IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

NO M 96 OF 2016

BETWEEN:

PLAINTIFF M96A/2016
First Plaintiff

PLAINTIFF M96B/2016
Second Plaintiff

AND:

~~THE OFFICER IN CHARGE MELBOURNE IMMIGRATION TRANSIT ACCOMMODATION~~
~~First Defendant~~

COMMONWEALTH OF AUSTRALIA
~~Second~~ First Defendant

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Second Defendant

DEFENDANTS' ANNOTATED AND AMENDED SUBMISSIONS

Filed on behalf of the Defendants by:

The Australian Government Solicitor
Level 21
200 Queen St
Melbourne, VIC 3000
DX 50 Melbourne

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Contact: Ashlee Briffa

File ref: 16005110
Telephone: 03 9242 1268
Facsimile: 03 9242 1333
E-mail: Ashlee.Briffa@ags.gov.au

PART I CERTIFICATION

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

PART II ISSUES

2. The issue in this case is whether the provisions of the *Migration Act 1958* (Cth) (**the Act**) which require detention of unlawful non-citizens in Australia — ss 189 and 196 — are invalid in their application to persons, such as the plaintiffs, who are brought to Australia for a temporary purpose pursuant to s 198B(1) of the Act.

PART III SECTION 78B NOTICE

3. Notices have been given under s 78B of the *Judiciary Act 1903* (Cth). DB 7-12

PART IV FACTS

4. The issue in this case arises on the defendants' demurrer filed ~~20 October 2016~~ 21 February 2017 to the plaintiffs' further amended statement of claim filed ~~20 October 2016~~ 20 February 2017. SDB 25-26 SDB 14-24

5. In accordance with established principle,[1] the demurrer is to be resolved on the basis of the material facts which are expressly or impliedly averred in the further amended statement of claim and mere "evidentiary statements" are to be discarded. Accordingly, while the allegations in the further amended statement of claim at [10], [11], [17], [18] and [19] are taken to be admitted for the purposes of the demurrer, the particulars to those paragraphs — being statements of "the evidence by which [material facts] are to be proved"[2] — are not taken to be admitted for the purposes of the demurrer. SDB 17-23

6. That being so, the Court should ***not*** proceed upon the basis of the events in the plaintiffs' chronology filed 28 November 2016, as that chronology draws in large part on the particulars to the further amended statement of claim.

7. The relevant facts set out in the plaintiffs' annotated submissions filed ~~28 November 2016~~ 1 March 2017 (**plaintiffs' submissions**) at [5]–[9] are properly limited to the material facts alleged in the further amended statement of claim. It is upon those facts, and only those facts, that the Court should proceed to resolve the demurrer.

PART V APPLICABLE PROVISIONS

8. In addition to the legislative provisions annexed to the plaintiffs' submissions, the defendants rely on the provisions in annexure A.

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1 *South Australia v The Commonwealth* (1962) 108 CLR 130 at 142 (Dixon CJ); *Kathleen Investments (Australia) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 135 (Gibbs J); *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 368 [119]–[120] (Gummow and Hayne JJ).

2 *South Australia v The Commonwealth* (1962) 108 CLR 130 at 142 (Dixon CJ), quoted in *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 368 [119]–[120] (Gummow and Hayne JJ).

PART VI ARGUMENT

9. On the plaintiffs' case, the Commonwealth:

   (a) can validly detain a non-citizen who enters Australia without a visa, including detaining such a non-citizen pending the taking of that person to a regional processing country; and

   (b) can validly bring a non-citizen back to Australia for a temporary purpose which cannot be achieved in the regional processing country; but

   (c) is prohibited from detaining such a non-citizen while they are in Australia for that temporary purpose.

10. Thus, it is said that for the Commonwealth, temporarily, to "reverse" its actions in taking a non-citizen to a regional processing country carries with it a constitutional requirement that the non-citizen be free to join the Australian community for whatever period it takes to pursue the temporary purpose for which the person is returned to Australia. That is said to result from Ch III of the Constitution. For the following reasons, those submissions should be rejected.

