IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S89/2014

BETWEEN:

PLAINTIFF S89 OF 2014

Plaintiff

and

10

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First defendant

HIGH COURT OF AUSTRALIA
FILED
23 MAY 2014
No.
THE REGISTRY MELBOURNE

and

THE COMMONWEALTH OF AUSTRALIA

Second defendant

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DEFENDANTS' WRITTEN SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. The defendants agree with the statement of issues in paragraph 2 of the written submissions of the plaintiff filed on 9 May 2014.

PART III: SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. The defendants consider that no notice need be given pursuant to s 78B of the *Judiciary Act 1903* (Cth).

PART IV: CONTESTED FACTS

30 4. As the defendants have demurred in both of these proceedings, there are no contested facts. The relevant facts are those alleged in the statement of claim dated 16 April 2014. Any legal assertions in that pleading must be disregarded.[1]

5. While various affidavits and other documents have been included in the demurrer books (over the objection of the defendants), they should be disregarded in view of the procedure by which the matter is now before the Full Court.

[1] *South Australia v Commonwealth* (1961) 108 CLR 130 at 142 per Dixon CJ; *Kathleen Investments (Australia) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 135 per Gibbs J, 144 per Stephen J; *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 368 [119] per Gummow and Hayne JJ.

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PART V: LEGISLATION

6. In addition to the provisions identified in the plaintiff's submissions at [83], the legislative provisions set out in Annexure A are relevant.

PART VI: ARGUMENT

7. In summary, the defendants submit that:

   (a) the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Cth) (**the UMA Regulation**) was not *ultra vires* the regulation-making power in the *Migration Act 1958* (Cth) (**the Migration Act**) on any of the grounds relied upon by the plaintiff, namely:

10 (i) it was not inconsistent with s 36(2) of the Migration Act by reason of its providing, as a matter of substance, that a protection visa can be granted only to a person who entered Australia as a lawful non-citizen;

   (ii) it was not inconsistent with s 36(2) of the Migration Act, or any other part of that Act, by reason of its being inconsistent with the *Convention relating to the Status of Refugees* done at Geneva on 28 July 1951, as applied by the *Protocol relating to the Status of Refugees* done at New York on 31 January 1967 (together, **the Refugees Convention**); and

   (iii) it was not void for unreasonableness or lack of proportionality to the enabling power; and

20 (b) the UMA Regulation did not infringe s 48 of the *Legislative Instruments Act 2003* (Cth) (**the Legislative Instruments Act**).

(a) ULTRA VIRES

(i) Legislative context

8. Section 30 of the Migration Act provides that a visa may be either a permanent visa (allowing the holder to remain in Australia indefinitely) or a temporary visa (allowing the holder to remain in Australia during a specified period, until a specified event happens or while the holder has a specified status). Relevantly to the latter, s 82(7) provides that a visa to remain in Australia during a particular period ceases to be in effect at the end of that period.

30 9. Section 31(1) of the Migration Act provides that there are to be prescribed classes of visas. The word "prescribed" is defined to mean "prescribed by the regulations" (s 5(1)). This directs attention to the power to make regulations conferred by s 504(1), which relevantly provides:

> The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act and, without limiting the generality of the foregoing, may make regulations [etc.]

10. Section 31(2) provides that, in addition to the prescribed classes of visas, there are to
40 be classes of visas as provided by certain sections of the Act. One of those classes is created by s 36, which provides that there is to be a class of visas to be known as protection visas (s 36(1)).

11. Pursuant to reg 2.01 of the *Migration Regulations 1994* (Cth) (**the Migration Regulations**), the prescribed classes of visa for the purposes of s 31(1) of the Migration Act are those classes set out in sched 1 to the Migration Regulations other than those classes created by the Act. Schedule 1 includes as item 1401 the Protection (Class XA) visa, being the class of visa created by s 36 of the Migration Act.

12. Section 31(3) of the Migration Act provides:

> The regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of this subsection, may be a class provided for by section 32, 36, 37, 37A or 38B but not by section 33, 34, 35, 38
10 or 38A).

13. The way in which this power has been exercised is as follows. Pursuant to reg 2.02(1) of the Migration Regulations, sched 2 prescribes various subclasses of visas. Pursuant to reg 2.02(2), a subclass is "relevant to" a particular class if that is provided by sched 1. Pursuant to reg 2.03, sched 2 prescribes criteria for various classes of visas.

14. The visa subclasses relevant to the Protection (Class XA) visa are specified in item 1401(4) of sched 1 to the Migration Regulations. There is, at present, only one subclass of the Protection (Class XA) visa specified, namely "Subclass 866 (Protection)". The criteria for that subclass are specified in cll 866.2ff of sched 2. If granted, the visa is a permanent visa (cl 866.511).

20 **(ii) The plaintiff's reliance on implication**

15. Section 31(3) expressly provides that the power to prescribe criteria extends to the class of visa created by s 36. Consistently with this, s 36(2) is expressed to state only "[a] criterion" for a protection visa.[2] From the time that protection visas were first created in 1994 there have always been numerous criteria for those visas in addition to that provided for by s 36(2).

16. The UMA Regulation inserted into sched 2 of the Migration Regulations a further criterion for a protection visa, namely that stated in cl 866.222. On its face, that criterion fell within the regulation-making power given by s 504(1) of the Migration Act read with s 31(3). Further, so far as it provided that a protection visa may be granted to an
30 applicant only if the applicant was immigration cleared on the applicant's last entry into Australia (cl 866.222(c)), it imposed a criterion of a kind expressly contemplated by s 40(2)(d) of the Migration Act.[3]

17. In order to overcome this *prima facie* position, the plaintiff must persuade the Court that cl 866.222 is "inconsistent with" the Migration Act.

18. The plaintiff does not suggest that cl 866.222 is inconsistent with any express provision of the Migration Act, for example because it precludes a person from obtaining a protection visa in circumstances where a provision of the Act expressly mandates that that person is to be granted a protection visa. He therefore does not contend that the

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[2] See further paragraph 37 below.

[3] See paragraph 25 below.

express provisions of the Migration Act and cl 866.222 create "conflicting commands which cannot both be obeyed, or produce irreconcilable legal rights or obligations".[4]

19. Rather, the plaintiff seeks to draw various implications which cut down the otherwise unqualified words of ss 31(3) and 504. The reliance by the plaintiff upon identifying an "implicit negative proposition"[5] in the text of the Migration Act confirms that this is the task upon which he has embarked.

20. An implication may be recognised where the express provisions of the Migration Act are such that it can be said that the Act "deals completely and thus exclusively with the subject matter of the regulation in question".[6] It was this kind of inconsistency with the scheme established by the Act for ministerial decisions to refuse or cancel protection visas on national security grounds, and for merits review of such decisions, which spelled invalidity for the regulation at issue in *Plaintiff M47/2012 v Director-General of Security*.[7] But to limit, by implication, the regulation-making power in the Migration Act by reference to a scheme discerned in its express provisions requires more than that the asserted limit is consistent with the scheme: it requires that the absence of the limit is inconsistent with the scheme.

21. It is with this background in mind that the plaintiff's submissions must be approached.

(iii) Exclusion of unlawful non-citizens

22. The plaintiff submits that the UMA Regulation is inconsistent with s 36(2) of the Migration Act because "the requirement in s 36(2)(a) that an applicant for a protection visa be 'in Australia' is to apply as the sole rule regulating the relevant subject matter (both presence in Australia and the circumstances associated with that presence)" and that cl 866.222 derogates from this "by limiting the scope to non-citizens whose presence in Australia is attended by particular circumstances in connection with their last entry".[8] This submission should be rejected.

