that their future status remains very much under the control of the Minister.

It is worth noting that the *Legacy Caseload Act* includes a raft of other amendments that will impact dramatically on the ability of asylum seekers in Australia to gain protection as refugees. Leaving to one side the provisions that strip the *Migration Act* of virtually any reference to the *Refugee Convention*,<sup>120</sup> the *Legacy Caseload Act* provides for a special fast-track regime for processing asylum claims. As explored further below, this includes a new appellate authority with powers to determine claims without oral hearings and without otherwise according full ‘due process’ rights to affected asylum seekers. One commentator summarised the effect of the *Legacy Caseload Act* as follows: ‘No other minister, not the Prime Minister, not the foreign minister, not the attorney-general, has the same unchecked control over the lives of other people’.<sup>121</sup>

#### IV TOWARDS A CONVENTION-COMPLIANT TEMPORARY PROTECTION REGIME

##### A Australia’s Use of Temporary Protection is Exceptional

Two initial points can be made about Australia’s use of temporary protection in its migration laws. First, although prompted by particular flows of irregular migrants, at no stage has Australia experienced anything approaching a mass influx of asylum seekers. At no point have normal status determination procedures been overwhelmed. This is so even though the backlog of 30 000

<sup>115</sup> *Migration Regulations* reg 2.11A prescribes TSH visas, THC visas and subclass 785 visas granted before 2 December 2013 — addressing the messy legacy of the various temporary protection strategies used over the preceding years. Regulation 2.11A also prescribes Safe Haven Enterprise Visas (‘SHEV’); however *Migration Act* s 46A(1A) provides that the bar will not apply where a person meets the eligibility requirements to transition to another visa.

<sup>116</sup> The Department of Immigration and Border Protection has indicated that as a matter of practice a bar lift will be requested after a person lodges an application for a SHEV: Department of Immigration and Border Protection, ‘Safe Haven Enterprise Visas: Information for People Who Arrived Illegally and Are Seeking Australia’s Protection’ (Fact Sheet, 5 July 2015) 5.

<sup>117</sup> *Migration Act* ss 41(2)–(2A); *Migration Regulations* reg 2.05(4), (4AA), sch 2 cl 785.511, sch 8 pt 8503.

<sup>118</sup> *Migration Regulations* reg 2.08F.

<sup>119</sup> Refugee Advice and Casework Service, ‘Radical New Refugee Laws Have Now Been Passed by Parliament’ (Fact Sheet) 3 <<http://perma.cc/9TK4-NMN9>>; Department of Immigration and Border Protection, above n 116, 5.

<sup>120</sup> See *Legacy Caseload Act* sch 5.

<sup>121</sup> Ben Doherty, ‘Senate Gives Scott Morrison Unchecked Control over Asylum Seekers’ Lives’, *The Guardian* (online), 5 December 2014 <<http://perma.cc/G4VH-66P5>>.

asylum applications has been characterised in this way.<sup>122</sup> Rather, Australia's crisis has reflected an island people's deep-seated resistance to any form of uncontrolled maritime migration. We would argue that this remains a core issue, even though the political discourse has attempted to frame recent punitive measures as necessary in order to save lives at sea.

Secondly, where international temporary protection is used typically to fill a gap in the international protection framework and promote *admission* in crisis situations, Australian temporary protection is a calculated policy response used as a *deterrent* to asylum seekers travelling to Australia irregularly. It has been stated repeatedly that 'the reintroduction of [TPVs] is a key element of the Government's border protection strategy to combat people smuggling and to discourage people from making dangerous voyages to Australia'.<sup>123</sup> Even accepting the assurance that the overriding objective is 'saving lives at sea', the substance remains that the measures are intended to deter people from seeking asylum in Australia. In the debate over the motion to disallow the *TPV Regulation*, Senator Michaelia Cash made this explicit when she stated:

In the short time since temporary protection visas have been reintroduced, 181 asylum seekers who were in the community on bridging visas have made their own decision to return home. That is because they were offered a temporary protection visa, and that was not what they wanted when they came to this country.<sup>124</sup>