THE LEGISLATIVE SCHEME

11. Before considering the validity of the application of ss 189 and 196 of the Act to transitory persons, it is necessary to understand the legislative scheme. That scheme is summarised in the plaintiffs' submissions at [10]–[17]. To that summary, the following points should be added.

12. *First*, the plaintiffs do not challenge the validity of s 198AD of the Act. Its validity was upheld by this Court in *Plaintiff S156/2013 v Minister for Immigration and Border Protection*.[3] Section 198AD(2) provides that "[a]n officer must, as soon as reasonably practicable, take an unauthorised maritime arrival to whom this section applies from Australia to a regional processing country". A premise for debate is therefore that the Act may validly require officers to take a specified category of non-citizens who enter Australia without a visa to a regional processing country.

13. *Secondly*, the plaintiffs do not challenge the validity of s 198B(1) of the Act. That section provides that "[a]n officer may, for a temporary purpose, bring a transitory person to Australia from a country or place outside Australia". The definition of "transitory person" in s 5 includes a person, such as the plaintiffs, taken to a regional processing country under s 198AD.

14. The "temporary purpose" to which s 198B(1) refers is the subjective purpose of the officer or officers who "bring" the transitory person to Australia, because it is that officer who decides to respond to a given set of facts by bringing a transitory person to Australia. In this case, the plaintiffs allege and the defendants accept for the purposes of the demurrer that the temporary purpose was, in the case of the first plaintiff, medical

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3 (2014) 254 CLR 28.

treatment and, in the case of the second plaintiff, to accompany the first plaintiff (her daughter) and medical treatment (further amended statement of claim [10], [11]). SDB 17

15. No doubt there are limits to the purposes which engage s 198B(1). Most obviously, the purpose must be a "temporary" one. An officer is not empowered to bring a transitory person to Australia for a purpose which is not properly characterised as "temporary". That would exclude purposes which are permanent. It does not, however, exclude purposes that may take some considerable time to achieve, particularly where the time required to achieve the purpose may be difficult or impossible to predict accurately in advance.

16. The limits of the power conferred by s 198B(1) may be enforced by the courts. It would, for example, be open to a person brought, or to be brought, to Australia purportedly pursuant to s 198B(1) to challenge the validity of that action or proposed action.[4] Amongst other things, any subjective purposes of officers that are alien to the subject matter, scope and purpose of the Act would be excluded from the permissible purposes as a matter of construction. However, it is not necessary in this proceeding to chart the full extent of the limitations which inhere in s 198B(1), as the plaintiffs do not allege that s 198B(1) did not empower officers to bring them to Australia for the temporary purposes nominated above.

17. Accordingly, a further premise for debate is that the Act may validly permit officers to bring to Australia, temporarily, persons taken to a regional processing country pursuant to s 198AD(2), and that that power was validly exercised in respect of the plaintiffs.

18. *Thirdly*, once an unauthorised maritime arrival is brought to Australia from a regional processing country pursuant to s 198B(1), s 189(1) of the Act requires that person to be detained. That detention must continue until one or other of the events referred to in s 196(1) of the Act occurs. Relevantly, s 196(1) requires that the detention continue until the person is removed from Australia pursuant to s 198 of the Act or returned to a regional processing country pursuant to s 198AD. It is this application of ss 189 and 196 which is challenged by the plaintiffs.

19. *Fourthly*, once an unauthorised maritime arrival is brought to Australia from a regional processing country pursuant to s 198B(1), s 198AH suspends the operation of s 198AD until "the person no longer needs to be in Australia for the temporary purpose (whether or not the purpose has been achieved)".

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4 See, eg, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 348–352 [23]–[30] (French CJ), 362–367 [63]–[76] (Hayne, Kiefel and Bell JJ), 370–371 [88]–[92] (Gageler J); *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 90 ALJR 197 at 204 [26] (French CJ, Bell, Keane and Gordon JJ), 210–211 [66]–[67] (Gageler J). See also *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 650–657 [127]-[146].