23. The fact that s 36(2) is expressed so that it is capable of applying to persons who enter Australia as either lawful or unlawful non-citizens does not confine the regulation-making power so as to prohibit any regulation which impinges upon that capacity. That is so for two reasons.

24. *First*, while s 36(2) refers to an applicant being "in Australia", it says nothing about the "circumstances associated with that presence". Section 36(2) is not the "sole rule" regulating that subject matter, as it does not in fact address that subject at all. By contrast, both s 46A(1) and the definition of "unauthorised maritime arrival" in s 5AA are directly concerned with the "circumstances" (including the mode of travel) by which a non-citizen comes to be "in Australia". Section 46A(1) expressly renders invalid an application for a visa by an unauthorised maritime arrival in Australia who is an unlawful non-citizen. The validity of that section has been upheld by this Court.[9] Its effect, subject only to the personal and non-compellable power of the Minister, is to deny

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4 *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1406 [136] per Gummow J. See also at 1439 [316] per Heydon J; *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 571–572 [2] per Gleeson CJ.

5 Plaintiff's submissions at [35].

6 *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1406 [133]–[134] per Gummow J.

7 (2012) 86 ALJR 1372 at 1395–1397 [65]–[72] per French CJ, 1418–1421 [203]–[221] per Hayne J, 1452–1456 [381]–[401] per Crennan J, 1460–1465 [429]–[459] per Kiefel J.

8 Plaintiff's submissions at [27].

9 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at 345–348 [53]–[61] per curiam.

unauthorised maritime arrivals — being one class of persons the subject of the UMA Regulation — the ability to apply for any class of visa, including a protection visa. Thus, as a result of s 46A(1) "the circumstances of a non-citizen's arrival in Australia" may prevent a non-citizen from having any capacity to lodge an application for a protection visa in the absence of ministerial intervention. That is inconsistent with s 36(2) stating the "sole rule" regulating "presence in Australia and the circumstances associated with that presence". It is a clear indication in the text of the Migration Act itself that the circumstances in which a non-citizen arrives in Australia may be a matter of great significance in relation to whether that non-citizen is able to obtain a protection visa.

10 25. *Secondly*, the plaintiff's submission founders on the express terms of s 40, which provides:

> (1) The regulations may provide that visas or visas of a specified class may only be granted in specified circumstances.
>
> (2) Without limiting subsection (1), the circumstances may be, or may include, that, when the person is granted the visa, the person ... (d) is in the migration zone and, on last entering Australia ... (i) was immigration cleared ...

Clause 866.222(c) is a condition of precisely the kind mentioned in sub-s (2), as a protection visa is clearly capable of being a visa of a "specified class": see s 31(3).

20 26. It may be accepted that s 40 must if possible be read harmoniously with the other provisions of the Migration Act.[10] But the plaintiff submits that to achieve that "harmonious" reading the Court must deny effect to the express terms of s 40 so as to give effect to an implication from s 36(2).[11] That is contrary to principle. Rather, the provisions should be read harmoniously by giving full effect to the express terms of both. As s 36(2) does not in its terms prohibit the imposition of additional criteria for protection visas, it is not inconsistent with the imposition of a criterion connected with the circumstances associated with the entry of an applicant for a protection visa into Australia, particularly given that a criterion of that kind is contemplated by the express terms of s 40. It cannot be said that s 36(2) designedly left open an area which must 30 not be encroached upon by regulations.[12] It simply said nothing about the existence of any criterion concerning circumstances of arrival, that topic being left to be addressed by any regulations of the kind expressly contemplated by s 40.

27. That submission is further supported by a comparison between ss 39(1) and 40. The former provision expressly exempts protection visas from the reach of the regulations which it contemplates. It indicates that where Parliament did not intend a general provision to extend to protection visas it so provided in express terms.[13]

28. None of the other matters relied upon by the plaintiff cast doubt on the above conclusion.

29. *First*, the fact that s 72(2) confers a non-compellable power on the Minister[14] to broaden 40 the circumstances in which bridging visas can be granted to include non-citizens who

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[10] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ.

[11] Plaintiff's submissions at [47]–[48].

[12] Plaintiff's submissions at [26].

[13] See also ss 40(3A)(a), 41(2)(a), 50, 72(2), 161(5), (6), 164D, 195(2).

[14] See s 72(2)(e), (3), (4), (7).

entered Australia as unlawful non-citizens does not provide any proper foundation for an implication restricting the regulation-making power so as to ensure that persons who enter Australia unlawfully are able to apply for protection visas.[15] Section 72(2) does no more than recognise that, in the absence of provision to the contrary (such as, where it applies, s 46A) persons who enter Australia as unlawful non-citizens can apply for protection visas. Section 72(2) confers a confined power to respond to that circumstance (the power being confined because it arises only where a non-citizen has been in detention for more than six months after an application for a protection visa has been made). The UMA Regulation leaves s 72(2) with considerable work to do, as that subsection would continue to operate with respect to the many protection visa applicants who are not affected by the UMA Regulation.

30. *Secondly*, s 91E likewise merely proceeds on an assumption that a non-citizen to whom Subdivision AI of Division 3 of Part 2 applies and who has not been immigration cleared may make an application for a protection visa. It does not deny that criteria may be prescribed which mean that such an application must be refused.[16] Indeed, far from suggesting that such criteria are impermissible, s 91E indicates that cl 866.222 is not repugnant to the Act, because s 91E adopts similar criteria to prevent the grant of protection visas to some categories of persons who may satisfy the criteria in s 36(2).

31. *Thirdly*, the plaintiff is not assisted by the presence of s 46A. The plaintiff's submission appears to be that if the UMA Regulation were empowered by the Migration Act, that would render s 46A superfluous.[17] That submission should be rejected.

32. Prior to the enactment of s 46A, unlawful non-citizens who arrived in Australia by sea (including at certain external Australian territories) could validly apply for visas, including but not limited to protection visas. As inserted into the Migration Act in 2001, s 46A(1) prohibited the making of valid visa applications by "offshore entry persons" (as defined) and s 46A(2) gave power to the Minister to permit such applications by way of the exercise of a personal and non-compellable power. From 2013, s 46A was amended to refer to "unauthorised maritime arrivals" in place of "offshore entry persons".

33. Section 46A says nothing as to the <u>criteria</u> by reference to which <u>any</u> visa, including a protection visa, may be granted or refused. It operates simply to prevent the persons to whom it applies from making a valid <u>application</u> for any kind of visa, unless the Minister "lifts the bar" to permit an application to be made for a specified kind of visa (which need not be a protection visa). If the Minister exercises the power under s 46A(2) to permit a valid application to be made for a specified class of visa, that application is subject to whatever criteria then apply with respect to that class of visa. A regulation that prescribes a criterion is not invalid simply because it means that an unauthorised maritime arrival cannot obtain a visa of a particular class. There are many visas that have criteria that could not be satisfied by most unauthorised maritime arrivals, even if applications were permitted to be made for those visas. It could not sensibly be suggested that all those criteria are invalid.

34. The UMA Regulation does not render s 46A superfluous: the fact that cl 866.222 precludes the grant of a protection visa to persons who fall within s 46A does not deny the application of s 46A(1) to other classes of visa, or the need for an exercise of the power under s 46A(2) to permit an application for such visas to be made. The UMA Regulation does not detract from the scheme created by the Act, because that scheme

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[15] cf plaintiff's submissions at [30]–[32].

