

**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY**

NO M68 OF 2015

BETWEEN: **PLAINTIFF M68/2015**
Plaintiff

AND: **MINISTER FOR IMMIGRATION AND
BORDER PROTECTION**
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

**TRANSFIELD SERVICES (AUSTRALIA)
PTY LTD (ACN 093 114 553)**
Third Defendant



10 **SUPPLEMENTARY SUBMISSIONS OF THE FIRST AND SECOND DEFENDANTS**

(pursuant to the orders of Nettle J made on 1 October 2015)

Filed on behalf of the defendants by:

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A. INTRODUCTION

1. The Commonwealth makes the following submissions concerning the expanded open centre arrangements reflected in the proposed amended SC [88]–[89] filed on 2 October 2015.¹ They address the position if that amendment is agreed between the parties to form part of an amended special case upon which the Court may answer the questions referred to it. Procedural issues will arise if these factual matters are not agreed between the parties.

B. AUTHORITY FOR FUTURE CONDUCT

- 10 2. It is critical to the plaintiff's attack on the actions of the Commonwealth that those actions 'facilitated, organised, caused, imposed, procured or resulted in' the plaintiff's detention in Nauru in the past and that they will do so again if the plaintiff is returned to Nauru. That premise is reflected in the questions in the special case: see question (1) (past conduct) and question (6) (future conduct).
3. The effect of the expanded open centre arrangements is to deny that premise in respect of future conduct. There is no doubt that the plaintiff will be able to participate in those expanded arrangements, as there are to be no eligibility requirements. In short, if the plaintiff is returned to Nauru, she will not be detained.
- 20 4. It is not to the point that the open centre arrangements, and participation in them, is at the discretion of the Operational Managers. The fact is that, at present, the manner in which the Operational Managers propose to exercise that discretion in respect of transferees, including the plaintiff, is as set out in the proposed amended form of SC [88]–[89]. In light of those facts, there is no proper basis to conclude that the plaintiff would be detained on her return to Nauru, let alone that any action of the Commonwealth would facilitate etc. that detention.
5. As none of the conduct referred to would facilitate etc. the detention of the plaintiff at RPC3, question (6) does not arise. It would follow that none of questions (7) to (9) could be answered.

¹ Abbreviations adopted in the Commonwealth's outline of submissions dated 18 September 2015 (CS) are adopted below.

C. SECTION 198AD OF THE MIGRATION ACT

6. A further consequence of the expanded open centre arrangements is that the plaintiff's contention that s 198AD(2) of the Migration Act is not engaged where a Commonwealth officer knows or ought to know that the Commonwealth will be involved in the continued detention of the plaintiff without a lawful Commonwealth purpose (PS [100]) falls away. For the reasons above, there is no basis to conclude that the plaintiff will be so detained if she were returned to Nauru. Question (10) must therefore be answered 'yes'. So too must question (12), for reasons outlined at CS [94]–[97].

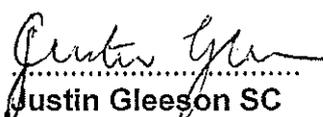
10 **D. CONSTITUTION OF NAURU**

7. Finally, given the expanded open centre arrangements, there could on no view be a deprivation of the plaintiff's liberty within art 5(1) of the *Constitution of Nauru* if she were now returned to Nauru. Accordingly, there is no basis to contend that the circumstances of the plaintiff if now returned to Nauru would be prohibited by the *Constitution of Nauru*. Question (11), if it arises, must therefore be answered 'no'; and for this additional reason question (12) would be answered 'yes'.

E. WHAT REMAINS OF THE CASE

20 8. The plaintiff cannot obtain declaratory or injunctive relief in respect of the Commonwealth's future conduct. In particular, there is no basis for an injunction restraining the Commonwealth from returning the plaintiff to Nauru as soon as reasonably practicable, as required by s 198AD(2). Accordingly, what remains of the case is, and is only, the plaintiff's challenge to the conduct of the Commonwealth in the past, when she was previously in Nauru. For the reasons in CS [26]–[31], the plaintiff has no standing to advance that challenge.

Dated: 2 October 2015


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