20. Section 198AD(2) requires an unauthorised maritime arrival to be taken to a regional processing country only when an officer is satisfied that this is reasonably practicable.[5] The requirement of s 198AH(1) that the person no longer needs to be in Australia for the temporary purpose (being the subjective purpose for which an officer brings the person to Australia) also depends on the satisfaction of the officer.[6] (That is even clearer in the analogue of s 198AH for transitory persons other than unauthorised maritime arrivals, being s 198(1A).)

21. It follows that, in the case of an unauthorised maritime arrival validly brought to Australia pursuant to s 198B(1) for a temporary purpose, subject to any request by that person for earlier removal (discussed in paragraphs 25 to 26 below), the time for their removal from Australia is the time at which an officer is satisfied *both* that the person no longer needs to be in Australia for the temporary purpose, and that taking them to a regional processing country is reasonably practicable.

22. The duration of detention for which s 196(1) provides in the case of an unauthorised maritime arrival brought to Australia for a temporary purpose is thus ultimately bounded by those two considerations. That is so in the same way as the period of detention of an unlawful non-citizen generally is ultimately bounded by an officer's satisfaction that their removal is reasonably practicable (once the other preconditions to removal set out in the various subsections of s 198 are met).

23. Even though the timing of removal, and thus the duration of detention, turns on the time at which an officer is satisfied of the identified matters, the lawful limits of detention are nonetheless ascertainable and enforceable by the courts and, ultimately, this Court. If the requisite state of satisfaction has been formed, then the taking of a person back to a regional processing country, and hence release from detention, can be compelled by mandamus. The same is so if the requisite state of satisfaction has not been formed, but that failure is legally unreasonable: if on the facts it is not open to an officer ***not*** to be satisfied of the requisite matters, mandamus will go to compel the only lawful manner of exercise of the power.[7] If an unauthorised maritime arrival contends that an officer's satisfaction as to the reasonable practicability of removal or as to the expiry of the temporary purpose has been invalidly formed, those contentions can be tested in judicial review proceedings. The position in each of these respects is the same as in the case of detention of an unlawful non-citizen generally.

24. *Fifthly*, s 198(11) provides that s 198, which generally deals with removal of unlawful non-citizens, "does not apply to an unauthorised maritime arrival to whom section 198AD applies". Accordingly, where the obligation under s 198AD(2) to take a person who is

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5 *Beyazkilinc v Manager, Baxter Immigration Reception and Processing Centre* (2006) 155 FCR 465 at 475-477 [40]-[43] (Besanko J); *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at 165 [65], 166 [67] (the Court).

6 See, eg, *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297 at 303 (the Court), approving *Australian Heritage Commission v Mount Isa Mines Ltd* (1995) 60 FCR 456 (FC) at 466–467 (Black CJ); *Buck v Bavone* (1976) 135 CLR 110 at 118-119 (Gibbs J).

7 *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 80–81; *Buck v Bavone* (1976) 135 CLR 110 at 119 (Gibbs J).

an unauthorised maritime arrival to a regional processing country applies, the obligation under s 198(2) to remove the person (as an unlawful non-citizen) does not apply.

25. However, as noted above, the effect of s 198AH(1) is that s 198AD applies to a transitory person "if, and only if" the person is covered by (relevantly) s 198AH(1A). That subsection applies only when an unauthorised maritime arrival who was brought to Australia under s 198B(1) for a temporary purpose no longer needs to be in Australia for the temporary purpose. Accordingly, until the time when a transitory person no longer needs to be in Australia for the temporary purpose, s 198AD does ***not*** apply to that person, meaning that s 198(11) is ***not*** engaged. However, the coherent operation of the scheme is preserved by s 198(1A), which deals specifically with the removal of unlawful non-citizens who have been brought to Australia under s 198B for a temporary purpose. Like ss 198AD and 198AH, the effect of s 198(1A) is that removal must occur as soon as reasonably practicable after the person no longer needs to be in Australia for the temporary purpose.