[16] cf plaintiff's submissions at [33]–[34].

[17] cf plaintiff's submissions at [36]–[41].

contemplates that it is for the Minister to determine in the public interest what, if any, visas may be validly applied for by unauthorised maritime arrivals. The plaintiff's apparent assumption that there is a presumptive right to apply for a protection visa simply cannot be reconciled with the terms of s 46A.

35. *Fourthly*, so far as reliance is placed on an asserted "underlying statutory design" directed to the purpose of responding to Australia's international obligations under the Refugees Convention,[18] it is convenient to deal with that submission together with the more particular submission founded upon arts 1F, 32 and 33 of that Convention.

(iv) The Refugees Convention

10 36. The plaintiff submits that to construe the regulation-making power as supporting the UMA Regulation would be inconsistent with a legislative intention that the provisions of the Migration Act "are intended to facilitate Australia's compliance with the obligations under the Refugees Convention".[19] The plaintiff further submits that the Migration Act "does not permit the imposition of exclusionary criteria for protection visas in addition to those founded upon Articles 1, 32 or 33 of the Convention".[20] Both of these formulations in substance seek to limit the regulation-making power in the Migration Act such that it does not authorise the imposition of criteria that would deny protection visas to persons in respect of whom Australia has protection obligations under the Refugees Convention. A similar argument was advanced in *Plaintiff M47*, although it
20 was not accepted by any member of the Court.[21] It should not be accepted now.

37. From the inception of the scheme for the grant of protection visas enacted by the *Migration Reform Act 1992* (Cth) (**the Reform Act**), the Migration Act has required an applicant for a protection visa to satisfy criteria in addition to the statutory criterion of being a person to whom (or now, "in respect of whom") Australia had protection obligations.[22] Thus s 36(2) provides that "'A criterion — not, it should be emphasised, 'the criterion'"[23] for the grant of a protection visa is that the applicant is "a non-citizen in Australia" in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention.

38. Section 31(3) "explicitly provides"[24] that criteria for a protection visa additional to those
30 found in s 36 may be prescribed. That power was, from inception of the scheme, expressly stated to apply in respect of protection visas. The further power in s 40 to specify by regulations that visas of a specified class may only be granted in specified circumstances, and the express inclusion within such circumstances as being that the applicant is in the migration zone and on last entering Australia was immigration cleared, likewise is naturally read as extending to protection visas.[25]

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[18] Plaintiff's submissions at [42]–[46].

[19] Plaintiff's submissions at [45].

[20] Plaintiff's submissions at [49].

[21] See esp *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1411 [164], 1414 [181] per Hayne J.

[22] *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1428 [265] per Heydon J, 1467–1468 [472] per Bell J.

[23] *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1399 [90] per Gummow J. See also at 1434 [283] per Heydon J.

[24] *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1406 [136] per Gummow J. See also at 1439 [316] per Heydon J.

[25] See paragraphs 25–26 above.

39. Criteria applicable to protection visas in addition to that stated in s 36(2) of the Migration Act were contained in sched 2 to the Migration Regulations, made contemporaneously with the coming into force of the Reform Act. Those criteria included that the applicant for a protection visa had undergone a medical examination and in some case a chest x-ray (cll 866.223, 866.224), that the applicant satisfied specified public interest criteria (cl 866.225) and that the Minister was satisfied that the grant of the visa is in the national interest (cl 866.226). These contemporaneously made regulations assist to understand the nature of the scheme established by the Migration Act so as to better interpret the Act in light of its purpose.[26]

10 40. In *Plaintiff M47*, no member of the Court denied that it is permissible to prescribe criteria for a protection visa going beyond the criterion in s 36(2). As Gummow J put it, "an applicant to whom the Minister is satisfied Australia has protection obligations under the Convention yet may fail to qualify for a protection visa".[27] And in *Plaintiff M76 v Minister for Immigration and Citizenship*, Hayne J observed that:[28]

> [A]s the decision in *Plaintiff M47/2012* demonstrates, the Act does recognise expressly that persons with a well-founded fear of persecution for a Convention reason may validly be refused a protection visa under the Act.

41. Thus, far from the Act establishing s 36(2) (or other criteria based on the Refugees Convention) as the exclusive or exhaustive criterion for the grant of a protection visa,
20 the prescription of criteria by regulations has always been an integral part of the scheme.[29] That scheme contemplates and has always contained criteria that may require a protection visa to be refused despite the fact that the applicant for that visa is a refugee[30] and therefore satisfies s 36(2).[31] Further, these criteria are not limited to criteria founded upon any of Arts 1, 32 or 33 of the Refugees Convention. For example, they have always required the refusal of a protection visa to a person determined by the Foreign Minister to be a person whose presence in Australia would prejudice relations between Australia and a foreign country.[32]

42. Statements in this Court that the Migration Act "focuses upon the definition in Art 1 of the Convention as the criterion of operation of the protection visa system"[33] must be
30 read in context.[34] Those statements were made to emphasise that the Migration Act

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[26] *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at 109–110 [19] per curiam. See further *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1441 [324] per Heydon J; Herzfeld, Prince and Tully, *Interpretation and Use of Legal Sources* (2013) at 307–308 [25.1.2760].

[27] *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1406 [136]. See also at 1414 [181] per Hayne J (accepting that the Act allows the creation of additional criteria, or "hurdles", beyond those found in s 36(2)), 1429 [271], 1434 [283] per Heydon J, 1470–1471 [485]–[490] per Bell J.

[28] (2013) 88 ALJR 324 at 346 [120].

[29] *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1406 [136] per Gummow J.

[30] A "person to whom Australia has protection obligations under" the Refugees Convention describes no more than a person who is a refugee within the meaning of art 1: *NAGV v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 176 [42] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

[31] This has long been accepted: see eg *SZ v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 342 (FC) at 347–349 [23]–[32] per Branson J (Beaumont and Lehane JJ agreeing).

[32] See cl 866.225, giving effect to sched 4, public interest criterion 4003. See also PIC 4004, concerning debts to the Commonwealth.

[33] *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 16 [45] per McHugh and Gummow JJ; *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 14–15 [34] per Gummow ACJ, Callinan, Heydon and Crennan JJ.

[34] cf plaintiff's submissions at [50].

does not enact into Australian municipal law protection obligations of Contracting States found in Chs II, III and IV of the Refugees Convention. They do not suggest that the criterion stated in s 36(2) is the sole criterion for the grant of a protection visa.

43. Further, in the nearly 20 years since the commencement of the Reform Act, Parliament has made numerous amendments to the Migration Act that emphasise that s 36(2) does not require the grant of a protection visa to every person in respect of whom Australia has protection obligations under the Refugees Convention. Section 46A, discussed above, is one example. Allied with s 46A, Subdivision B of Division 8 of Part 2 now provides for the taking of unauthorised maritime arrivals to regional processing countries, whether or not they are persons to whom Australia has protection obligations (see s 198AA(b)).

44. In light of those provisions, s 36(2) cannot be regarded as the only — or even the principal — mechanism by which the Migration Act responds to Australia's international obligations under the Refugees Convention. Compliance with those obligations does not require Australia to grant protection visas (or any other visas) to refugees, because refugees have no right to asylum.[35] Australia can comply with its *non-refoulement* obligations under art 33 of the Refugees Convention, and any other obligations under that Convention that apply to refugees who are not lawfully in its territory, without granting protection visas under s 36. Subdivision B of Division 8 of Part 2 of the Migration Act specifically contemplates that such a course may be adopted with respect to unauthorised maritime arrivals.