Even if the 'saving lives at sea' motive is accepted, as a matter of law the end cannot justify the means. Australia is required to implement the treaty obligations it has assumed in good faith.<sup>125</sup> This duty means that states cannot act in a way that would defeat the object and purpose of a treaty, or seek to avoid the obligations they have assumed.<sup>126</sup> In other words, it is never acceptable to abandon the core precepts of the *Refugee Convention* as they operate to protect the embodied refugee, even if the motivation is to protect other (putative) refugees.<sup>127</sup>

In any event, the deterrence argument in the context of the Coalition's vision for temporary protection in Australia makes no sense. The government maintains that any asylum seeker who arrives in the future will be sent to Nauru or Manus Island and will never be settled in Australia. As such, TPVs are relevant only for refugees who are already in Australia — the 'legacy caseload'. Minister Scott Morrison readily pointed out this distinction in respect of the SHEV, in order to

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<sup>122</sup> See the second reading speech for the Legacy Caseload Bill: Commonwealth, *Parliamentary Debates*, House of Representatives, 25 September 2014, 10545–6 (Scott Morrison).

<sup>123</sup> Explanatory Statement, *Migration Amendment (Temporary Protection Visas) Regulation 2013* (Cth), 1; Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), 6.

<sup>124</sup> Commonwealth, *Parliamentary Debates*, Senate, 2 December 2013, 598 (Michaelia Cash). She concluded: 'That proves that temporary protection visas work'. At 600.

<sup>125</sup> *Vienna Convention on the Law of Treaties*, opened for signature 22 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 26 ('*VCLT*').

<sup>126</sup> See Goodwin-Gill and McAdam, *The Refugee in International Law*, above n 3, 387–90.

<sup>127</sup> See Mary Crock, 'Of Relative Rights and Putative Children' (2013) 20 *Australian International Law Journal* 33.

show it did not contradict his strong position that no asylum seeker would gain permanent residence. He explained that the visa

will be open to applications by those who have been processed under the legacy case load and are found to be refugees. I stress that that does not relate to people who may seek to come to Australia in the future by this method. They of course are subject to offshore processing and resettlement, as well as our turn-back measures and other arrangements.<sup>128</sup>

This statement reveals the bankruptcy of the argument that TPVs are necessary as a deterrent. A policy that applies only to people who have already arrived (including many who arrived years earlier) can hold no value as a deterrent if new arrivals are to be subject to a different regime. The only conclusion to draw is that TPVs are being used as a punishment for refugees who arrived in Australia irregularly. As many have argued before us, it is our view that using TPVs as a way to punish refugees for arriving by boat constitutes a breach of art 31 of the *Refugee Convention*, which prohibits states from imposing penalties on refugees ‘on account of their illegal entry or presence’.<sup>129</sup>

The policy is particularly offensive in that Australia’s policymakers know that the protection needs of asylum seekers in this country are likely to be anything but temporary. This is a point made by Deborah Anker, Joan Fitzpatrick and Andrew Shacknove. They wrote in 1998:

One of the most serious flaws in a reformulation of refugee law to emphasize temporary protection is the fact that many refugee crises are enduring. It is the exception rather than the rule that the causes of flight can be resolved within the approximately five-year period that defines the outer bounds of a temporary protection system meeting basic standards of humane treatment.<sup>130</sup>

## B *The Content of Refugee Rights*

It should be noted that temporary visas are used across most migration categories in Australia as probationary or ‘try before you buy’ mechanisms. As we have seen, temporary protection is not of itself incompatible with the *Refugee Convention*. Importantly, however, the *Refugee Convention* requires the rights afforded refugees to be increased as they progress from merely ‘present’ to ‘lawfully present’ and ‘lawfully staying’ or ‘resident’ in a state. In what follows we examine what international refugee law demands as a country’s interaction with asylum seekers deepens. We consider how Australia’s two new forms of temporary protection fare in some key respects.

Of course, the boundaries between physical presence and lawful presence, and between lawful presence and lawful stay, can be contentious. In the Australian case, it is the characterisation of the refugee as ‘present’, ‘lawfully present’ or ‘lawfully resident’ that serves as the pivot point for (dis)entitlement. We are

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<sup>128</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 25 September 2014, 10547 (Scott Morrison).

<sup>129</sup> Goodwin-Gill, ‘Article 31 of the 1951 Convention relating to the Status of Refugees’, above n 58, 208–9.