26. Importantly, however, one consequence of the fact that s 198 applies to an unlawful non-citizen who has been brought to Australia for a temporary purpose until the point where that person no longer needs to be in Australia for a temporary purpose (at which point s 198(11) would be engaged) is that, pursuant to s 198(1), an officer must remove such a person as soon as reasonable practicable if they ask the Minister, in writing, to be so removed. Accordingly, where an unauthorised maritime arrival is brought to Australia for a temporary purpose, even if they still need to be in Australia for the temporary purpose, they can at any time bring about their return to the regional processing country (or to any other country to which it is reasonably practicable to remove them) (cf plaintiffs' submissions at [37]).[8] That entitlement is enforceable by mandamus.

APPLICABLE CONSTITUTIONAL PRINCIPLES

27. The plaintiffs' attack on the validity of the application of ss 189 and 196 to transitory persons brought to Australia pursuant to s 198B(1) rests on propositions said to have been identified or established in *Chu Kheng Lim v Minister for Immigration* (***Lim***).[9] However, the plaintiffs seek to draw more from that case than the propositions for which it stands and, in doing so, seek to advance a limitation beyond that which the Constitution contains.

28. In *Lim*, Brennan, Deane and Dawson JJ (with whom Mason CJ relevantly agreed) noted that the provisions of Ch III constitute "an exhaustive statement of the manner in which

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8 By force of a determination made under s 198AE of the Act on 28 July 2013, the same applies to an unauthorised maritime arrival to whom s 198AD of the Act would otherwise apply: s 198AD is specified not to apply to such a person with an extant request in writing to be removed from Australia, where the person has a right of entry to the country to which the person has asked to be removed which the Department of Immigration and Border Protection is satisfied can be exercised, where the person has not made or has withdrawn any claims for Australia's protection, and the person remains cooperative to the Department's satisfaction in all aspects necessary to effect their removal.

9 (1992) 176 CLR 1.

the judicial power of the Commonwealth is or may be vested"[10] and that, accordingly, the grants of legislative power "do not permit the conferral upon any organ of the Executive Government of any part of the judicial power of the Commonwealth".[11] Their Honours quoted *R v Kirby; Ex parte Boilermakers' Society of Australia*[12] for the first proposition. The second — that the judicial power of the Commonwealth may not be conferred other than on a court specified in s 71 of the Constitution — is even older.[13]

29. Brennan, Deane and Dawson JJ said that there are some functions that, by reason of their nature or because of historical associations, are "essentially and exclusively judicial in character" and identified within that class the function of adjudging and punishing criminal guilt under a law of the Commonwealth.[14] In the course of explaining that the concern of the Constitution in this regard is with "substance and not mere form", their Honours said:[15]

> It would, for example, be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt. The reason why that is so is that, ***putting to one side the exceptional cases to which reference is made below, the involuntary detention of a citizen in custody by the State is penal or punitive in character*** and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt. [emphasis added]

Their Honours concluded that, at least in times of peace, citizens enjoy "a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth".[16]

30. However, as Gaudron J pointed out in *Kruger v The Commonwealth*:[17]

> ***[I]t cannot be said that the power to authorise detention in custody is exclusively judicial except for clear exceptions***. ... The exceptions recognised in *Lim* are neither clear nor within precise and confined categories. ...
>
> Once exceptions are expressed in terms involving the welfare of the individual or that of the community ... it is not possible to say that, subject to clear exceptions, the power to authorise detention in custody is necessarily and exclusively judicial power. Accordingly, I adhere to the view that I tentatively expressed in *Lim*, namely,

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10 (1992) 176 CLR 1 at 26.

11 (1992) 176 CLR 1 at 27.