45. So too, non-citizens to whom Subdivision AI of Division 3 of Part 2 applies (concerning "safe third countries") and non-citizens to whom Subdivision AK applies (concerning non-citizens with access to protection from third countries) cannot in general make valid applications for protection visas regardless of whether they satisfy s 36(2).[36]

46. These legislative provisions deny any basis for the submission that there is a "clear necessity" or "clear reason" for an implication limiting the power to prescribe criteria for protection visas. In particular, they deny any sure foundation for an implication premised on the centrality of s 36(2) in ensuring that Australia complies with its obligations under the Refugees Convention.

47. The qualifications inserted by 46A and Subdivision B of Division 8 of Part 2 are particularly important for present purposes, as the class of persons to whom they are directed — unauthorised maritime arrivals — overlaps to a significant extent with the class of persons to whom the UMA Regulation is directed.

48. None of the above denies the relevance to the construction of the Migration Act of the recognition that it is, in part, directed to the purpose of responding to international obligations which Australia has undertaken in the Refugees Convention.[37] But at issue here is the implication of limitations, not found in the express words of the Act, upon an express and wide power to make regulations, that being a power that occupies a central role in the visa regime that the Migration Act creates to regulate in the national interest the presence of non-citizens in Australia (s 4). Neither the *Offshore Processing Case*,[38] nor any of the cases that have followed it, suggest that compliance with Australia's

[35] See *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 273–274 per Gummow J; *NAGV v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 169–170 [16] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ; *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1470 [487] per Bell J. See also plaintiff's submissions at [43].

[36] See ss 91E and 91P.

[37] *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at 339 [27] per curiam.

[38] *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319.

obligations under the Refugees Convention requires refugees to be granted protection visas. Absent any such obligation, it is entirely consistent with the purpose of the Act in responding to the Refugees Convention to recognise that criteria can validly be prescribed that restrict access to the protection visa regime, leaving other limits to ensure that Australia complies with its obligations under that Convention. There is therefore no "clear necessity" or "clear reason" to imply limits on the regulation-making power of the kind for which the plaintiff contends.

49. The plaintiff points to two "anomalies" said to demonstrate the invalidity of cl 866.222.[39] The first is that where an application for a protection visa is refused by reason of that regulation, without a determination of whether Australia owes protection obligations in respect of the applicant, such a determination would nevertheless still be required before the applicant may be removed pursuant to s 198(2)(c)(ii).[40] However, this is not anomalous. The same is true with respect to every unauthorised maritime arrival who is subject to s 46A and who claims to be a refugee. In such cases, unless the Minister decides to "lift the bar" to allow an application to be made for a protection visa, an assessment of Australia's protection obligations will be undertaken not in the context of an application for a protection visa, but either for the purpose of the Minister considering whether to exercise that power (as was occurring under the processing model in place at the time of the *Offshore Processing Case*) or for the purposes of determining whether the removal power under s 198 may be exercised to removal an unauthorised maritime arrival to a particular country.[41]

50. The second asserted anomaly is that it is said that the effect of cl 866.222(c) is to "repose the determination of a person's application for a protection visa in the hands of" the officer who decides whether to grant or refuse immigration clearance. That point is without substance. By definition, at the time that the question of immigration clearance is determined, a person will not have made an application for a protection visa. Plainly, therefore, the clearance officer cannot be "determining" such an application. Rather, the clearance officer performs the particular functions specified in ss 166–172 of the Migration Act, in circumstances where the performance of those functions may have a variety of consequences under the Act (see, eg, under ss 174, 193(1)(a) and (b)). Section 40(2) specifically contemplates that one such consequence may be to limit the circumstances in which a visa may be granted.[42] There is therefore nothing anomalous about the regulations providing that the refusal of immigration clearance has consequences for whether a visa may be granted.

[39] Plaintiff's submissions at [61]–[62].

[40] Following the reasoning in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 187–189 [83]–[99] per Gummow, Hayne, Crennan and Bell JJ.

[41] See, eg, *SZQRB v Minister for Immigration and Citizenship* (2013) 210 FCR 505 (FC) at 549 [228]–[229], 554 [270]–[271] per Lander and Gordon JJ.

[42] See paragraph 25 above.

(v) Unreasonableness

51. The plaintiff submits that the UMA Regulation is void for unreasonableness because it is not capable of being considered proportionate to the pursuit of the object of giving effect to Australia's obligations under the Refugees Convention.[43]

52. The degree of unreasonableness required to justify a challenge of this kind is very great. Expressions that have been used include:[44] "fantastic and capricious ... such as reasonable men could not make in good faith";[45] "so oppressive or capricious that no reasonable mind can justify it";[46] "such oppressive or gratuitous interference with the rights of those who are subject to it as could find no justification in the minds of reasonable men";[47] "such manifest arbitrariness, injustice or partiality that a court would say: 'Parliament never intended to give authority to make such rules'";[48] and "no reasonable mind could justify it by reference to the purposes of the power".[49]

53. The fact that the UMA Regulation is required to be laid before Parliament makes a successful attack on this ground even more difficult.[50]

54. An object of the TPV Regulation was stated in the Explanatory Statement as follows:[51]

> The reintroduction of Temporary Protection visas 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.

55. The Explanatory Statement to the UMA Regulation provided:[52]

> On 2 December 2013, the Migration Amendment (Temporary Protection Visa) Regulation 2013 was disallowed by the Senate. This Regulation reintroduced Subclass 785 (Temporary Protection) visas and stipulated that they would be the only type of protection visa available to people who arrive in Australia via unauthorised maritime means. It continues to be the Government's intention to ensure that persons who arrive in Australia without visas are not to be granted permanent protection via a Subclass 866 (Protection) visa (Protection visa) in Australia.

It is readily apparent how the UMA Regulation gives effect to the stated objects, which are entirely consistent with the objects set out in s 4 of the Migration Act. It is also

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[43] Plaintiff's submissions at [65]–[70].

[44] See also *Attorney-General (SA) v Corp of City of Adelaide* (2013) 87 ALJR 289 at 306–310 [48]–[59] per French CJ, 319–321 [117]–[123] per Hayne J (Bell J agreeing), 334 [198]–[199] per Crennan and Kiefel JJ; Herzfeld, Prince and Tully, *Interpretation and Use of Legal Sources* (2013) at 380–382 [25.1.3720].

[45] *Slattery v Naylor* (1888) 13 App Cas 446 (PC) at 452 per Lord Hobhouse (for the Board).

[46] *Brunswick Corp v Stewart* (1941) 65 CLR 88 at 97 per Starke J.

[47] *Brunswick Corp v Stewart* (1941) 65 CLR 88 at 99 per Williams J.

[48] *Mixnam's Properties Ltd v Chertsey UDC* [1964] 1 QB 214 (CA) at 237 per Diplock LJ.

[49] *Clements v Bull* (1953) 88 CLR 572 at 577 per Williams ACJ and Kitto J.

[50] *Ferrier v Wilson* (1906) 4 CLR 785 at 802 per Isaacs J; *Bienke v Minister for Primary Industries & Energy* (1994) 125 ALR 151 (FCA) at 166 per Gummow J.

[51] Explanatory Statement to Select Legislative Instrument No 234, 2013 – *Migration Amendment (Temporary Protection Visas) Regulation 2013* (Cth), p 1.

[52] Explanatory Statement to Select Legislative Instrument No 280, 2013 — *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Cth), p 1.

readily apparent that it falls well short of the standard required to be deemed unreasonable within the expressions above.