<sup>130</sup> See Deborah Anker, Joan Fitzpatrick and Andrew Shacknove, ‘Crisis and Cure: A Reply to Hathaway, Neve and Schuck’ (1998) 11 *Harvard Human Rights Journal* 295, 302.

mind to think that many in government<sup>131</sup> would take issue with Hathaway's argument that 'presence is lawful so long as it is officially sanctioned'<sup>132</sup> and thus includes the stage where a person has made a claim for asylum and their refugee status is being determined. He argues further that a refugee may also be 'lawfully present' where a state is not carrying out refugee status determination procedures, including in temporary protection situations.<sup>133</sup> Australia provides a neat example of a state with domestic laws that do not authorise presence for the purpose of claiming asylum, with arguments (for example) that the presence of asylum seekers arriving without visas is not then 'lawful'.<sup>134</sup>

The term 'lawfully staying' is still more difficult. Considering the debate and confusion around the term during the drafting process, Hathaway concludes that the status is 'characterized by officially sanctioned, ongoing presence in a state party, whether or not there has been a formal declaration of refugee status, grant of the right of permanent residence, or establishment of domicile there'.<sup>135</sup> In the context of temporary protection (in the international sense), Durieux and McAdam argue that it would be applicable 'once refugees have been admitted and treated as refugees over a number of years (albeit on a prima facie basis), and no other State will assume responsibility for them'.<sup>136</sup>

At the point of first arrival, the most significant duty of receiving states is to permit asylum seekers to claim asylum. States must then assess the claims made — properly. Failure to do this without good cause would arguably place the state in breach of its duty to perform their treaty obligations 'in good faith'.<sup>137</sup>

We would argue that Australia has not acted in good faith by refusing to determine refugee claims, especially where processing has been suspended to avoid affording to refugees rights contained in the *Refugee Convention*. A good faith implementation of *non-refoulement* obligation requires that a state conduct fair and effective refugee status determination procedures.<sup>138</sup> Otherwise, there is a risk of failing to identify genuine refugees who may then be *refouled*.

In 2000, Stephen Legomsky outlined what he considered should be the core process rights of an asylum seeker in a 'non-utopian world'.<sup>139</sup> He groups these rights under the two central principles of fair access to the process and a fair process. The latter should include a right to representation; an opportunity to be heard; standards of proof; and a right of review.

Australia continues to explore new devices for resisting these most basic principles, apparently drawing inspiration from the US' Expedited Adjudication

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<sup>131</sup> See Bianca Hall, 'Minister Wants Boat People Called Illegals', *The Sydney Morning Herald* (online), 20 October 2013 <<http://perma.cc/W5RS-K755>>.

<sup>132</sup> Hathaway, *The Rights of Refugees under International Law*, above n 11, 174–5.

<sup>133</sup> *Ibid* 184.

<sup>134</sup> *Ibid* 175–8.

<sup>135</sup> *Ibid* 189. Cf Goodwin-Gill and McAdam, *The Refugee in International Law*, above n 3, 525–6.

<sup>136</sup> Durieux and McAdam, 'Non-Refoulement through Time', above n 38, 15.

<sup>137</sup> *VCLT* art 26.

<sup>138</sup> United Nations High Commissioner for Refugees, *Asylum Processes (Fair and Efficient Asylum Procedures)*, UN Doc EC/GC/01/12 (31 May 2001) 2 [5].

<sup>139</sup> Stephen Legomsky, 'An Asylum Seeker's Bill of Rights in a Non-Utopian World' (2000) 14 *Georgetown Immigration Law Journal* 619.

and Removal regime for certain irregular migrants.<sup>140</sup> Asylum seekers subjected to ‘enhanced screening’ are denied even the opportunity to present their claim for refugee status.<sup>141</sup> The *Legacy Caseload Act*’s ‘fast-track assessment process’ applies in the first instance to people who arrived ‘irregularly’ by boat after 31 August 2012, although provision is made for extending the regime to cover other cohorts by regulation.<sup>142</sup> The procedure restricts access to independent review of a decision to refuse a protection visa. Adverse rulings can be appealed to a new Immigration Assessment Authority (‘the Authority’) (established within the Migration and Refugee Division of the Administrative Appeals Tribunal).<sup>143</sup> Review is conducted on the papers and the Authority is expressly excluded from accepting new material or interviewing the applicant, except in very limited circumstances.<sup>144</sup> ‘Excluded fast track review applicants’ are not permitted even that level of review. Such persons include asylum seekers who have ever been refused refugee status in any country or who make a ‘manifestly unfounded claim for protection’.<sup>145</sup>

The rationale for Australia’s fast track procedure is not to resolve cases quickly so as to relieve the suffering of refugees.<sup>146</sup> Rather, the stated objective is to ‘efficiently and effectively respond to unmeritorious claims for asylum’.<sup>147</sup> The presumption is that the ‘legacy caseload’ of 30 000 asylum claims is replete with fraudulent or unworthy claims — and that future irregular maritime arrivals will also meet this description. It is a presumption that runs against the heft of history in terms of Australia’s prior experience of irregular maritime migration. Over time, the vast majority of asylum seekers arriving by boat have been recognised as *Convention* refugees, with acceptance rates sometimes as high as 98 per cent for the fugitives from certain conflicts.<sup>148</sup>

It is our view that reducing the quality or availability of merits review is counterproductive. As Mary Crock and Hannah Martin note, previous attempts have lead simply to an increase in (more expensive and time consuming) judicial review proceedings.<sup>149</sup> For those unable to access judicial review, there is an obvious risk that fast track processing may fail to identify genuine *Convention*

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<sup>140</sup> The procedures apply to all ‘arriving aliens’ with the exception of Cubans arriving by plane, who present without a visa or with documentation affected by fraud. The scheme was introduced in 1996 as part of the: *Illegal Immigration Reform and Immigrant Responsibility Act*, Pub L No 104-208, 110 Stat 3009 (1996). See Karen Musalo, Jennifer Moore and Richard Boswell, *Refugee Law and Policy: A Comparative and International Approach* (Carolina Academic Press, 3<sup>rd</sup> ed, 2007) 132–4 (extracting relevant articles on the scheme). See also the ‘Accelerated Procedures’ used in many European Union countries: at 146–7.

<sup>141</sup> See Commonwealth, *Parliamentary Debates*, Senate, 28 May 2013, 47–8 (Sarah Hanson-Young).

<sup>142</sup> *Migration Act* ss 5(1) (definition of ‘excluded fast track review applicant’), 5(1AA), pt 7AA.

<sup>143</sup> *Ibid* s 473CA.

<sup>144</sup> *Ibid* s 473DB–473DD.

<sup>145</sup> *Ibid* s 5(1) (definition of ‘excluded fast track review applicant’).

<sup>146</sup> Department of Parliamentary Services (Cth), *Bills Digest*, No 40 of 2014–15, 23 October 2014, 16.

<sup>147</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 25 September 2014, 10547 (Scott Morrison).

<sup>148</sup> See Department of Immigration and Citizenship, ‘Annual Report 2009–10’ (Annual Report, 2010) 113 Table 43.

<sup>149</sup> See Mary Crock and Hannah Martin, ‘Refugee Rights and the Merits of Appeals’ (2013) 32 *University of Queensland Law Journal* 137.

refugees. It is worth recalling that status determination procedures do not create refugees, they are merely declarative in effect. The foundational obligation not to *refouler* or send a refugee back to a place where they face death or persecution cannot be avoided by creating a process so degraded that refugees fail to have their status recognised. The better response — from the perspective not just of international law and fairness, but also of practicality — is to consider the claims of all asylum seekers fairly. Those whose claims are genuinely unfounded may then be removed.