56. In truth, though expressed as being a challenge to the UMA Regulation on grounds of unreasonableness, the plaintiff's submissions are directed to a lack of "proportionality" between the UMA Regulation and the empowering provisions. The amenability of a regulation to challenge on this ground has not been determined by this Court.[53] It is, however, submitted that the Court should conclude that such a challenge is available (if at all) only in cases where legislation empowers regulations directed to a particular purpose, not a particular subject matter.[54] For that reason, a proportionality analysis is not applicable to the regulation-making power at issue here.

57. Even if proportionality is relevant, the degree of disproportionality required before a regulation will be invalid is akin to the degree of unreasonableness referred to above.[55] The UMA Regulation should not be held invalid on this ground.

58. The power to prescribe criteria for visa classes created by the Migration Act and the Migration Regulations does not exist only for the limited purpose of giving effect to Australia's obligations under the Refugees Convention. The submission by the plaintiff to the contrary[56] is, in a different guise, the same submission dealt with in paragraphs 36–50 above; it should be rejected for the same reasons. The regulation-making power is generally expressed and it applies to all visa classes. It should be interpreted having regard to the object of the Migration Act as a whole, being to "regulate, in the national interest, the coming into, and presence in, Australia of non-citizens".[57] The UMA Regulation is "capable of being reasonably considered to be appropriate and adapted" for giving effect to that purpose.[58]

(b) LEGISLATIVE INSTRUMENTS ACT

59. The plaintiff submits that the UMA Regulation infringed s 48(1) of the Legislative Instruments Act because it was "the same in substance" as the *Migration Amendment (Temporary Protection Visas) Regulation 2013* (Cth) (**TPV Regulation**) and that, by reason of s 48(2) of the Legislative Instruments Act, it was therefore of no effect.[59]

60. The defendants accept that if the UMA Regulation was the same in substance as the TPV Regulation, the other elements of s 48(1) of the Legislative Instruments Act were satisfied and none of the exceptions applied. However, the UMA Regulation was not the same in substance as the TPV Regulation. That is because, though the effect of

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[53] It was conceded that lack of proportionality was an open ground of challenge in *South Australia v Tanner* (1989) 166 CLR 161: see at 165 per Wilson, Dawson, Toohey and Gaudron JJ.

[54] See eg *Minister for Urban Affairs & Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31 (NSWCA) at 37–38 per Handley JA, 45–46 per Sheller JA, 81–84 per Cole JA; *De Silva v Minister for Immigration & Multicultural Affairs* (1998) 89 FCR 502 (FC) at 510 per curiam; *Environment Protection Authority v Schon G Condon as liquidator for Orchard Holdings (NSW) Pty Ltd (in liq)* [2014] NSWCA 149 at [67] per Leeming JA. See also *Attorney-General (SA) v Corp of City of Adelaide* (2013) 87 ALJR 289 at 308–310 [55]–[61] per French CJ.

[55] *Minister of State for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565 (FC) at 577 per Gummow J, 585–586 per Cooper J; *Attorney-General (SA) v Corp of City of Adelaide* (2013) 87 ALJR 289 at 334–335 [201] per Crennan and Kiefel JJ.

[56] Plaintiff's submissions at [68].

[57] See *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1406 [133] per Gummow J.

[58] *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 264–265 per Deane J, applied in *South Australia v Tanner* (1989) 166 CLR 161 at 165 per Wilson, Dawson, Toohey and Gaudron JJ.

[59] Plaintiff's submissions at [71]–[82].

both legislative instruments was that a certain class of person could not obtain a permanent protection visa, the effect of the TPV Regulation was that a person who was refused a permanent protection visa as a result of the new cl 866.222 would be granted a temporary protection visa. By contrast, the effect of the UMA Regulation was that such persons could not obtain a protection visa at all.

(i) Principles

61. Section 48 of the Legislative Instruments Act has not been considered by this Court. However, the predecessor provision, s 49 of the *Acts Interpretation Act 1901* (Cth) (**the Acts Interpretation Act**), was examined in *Victorian Chamber of Manufacturers v The* 10 *Commonwealth (Women's Employment Regulations Case)*.[60]

62. At the time of that case, s 49(1) of the Acts Interpretation Act provided:

> Where, in pursuance of the last preceding section, either House of the Parliament disallows any regulation, or any regulation is deemed to have been disallowed, no regulation, being the same in substance as the regulation so disallowed, or deemed to have been disallowed, shall be made within six months after the date of the disallowance, unless ...

63. It might at first be thought that there is a difference between this provision and s 48 of the Legislative Instruments Act, because the current provision contemplates that a provision of a legislative instrument may be the same in substance as a provision that 20 has been previously disallowed. However, when s 49(1) of the Acts Interpretation Act is read in the context of "the last preceding section", namely s 48, it becomes clear that s 49 of the Acts Interpretation Act also contemplated that prospect. Section 48(1) provided that "regulations ... shall be laid before each house of Parliament within fifteen sitting days of that House after the making of the regulations". Section 48(4) then provided:[61]

> If either House of the Parliament passes a resolution (of which notice has been given at any time within fifteen sitting days after any regulations have been laid before that House) disallowing any of those regulations, the regulation so disallowed shall thereupon cease to have effect.

30 Subsection (4) thus drew a distinction between the "regulations" laid before the House, ie the set of such regulations, and the disallowance of any one "regulation" within that set. It was to the disallowance of a single regulation that s 49(1) was directed but, by reason of s 23 of the Acts Interpretation Act,[62] it extended also to the disallowance of a set of regulations. So much was expressly recognised in the *Women's Employment Regulations Case* by Latham CJ[63] and McTiernan J.[64]

64. Accordingly, like s 48 of the Legislative Instruments Act, s 49 of the Acts Interpretation Act dealt both with wholesale disallowance of a set of regulations as well as disallowance of a single regulation within the set. Section 48 of the Legislation Instruments Act was thus accurately described in the relevant explanatory

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[60] (1943) 67 CLR 347.

[61] Emphasis added.

[62] "In any Act, unless the contrary intention appears ... [w]ords in the singular shall include plural, and words in the plural shall include the singular."

[63] (1943) 67 CLR 347 at 360.

[64] (1943) 67 CLR 347 at 388–389. Plaintiff's submissions at [73] fn 79 accept this point.

memorandum as a re-enactment of s 49 of the Acts Interpretation Act.[65] The approach to the predecessor provision adopted by this Court in the *Women's Employment Regulations Case* should be applied to the current provision.[66]

65. The following propositions may be drawn from the *Women's Employment Regulations Case*:

    (a) *First*, the question to which s 48 of the Legislative Instruments Act is directed is whether a new legislative instrument or provision is sufficiently similar to a disallowed legislative instrument or provision.[67]

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    (b) *Secondly*, in considering the degree of similarity between the new and disallowed legislative instruments or provisions, the comparison focusses on substance, ie operation and effect, not form.[68]

    (c) *Thirdly*, where a new legislative instrument is made after the disallowance of a previous legislative instrument, it is necessary to consider the effect of each as a whole.[69]

66. The third proposition is critical in this case. As Williams J noted, while comparison between each disallowed provision and each new provision is required "the meaning of a regulation must be ascertained in the context of the whole set of regulations of which it forms a part just as a section must be construed in the context of the whole Act".[70] Thus, though a particular provision within a new legislative instrument is the same or very similar in form as a provision within a disallowed legislative instrument, s 48 is not engaged if the new provision, read in the context of the new legislative instrument taken as a whole, does not "produce substantially, that is, in large measure ... the same effect" as the disallowed law,[71] or if the new provision cannot be "fairly said to be the same law as the disallowed regulation".[72]

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67. Contrary to the plaintiff's submissions at [76], this is not simply a matter of construing each provision within the context of the legislative instrument as a whole, in the sense that the context may cause the words of a provision to bear a different meaning to that which those words bore in the disallowed legislative instrument. Rather, it is to recognise that the effect of a provision on the rights and liabilities of those it affects may be radically different depending upon the extent to which it is qualified or expanded by other provisions within the legislative instrument.