We agree with Hathaway that refugees should be regarded as ‘lawfully present’ in a state during the processing of asylum claims. We would argue that asylum seekers granted *de facto* leave to remain fall into the same category, even where a state declines to process protection claims as Australia has been doing with its ‘legacy caseload’. This refusal to process asylum claims raises questions about the propriety of keeping asylum seekers in detention for prolonged periods of time, particularly where the asylum seekers include families with children. Such practices offend both the *Refugee Convention*<sup>150</sup> and the core human rights conventions, including the *International Covenant on Civil and Political Rights* (‘*ICCPR*’)<sup>151</sup> and the *Convention on the Rights of the Child* (‘*CRC*’).<sup>152</sup> As well as being intrinsically damaging to children’s psychological wellbeing, immigration detention can involve the denial of other rights that affect a child’s development such as the right to education.<sup>153</sup>

Once a refugee is ‘lawfully staying’ in the state, under the *Refugee Convention* they enjoy a much broader range of rights, particularly social rights. These include: the right to be issued with travel documents to enable international travel (art 28); the right to work (art 17); and rights in respect of social security (art 24) and housing (art 21). As explained above, the transition to ‘lawfully staying’ occurs regardless of whether status determination has been completed, and can be satisfied by mere tolerance of refugees over an extended period. We would submit that the ‘legacy caseload’, most of whom have now been in Australia for well over two years, would classify as ‘lawfully staying’. Once a person is found to be a refugee and granted a TPV or SHEV, it becomes even harder to deny that they have this status, and are entitled to all the rights contained in the *Convention*.

Both TPVs and SHEVs do provide work rights, as well as access to Medicare and social security. An important right which is lacking is the ability to travel outside Australia. Article 28 of the *Convention* requires states to ‘issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require’. As a result of amendments made in the

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<sup>150</sup> The rights enshrined in the *Refugee Convention* include freedom of residence and movement within the state (art 26) and the right to engage in self-employment (art 18).

<sup>151</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9.

<sup>152</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 37 (‘*CRC*’).

<sup>153</sup> *Refugee Convention* art 22; *CRC* art 28(1).

Senate,<sup>154</sup> TPVs and SHEVs are both visas permitting the holder to re-enter Australia.<sup>155</sup> However, a condition is imposed that prevents the holder from entering the country in respect of which they were found to require protection, or any other country ‘unless the Minister is satisfied that there are compassionate or compelling circumstances justifying the entry’ and approves the entry in writing.<sup>156</sup> TPVs should permit refugees to travel freely outside of Australia without forfeiting their visa. Instead, this has become another area where refugee rights are contingent on the exercise of personal ministerial powers. Having said this, the provisions are an improvement on the earlier iterations of TPVs which allowed no travel rights at all.

Possibly the most contentious aspect of Australia’s temporary protection scheme is the failure to provide for any kind of family reunion. The opportunity for refugees holding permanent visas to be reunited with their family was already severely limited (in the name of deterrence). Changes in September 2012 excluded UMAs from eligibility to nominate family through the split family provisions in the humanitarian program.<sup>157</sup> One final and seemingly vindictive amendment in March 2014 removed the remaining concession that had allowed unaccompanied minors already in Australia to nominate family members.<sup>158</sup> The possibility of refugees sponsoring family through the general family migration program nominally remains open, yet *Direction No 62* of 19 December 2013 gives lowest processing priority to protection visa holders. This prospect is not available to refugees granted temporary protection only.

Family reunion is a contested area in international law. Guidance from UNHCR on family reunification ‘tends to appeal to States’ humanitarian sensibilities and compassion, rather than to any strict legal obligation’.<sup>159</sup> No right to family reunification was included in the *Refugee Convention*. The *ICCPR* contains protection against ‘arbitrary or unlawful interference’ with the family (art 17) and affirms that the family is entitled to protection of the state as the fundamental unit of society (art 23(1)). Arguments that these provisions give rise to a right to enter and reside in a state for the purposes of family reunion are difficult to sustain.<sup>160</sup> Australia’s argument has been that the provisions are not

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<sup>154</sup> See Supplementary Explanatory Memorandum relating to Sheet GH118, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth).

<sup>155</sup> *Migration Regulations* sch 2 cls 785.5, 790.5. This is in contrast to earlier forms of TPVs which only allowed the holder to ‘remain’ rather than ‘travel to, enter and remain’.

<sup>156</sup> *Migration Regulations* sch 2 cls 785.611, 790.611, sch 8 cl 8570.

<sup>157</sup> Unauthorised Maritime Arrivals (‘UMAs’) who arrived after 13 August 2012 are completely barred; previous arrivals are effectively excluded through a reordering of ‘processing priorities’ and additional criteria to be met for the grant of the visa. On the expert panel’s recommendation, the change was accompanied by an increase of 4000 places in the family category. See Department of Immigration and Citizenship, ‘2012–13 Migration Program Report’ (Report, 2013) 15 <<https://perma.cc/29N9-KEKP?type=source>>. This increase was reversed by the Coalition government. See ‘Migration Programme — Allocation of Places for 2014–2015’ in Australian Government, *Budget 2014–15 — Budget Measures: Budget Paper No 2* (2014) 153.

<sup>158</sup> *Migration Amendment (2014 Measures No 1) Regulation 2014* (Cth). See discussion of the disallowance motion in the Senate: Commonwealth, *Parliamentary Debates*, Senate, 17 July 2014, 5484–95 (Sarah Hanson-Young).

<sup>159</sup> Alice Edwards, ‘Human Rights, Refugees, and the Right “to Enjoy” Asylum’ (2005) 17 *International Journal of Refugee Law* 293, 313.

<sup>160</sup> See *ibid* 308–19.

engaged because Australia has not caused the refugee to become separated from their family, but rather that was their choice when they chose to travel to Australia.<sup>161</sup>

The *CRC* deals more directly with family reunion, providing that an application by a child or his or her parents to enter a state for the purpose of family reunification shall be dealt with in a ‘positive, humane and expeditious manner’ (art 10(1)). It also requires states to ‘ensure that a child shall not be separated from his or her parents against their will’ (art 9). Alice Edwards argues that reading these two articles together, ‘States Parties may be seen as indirectly contributing to the separation of a child from his or her parents by delaying consideration of family reunification applications or denying reunification without valid justifications’.<sup>162</sup> Australia maintains that *CRC* ‘[a]rticle 10 does not amount to a right to family reunification’.<sup>163</sup>

Nonetheless, the international notion of temporary protection holds family reunion as a central principle.<sup>164</sup> The *EU Temporary Protection Directive* contains detailed provision for family reunion.<sup>165</sup> The UNHCR Guidelines include ‘opportunities for reunification with separated family members’ as a minimum standard of treatment.<sup>166</sup> That family reunion is granted as a right in the international context of temporary protection, which it is acknowledged provides a *reduced* set of rights as a trade-off for securing admission in mass influx situations, should be instructive. Moreover, most developed states provide a clear right for refugees to be reunited with their family.<sup>167</sup> Although the legal situation may be uncertain, the argument for allowing family reunion is foremost practical and moral — because family is crucially important for refugees to be able to establish themselves and lead productive lives.<sup>168</sup> It is a key area where Australia is acting exceptionally and would do well to align itself with international practice.

If a regime of temporary protection is used, in our view the most crucial factor is that it provides refugees with a path to permanent residence. Indefinite rolling three-year TPVs might strictly be permissible within the *Convention* framework if they provide refugees with the participation and other rights discussed. Having said this, the practical and moral rationale for eventual permanent residence is compelling. The adverse social and psychological effects of requiring refugees to

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<sup>161</sup> Explanatory Statement, *Migration Amendment Regulation 2012 (No 5)*, 2 <<https://perma.cc/V9VQ-58BQ?type=source>>. The argument continues that to the extent it does amount to interference with the family, it is not arbitrary because it is a ‘necessary, reasonable and proportionate measure to achieve the legitimate aim of preventing UMAs from making the dangerous journey to Australia by boat’.

<sup>162</sup> Edwards, ‘Human Rights, Refugees, and the Right “to Enjoy” Asylum’, above n 159, 315.

<sup>163</sup> Explanatory Statement, *Migration Amendment Regulation 2012 (No 5)*, 4 <<https://perma.cc/V9VQ-58BQ?type=source>>.

<sup>164</sup> See Coles, ‘Temporary Refuge and the Large Scale Influx of Refugees’, above n 13, 206.

<sup>165</sup> *EU Temporary Protection Directive* [2001] OJ L 212/12, art 15.

<sup>166</sup> *UNHCR Guidelines*, above n 28, 4–5 [16].