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[65] Explanatory Memorandum to the Legislative Instruments Bill 2003 (Cth), p 24. The Explanatory Memorandum contained a typographical error, referring incorrectly to s 48 of the Acts Interpretation Act in place of s 49.

[66] *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Mfg & Engineering Employees (Cth)* (1994) 181 CLR 96 at 106–107 per curiam; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 323–325 [7]–[8] per Gleeson CJ, 346-347 [81] per McHugh J, 370–371 [161]–[162] per Gummow, Hayne and Heydon JJ; *Spriggs v Federal Commr of Taxation* (2009) 239 CLR 1 at 17 [53] per curiam.

[67] (1943) 67 CLR 347 at 363–364 per Latham CJ, 388–389 per McTiernan J.

[68] (1943) 67 CLR 347 at 360–361, 364 per Latham CJ, 377 per Rich J, 388–389 per McTiernan J, 405–406 per Williams J.

[69] (1943) 67 CLR 347 at 360–361 per Latham CJ, 406 per Williams J; cf the plaintiff submissions at [76]–[82].

[70] (1943) 67 CLR 347 at 406.

[71] (1943) 67 CLR 347 at 364.

[72] (1943) 67 CLR 347 at 389.

68. It may be accepted, as Latham CJ said,[73] that s 48 may apply where a new legislative instrument deals with cases covered by a disallowed legislative instrument in the same way as they were dealt with by the disallowed legislative instrument, though the new legislative instrument also deals with other cases to which the disallowed legislative instrument did not apply. To the extent of the cases covered by both, the legislative instruments are identical in effect and thus may be the same in substance.[74] But that is quite different to the circumstance of a new legislative instrument which deals with the same cases covered by a disallowed legislative instrument in a different way to the way they were dealt with by the disallowed legislative instrument. The fact that two legislative instruments operate upon the same cases does not mean that they are the same in substance: consistently with the second proposition in paragraph 65 above, the critical question is the way in which they operate on those cases as a matter of substance, having regard to the operation of the other provisions of the disallowed and new legislative instruments.

69. None of this is to require the Court to "seek to decipher from an inscrutable disallowance motion whether one part, or another or the whole of a disallowed legislative instrument was considered obnoxious by the Senate".[75] It requires no consideration of the meaning of the disallowance motion at all. Rather, in a manner familiar to the Court in other contexts,[76] it focusses upon the rights, powers, liabilities, duties and privileges created by the legislative instrument, and each of its provisions within the context of the instrument as a whole, having regard both to its legal operation and practical effect.

(ii) Application to the UMA Regulation

70. In light of the above, for the following reasons, the UMA Regulation is not the same in substance as the TPV Regulation.

The TPV Regulation

71. The TPV Regulation relevantly had the following effect:

(a) It introduced[77] a new subclass of Protection (Class XA) visa specified in item 1401(4) of sched 1 to the Migration Regulations, namely "Subclass 785 (Temporary Protection)".

(b) It introduced[78] cll 785.1ff into sched 2 to the Migration Regulations specifying the criteria for that subclass. The Subclass 785 (Temporary Protection) visa was a temporary visa permitting the holder to remain in Australia for a limited period of time (cl 785.511).

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[73] (1943) 67 CLR 347 at 361.

[74] Whether they are in fact the same in substance will depend on the circumstances, including the degree of overlap between the legislative instruments.

[75] cf plaintiff's submissions at [81].

[76] *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 492 [16] per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ

[77] TPV Regulation, sched 1 item 5.

[78] TPV Regulation, sched 1 item 6.

(c) It introduced[79] a new criterion for the grant of a Subclass 866 (Protection) visa in cl 866.222 of sched 2 to the Migration Regulations, namely:

> The applicant:
>
> (a) does not hold a Subclass 785 (Temporary Protection) visa; and
>
> (b) has not held a Subclass 785 (Temporary Protection) visa since last entering Australia; and
>
> (c) held a visa that was in effect on the applicant's last entry into Australia; and
>
> (d) is not an unauthorised maritime arrival; and
>
> 10 (e) was immigration cleared on the applicant's last entry into Australia.

(d) It provided,[80] through a new reg 2.08H, that a valid application for a Protection (Class XA) visa made, but not finally determined, before 18 October 2013 was taken to be a valid application for a Subclass 785 (Temporary Protection) visa if the applicant was a person who would fail one or more of the criteria in cl 866.222.

(e) It inserted[81] new sub-items (d) and (e) into item 1401 of sched 1 to the Migration Regulations. Sub-item (e) provided that an application for a Subclass 866 (Protection) visa was valid only if the applicant satisfied the same five criteria set out in cl 866.222. Sub-item (d) provided that an application for a Subclass 20 785 (Temporary Protection) visa was valid only if the applicant failed one of those criteria.

72. The effect of the TPV Regulation was to separate persons claiming to be persons in respect of whom Australia has protection obligations under the Refugees Convention into two classes. Those who satisfied cl 866.222 (and therefore sub-item 1401(3)(e) of sched 1) were eligible for a Subclass 866 (Protection) visa. Those who did not satisfy cl 866.222 could not obtain a Subclass 866 (Protection) visa. But they could obtain a Subclass 785 (Temporary Protection) visa. Further, such a visa would be granted to any person who satisfied all the criteria for a Subclass 866 (Protection) visa other than cl 866.222.

30 73. In other words, the TPV Regulation did not prevent any person from obtaining a Protection (Class XA) visa. It merely separated persons obtaining Protection (Class XA) visas into those who obtained a Subclass 866 (Permanent) visa and those who obtained a Subclass 785 (Temporary Protection) visa.

The UMA Regulation

74. The TPV Regulation being disallowed, the Subclass 785 (Temporary Protection) visa ceased to exist. The UMA Regulation did not reintroduce it.

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[79] TPV Regulation, sched 1 item 9.

[80] TPV Regulation, sched 1 item 2.

[81] TPV Regulation, sched 1 item 4. Regulations prescribing criteria and requirements for a valid visa application are contemplated by s 46(1)(b) of the Migration Act.

75. Like the TPV Regulation, the UMA Regulation introduced a new criterion for the grant of a Subclass 866 (Protection) visa.[82] That criterion, again found in cl 866.222 of sched 2 to the Migration Regulations, was as follows:

> The applicant:
>
> (a) held a visa that was in effect on the applicant's last entry into Australia; and
>
> (b) is not an unauthorised maritime arrival; and
>
> (c) was immigration cleared on the applicant's last entry into Australia.

76. The language of that provision was identical to the language of three of the five paragraphs in the equivalent provision introduced by the TPV Regulation. However, consistently with the principles set out in paragraphs 65–67 above, it is insufficient to focus merely on that similarity. Rather, the operation and effect of each of the legislative instruments as a whole must be compared. In that comparison, it is necessary to identify the substantive effect of cl 866.222 as inserted by the UMA Regulation within the context of the integrated scheme of which it formed part.