<sup>167</sup> Hathaway, *The Rights of Refugees under International Law*, above n 11, 535

<sup>168</sup> See Refugee Council of Australia, ‘Humanitarian Family Reunion: The Building Blocks of Good Settlement’ (Paper, April 2012) <<http://perma.cc/8R7W-YEUM>>.

live in a permanent state of limbo are well established and have frequently been explained.<sup>169</sup>

It is in Australia's national interest for refugees to become established and productive members of the community. In our view, this can be achieved by providing access to mainstream economic, family and student visas, as is provided in a qualified way by the SHEV. Such a program provides refugees an incentive to seek further education and employment, to avoid the uncertainty of their future stay in Australia being bound to their continuing refugee status. To be able to apply for a mainstream visa, a SHEV holder is required to be employed and not receiving social security benefits, or be enrolled in full-time study, for 42 months.<sup>170</sup> To be eligible for a mainstream visa, former TPV holders may still be required to obtain a waiver of the 8503 'No Further Stay' condition (see Part III(D) above). Then there are requirements as to sponsorship and English language, as well as application fees. These may prove difficult for many refugees. The only real option for many who remain in need of protection would be a further SHEV or else the three-year TPV, the grant of which precludes any subsequent application for a permanent visa. As the Kaldor Centre notes: 'The SHEV pathway attempts to turn humanitarian protection (based on treaty obligations) into a discretionary skilled migration program, through which Australia can pick and choose the refugees who can remain permanently'.<sup>171</sup>

Those who remain in need of protection after the expiry of their initial visa and who are unable to obtain an unrelated visa must be granted further humanitarian stay. In our view it should be permanent. To comply with international law, at this stage the refugee should not be required to re-establish their claim to refugee status. Rather, the onus should be on the government to show that refugee status has ceased in accordance with art 1(C) of the *Refugee Convention*.<sup>172</sup> Again, this is an area where Australia has opted to be an exception to international jurisprudential trends.<sup>173</sup>

A system that consigns refugees to a future of indefinite rolling TPVs where they must navigate the refugee status determination process every three to five years is not only huge in its human cost. It is an astonishing waste of resources. The introduction of fast-track assessment procedures in the *Legacy Caseload Act* was justified as a cost saving measure. Yet the TPV system introduced by this Act will mean that refugees will have to navigate the complexities of asylum determination schemes not once but on multiple occasions, potentially over a

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<sup>169</sup> See, eg, Greg Marston, 'Temporary Protection, Permanent Uncertainty — The Experience of Refugees Living on Temporary Protection Visas' (Report, Centre for Applied Social Research, RMIT University, 2003); Shakeh Momartin et al, 'A Comparison of the Mental Health of Refugees with Temporary versus Permanent Protection Visas' (2006) 185 *Medical Journal of Australia* 357, 357; Refugee Council of Australia, 'Temporary Protection Visas' (Policy Brief, 24 September 2013) <<http://perma.cc/7H36-4QLK>>; Australian Human Rights Commission, 'Tell Me About: Temporary Protection Visas' (Fact Sheet, December 2013) <<http://perma.cc/GU7A-3ATF>>.

<sup>170</sup> *Migration Act* s 46A(1A)(c); *Migration Regulations* reg 2.06AAB(2).

<sup>171</sup> Andrew and Renata Kaldor Centre for International Refugee Law, 'Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014' (Legislative Brief, 5 December 2014) 3 <<http://perma.cc/AZP3-MBE4>>.

<sup>172</sup> Goodwin-Gill and McAdam, *The Refugee in International Law*, above n 3, 143.

<sup>173</sup> See *QAAH* (2006) 231 CLR 1; Hossein Esmaeili and Suzanne Carlton, 'The High Court Decision in *MIMIA v QAAH of 2004* and Its Implications for Temporary Protection Visa Holders' (2007) 3 *Journal of Migration and Refugee Issues* 111.

lifetime. From a resource perspective, granting immediate permanent protection would be far more efficient. Temporary protection may be an open option under international law, providing the status secures certain rights for refugees. In the Australian context, however, temporary protection remains difficult to justify as a practical, let alone compassionate, policy choice.

As we have sought to explain, the hastily constructed SHEV scheme continues to suffer from many of the same shortcomings as the TPV regime. It is our hope nevertheless that the scheme will herald a more creative approach to finding protection solutions for asylum seekers in Australia. The SHEV at least opens the door for the development of practical policy that respects the rights of asylum seekers and provides the kind of durable solutions that work for both refugees and for the Australian national interest.