77. Like the TPV Regulation, the effect of the UMA Regulation was to separate persons claiming to be persons in respect of whom Australia has protection obligations under the Refugees Convention into two classes. As before, those who satisfied cl 866.222 were eligible for a Subclass 866 (Protection) visa. But now, those who did not satisfy cl 866.222 were not entitled to an alternative subclass of Protection (Class XA) visa: rather, their application for such a visa was required to be refused.

78. Accordingly, while the TPV Regulation and the UMA Regulation used essentially the same language in their respective versions of cl 866.222 to identify essentially the same classes of person, their effects on the persons within those classes were radically different. Under the TPV Regulation, the effect of cl 866.222 was to distinguish between those entitled to permanent protection visas and those entitled to temporary protection visas. Under the UMA Regulation, the effect of cl 866.222 was to distinguish between those entitled to permanent protection visas and those not entitled to protection visas at all. From the perspective of the people who did not satisfy cl 866.222, the difference could not be starker.

79. This is not a case in which the UMA Regulation dealt with the same cases as the TPV Regulation in the same way as the TPV Regulation as well as other cases. Each legislative instrument dealt with the substantially the same cases — people who did not satisfy cl 866.222 — but did so in an entirely different way.

80. In light of the above, the UMA Regulation was not the "same in substance" as the TPV Regulation. That is so irrespective of the precise test that is applied in determining that question. It is not the case that the two manifestations of cl 866.222, or the two legislative instruments as a whole, "produce substantially, that is, in large measure, though not in all details, the same effect as the disallowed regulation".[83] Nor can it be said that the UMA Regulation is "so much like the disallowed regulation in its general

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[82] UMA Regulation, sched 1 item 1.

[83] *Women's Employment Regulation Case* (1943) 67 CLR 347 at 364 per Latham CJ.

legal operation that it could be fairly said to be the same law as the disallowed regulation",[84] or to "have in substance the same 'real purpose and effect'".[85]

81. The point may be tested by considering whether, if those parts of the TPV Regulation providing for temporary protection visas had been held invalid, the remaining parts — denying permanent protection visas to those within cl 866.222 — could have been severed. That could be done only "provided that the operation of the remaining parts of the law remains unchanged" and not if "the law was intended to operate fully and completely according to its terms, or not at all".[86] It is plain that the TPV Regulation could not be severed in this way.

10 82. None of this is denied by the extrinsic material relied upon in the plaintiff's submission at [77]–[78]; to the contrary, the extrinsic material underscores the difference between the TPV Regulation and the UMA Regulation, and cl 866.222 inserted by each. The purpose of cl 866.222 as introduced by the TPV Regulation was, as is clear from its terms, that stated in the explanatory statement, namely to deny Subclass 866 (Protection) visas to those falling within its terms. But it is plain from that explanatory statement that that purpose formed part of a unified scheme "to establish new arrangements for dealing with people who have arrived in Australia without visas and claimed protection", the new arrangements being that persons falling within cl 866.222 could obtain temporary protection visas.[87] In contrast, the explanatory statement to the
20 UMA Regulation fixes only upon the purpose of denying to those persons the ability to obtain protection visas.[88]

83. Accordingly, s 48(2) of the Legislative Instruments Act did not render the UMA Regulation of "no effect".

(c) ORDERS

84. The demurrer should be allowed with costs.

PART VII: ORAL ARGUMENT

85. The defendants estimate that presentation of their oral argument will require approximately 1.5 hours.

Dated 23 May 2014

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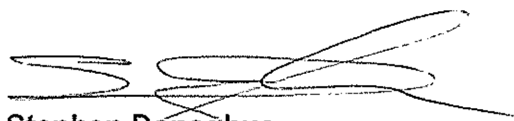

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[84] *Women's Employment Regulation Case* (1943) 67 CLR 347 at 389 per McTiernan J.

[85] *Women's Employment Regulation Case* (1943) 67 CLR 347 at 406 per Williams J.

[86] *Pidoto v Victoria* (1943) 68 CLR 87 at 108 per Latham CJ.

[87] Explanatory Statement to Select Legislative Instrument No 234, 2013 – *Migration Amendment (Temporary Protection Visas) Regulation 2013* (Cth), p 1.

[88] Explanatory Statement to Select Legislative Instrument No. 280, 2013 – *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Cth), p 1.

ANNEXURE A
Additional relevant legislative provisions

The *Acts Interpretation Act 1901* (Cth), as at the date of *Victorian Chamber of Manufacturers v The Commonwealth (Women's Employment Regulations Case)*:[89]

23.—In any Act, unless the contrary intention appears—

...

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(b) Words in the singular shall include the plural, and words in the plural shall include the singular.

...

48.—(1.) Where an Act confers power to make regulations, then, unless the contrary intention appears, all regulations made accordingly—

(a) shall be notified in the *Gazette*;

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(b) shall, subject to this section, take effect from the date of notification, or, where another date is specified in the regulations, from the date specified; and

(c) shall be laid before each House of the Parliament within fifteen sitting days of that House after the making of the regulations.

...

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(4.) If either House of the Parliament passes a resolution (of which notice has been given at any time within fifteen sitting days after any regulations have been laid before that House) disallowing any of those regulations, the regulation so disallowed shall thereupon cease to have effect.

(5.) If, at the expiration of fifteen sitting days after notice of a resolution to disallow any regulation has been given in either House of the Parliament in accordance with the last preceding sub-section, the resolution has not been withdrawn or otherwise disposed of, the regulation specified in the resolution shall thereupon be deemed to have been disallowed.

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(6.) Where a regulation is disallowed, or is deemed to have been disallowed, under this section, the disallowance of the regulation shall have the same effect as a repeal of the regulation.

49.—(1.) Where, in pursuance of the last preceding section, either House of the Parliament disallows any regulation, or any regulation is deemed to have been disallowed, no regulation, being the same in substance as the regulation so disallowed, or deemed to have been disallowed, shall be made within six months after the date of the disallowance, unless—

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(a) in the case of a regulation disallowed by resolution—the resolution has been rescinded by the House of the Parliament by which it was passed; or

(b) in the case of a regulation deemed to have been disallowed—the House of the Parliament in which notice of the resolution to disallow the regulation was given by resolution approves the making of a regulation

[89] (1943) 67 CLR 347.

the same in substance as the regulation deemed to have been disallowed.

(2.) Any regulation made in contravention of this section shall be void and of no effect.

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10 **The *Migration Act 1958* (Cth) (current):**

5AA. Meaning of unauthorised maritime arrival

(1) For the purposes of this Act, a person is an unauthorised maritime arrival if:

(a) the person entered Australia by sea:

(i) at an excised offshore place at any time after the excision time for that place; or 20

(ii) at any other place at any time on or after the commencement of this section; and

(b) the person became an unlawful non-citizen because of that entry; and

(c) the person is not an excluded maritime arrival.

30 *Entered Australia by sea*

(2) A person entered Australia by sea if:

(a) the person entered the migration zone except on an aircraft that landed in the migration zone; or

(b) the person entered the migration zone as a result of being found on a ship detained under section 245F and being dealt with under paragraph 245F(9)(a); or

40

(c) the person entered the migration zone after being rescued at sea.

Excluded maritime arrival

(3) A person is an excluded maritime arrival if the person:

(a) is a New Zealand citizen who holds and produces a New Zealand passport that is in force; or

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(b) is a non-citizen who holds and produces a passport that is in force and is endorsed with an authority to reside indefinitely on Norfolk Island; or

(c) is included in a prescribed class of persons.

Definitions

(4) In this section:

"aircraft" has the same meaning as in section 245A.

"ship" has the meaning given by section 245A.

...

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46. Valid visa application

(1) Subject to subsections (1A), (2) and (2A), an application for a visa is valid if, and only if:

(a) it is for a visa of a class specified in the application; and

(b) it satisfies the criteria and requirements prescribed under this section; and

20

...

82. When visas cease to be in effect

...

(7) A visa to remain in Australia (whether also a visa to travel to and enter Australia) during a particular period or until a particular date ceases to be in effect at the end of that period or on that date.

30

...

166. Persons entering to present certain evidence of identity etc.

Requirement to be immigration cleared

(1) A person, whether a citizen or a non-citizen, who enters Australia must, without unreasonable delay:

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(a) present the following evidence (which might include a personal identifier referred to in subsection (5)) to a clearance authority:

(i) if the person is a citizen (whether or not the person is also the national of a country other than Australia)—the person's Australian passport or prescribed other evidence of the person's identity and Australian citizenship;

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(ii) if the person is a non-citizen—evidence of the person's identity and of a visa that is in effect and is held by the person; and

(b) provide to a clearance authority any information (including the person's signature, but not any other personal identifier) required by this Act or the regulations; and

(c) if the person is a non-citizen and prescribed circumstances exist—comply with any requirement, made by a clearance authority before an event referred to in subparagraph 172(1)(a)(iii) or (b)(iii) or paragraph 172(1)(c) occurs, to

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provide one or more personal identifiers referred to in subsection (5) of this section to a clearance officer.

...

172. Immigration clearance

When a person is immigration cleared

10 (1) A person is immigration cleared if, and only if:

(a) the person:

(i) enters Australia at a port; and

(ii) complies with section 166; and

(iii) leaves the port at which the person complied and so leaves with the permission of a clearance authority
20 and otherwise than in immigration detention; or

...

When a person is refused immigration clearance

(3) A person is refused immigration clearance if the person:

(a) is with a clearance officer for the purposes of section 166; and

30 (b) satisfies one or more of the following subparagraphs:

(i) the person has his or her visa cancelled;

(ii) the person refuses, or is unable, to present to a clearance officer evidence referred to in paragraph 166(1)(a);

(iii) the person refuses, or is unable, to provide to a clearance officer information referred to in paragraph
40 166(1)(b);

(iv) the person refuses, or is unable, to comply with any requirement referred to in paragraph 166(1)(c) to provide one or more personal identifiers to a clearance officer.

...

174. Visa ceases if holder remains without immigration clearance

50 If the holder of a visa:

(a) is required to comply with section 166; and

(b) does not comply;

the visa ceases to be in effect.

...

193. Application of law to certain non-citizens while they remain in immigration detention

(1) Sections 194 and 195 do not apply to a person:

(a) detained under subsection 189(1):

(i) on being refused immigration clearance; or

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(b) detained under subsection 189(1) who:

(i) has entered Australia after 30 August 1994; and

(ii) has not been immigration cleared since last entering; or

...

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Division 8—Removal of unlawful non-citizens etc

...

Subdivision B—Regional processing

198AA. Reason for Subdivision

This Subdivision is enacted because the Parliament considers that:

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(a) people smuggling, and its undesirable consequences including the resulting loss of life at sea, are major regional problems that need to be addressed; and

(b) unauthorised maritime arrivals, including unauthorised maritime arrivals in respect of whom Australia has or may have protection obligations under the Refugees Convention as amended by the Refugees Protocol, should be able to be taken to any country designated to be a regional processing country; and

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(c) it is a matter for the Minister and Parliament to decide which countries should be designated as regional processing countries; and

(d) the designation of a country to be a regional processing country need not be determined by reference to the international obligations or domestic law of that country.

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The *Migration Regulations 1994* (Cth) (current):

2.01 Classes of visas (Act, s 31)

For the purposes of section 31 of the Act, the prescribed classes of visas are:

(a) such classes (other than those created by the Act) as are set out in the respective items in Schedule 1 ...

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2.02. Subclasses

(1) Schedule 2 is divided into Parts, each identified by the word "Subclass" followed by a 3-digit number (being the number of the subclass of visa to which the Part relates) and the title of the subclass.

(2) For the purposes of this Part and Schedules 1 and 2, a Part of Schedule 2 is relevant to a particular class of visa if the Part of Schedule 2 is listed under the subitem "Subclasses" in the item in Schedule 1 that refers to that class of visa.

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3.03. Criteria applicable to classes of visas

(1) For the purposes of subsection 31(3) of the Act (which deals with criteria for the grant of a visa) and subject to regulation 2.03A, the prescribed criteria for the grant to a person of a visa of a particular class are:

(a) the primary criteria set out in a relevant Part of Schedule 2; or

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(b) if a relevant Part of Schedule 2 sets out secondary criteria, those secondary criteria.

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(2) If a criterion in Schedule 2 refers to a criterion in Schedule 3, 4 or 5 by number, a criterion so referred to must be satisfied by an applicant as if it were set out at length in the first-mentioned criterion.

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Schedule 1—Classes of visa

...

1401. Protection (Class XA)

(1) Form: 866.

(2) Visa application charge ...

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(3) Other:

(a) Application must be made in Australia.

(b) Applicant must be in Australia.

(c) Application by a person claiming to be a member of the family unit of a person who is an applicant for a Protection (Class XA) visa may be made at the same time and place as, and combined with, the application by that person.

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(4) Subclasses:

866 (Protection)

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The *Migration Regulations 1994* (Cth) (as made):

SCHEDULE 2

PROVISIONS WITH RESPECT TO THE GRANT OF SUBCLASSES OF VISAS

...

SUBCLASS 866—PROTECTION (RESIDENCE)

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866.1 INTERPRETATION

866.111 In this Part:

"Refugees Convention" means the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees.

866.2 PRIMARY CRITERIA

[NOTE: All applicants must satisfy the primary criteria.]

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866.21 Criteria to be satisfied at time of application

866.211 The applicant claims to be a person to whom Australia has protection obligations under the Refugees Convention and:
(a) makes specific claims under the Refugees Convention; or
(b) claims to me a member of the family unit of a person who:
(i) has made specific claims under the Refugees Convention; and
(ii) is an applicant for a Protection (Class AZ) visa.

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866.22 Criteria to be satisfied at time of decision

866.221 The Minister is satisfied the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

866.222 In the case of an applicant referred to in paragraph 866.211(b):
(a) the Minister is satisfied that the applicant is a member of the family unit of a person who has made specific claims under the Refugees Convention; and
(b) the person of whose family unit the applicant is a member has been granted a Protection (Residence) visa.

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866.223 The applicant has undergone a medical examination carried out by a Commonwealth medical officer.

866.224 The applicant:
(a) has undergone a chest x-ray examination conducted by a medical practitioner who is qualified as a radiologist in Australia; or
(b) is under 16 years of age and is not a person in respect of whom a Commonwealth medical officer has requested such an examination.

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866.225 The applicant satisfies public interest criteria 4001 to 4004.

866.226 The Minister is satisfied that the grant of the visa is in the national interest.

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SCHEDULE 4

PUBLIC INTEREST CRITERIA

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...

4003. The applicant is not determined by the Foreign Minister to be a person whose presence in Australia would prejudice relations between Australia and a foreign country.

4004. The applicant does not have outstanding debts to the Commonwealth unless the Minister is satisfied that appropriate arrangements have been made for payment.

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