12 (1956) 94 CLR 254 at 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

13 See, eg, *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 355 (Griffith CJ); *R v Commonwealth Court of Conciliation & Arbitration; Ex parte Brisbane Tramways Co Ltd (Tramways Case [No 1])* (1914) 18 CLR 54 at 75 (Isaacs J); *New South Wales v The Commonwealth (Wheat Case)* (1915) 20 CLR 54 at 62 (Griffith CJ), 89–90 (Isaacs J); *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 441–442 (Griffith CJ), 450 (Barton J).

14 (1992) 176 CLR 1 at 27.

15 (1992) 176 CLR 1 at 27.

16 (1992) 176 CLR 1 at 28–9.

17 (1997) 190 CLR 1 at 110. See also at 84 (Toohey J).

> that a law authorising detention in custody is not, of itself, offensive to Ch III. [emphasis added]

These comments have been cited with approval many times.[18]

31. As recognised in *Lim*, the relevant principle is that the judicial power of the Commonwealth may be conferred only in accordance with s 71 of the Constitution and, hence, only on the courts to which that section refers. The corollary is that legislation which is supported by a head of power, and which authorises the Executive to detain a person, is invalid if, and only if, it amounts to an attempt to confer the judicial power of the Commonwealth otherwise than in accordance with s 71 of the Constitution.

32. The feature that distinguishes detention that can be imposed only as an incident of the exercise of judicial power from permissible detention by the Executive is whether the detention is imposed as punishment for a breach of the law.[19] That feature formed the basis of the analysis of the "exceptions" identified by Brennan, Deane and Dawson JJ in *Lim*.[20] It was also the basis for the actual decision in *Lim* that legislation authorising detention by the Executive of aliens, being detention for the purposes of preventing their entry into Australia or removing them from Australia, was valid, because such detention "is neither punitive in nature nor part of the judicial power of the Commonwealth".[21]

33. The distinction between detention imposed for punitive and non-punitive purposes has been adopted in later decisions of this Court,[22] and it should be accepted as the doctrine of this Court.[23] To the extent that *dicta* in *Lim* suggests any broader principle, it is not consistent with subsequent authority, is unsupported by principle and should not be followed.

34. Like all questions of characterisation, the identification of the purpose of a law that involves detention by the Executive requires attention to be directed to the purpose of

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18 See, eg, *Al-Kateb v Godwin* (***Al-Kateb***) (2004) 219 CLR 562 at 648 [258] (Hayne J, with Heydon J agreeing); *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 24–27 [57]–[62] (McHugh J) (***Woolley***); *Thomas v Mowbray* (2007) 233 CLR 307 at 330 [18] (Gleeson CJ); *South Australia v Totani* (2010) 242 CLR 1 at 146–147 [382]–[383] (Heydon J); *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 135–136 [345] (Heydon J).

19 See recently *Duncan v New South Wales* (2015) 255 CLR 388 at 407–410 [41]–[51]. See also *Pollentine v Bleijie* (2014) 253 CLR 629 at 650 [45] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) and 656–657 [72]–[73] (Gageler J).

20 (1992) 176 CLR 1 at 28.

21 (1992) 176 CLR 1 at 32.

22 *Al-Kateb* (2004) 219 CLR 562 at 584 [45], 586 [49] (McHugh J), 648 [255]—256] (Hayne J, with Heydon J agreeing), 658 [289] (Callinan J). See also *Woolley* (2004) 225 CLR 1 at 13 [19] (Gleeson CJ), 75 [222], 77 [227] (Hayne J); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 592–593 [36]–[38] (French CJ, Kiefel and Bell JJ); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 (***Plaintiff M68***) at 69–70 [40] (French CJ, Kiefel and Nettle JJ), 86 [98], 87 [100] (Bell J), 111 [184] (Gageler J), 124 [238] (Keane J).

23 Gummow J's contrary reasons in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 613 [84] (which was adopted by Gummow and Crennan JJ in *Thomas v Mowbray* (1997) 233 CLR 307 at 356 [114]—[115]) have not been accepted by a majority of the Court. They are not consistent with the fundamental basis of the analysis in *Lim*.

the law objectively determined as a matter of construction.[24] It requires attention primarily to the terms of the relevant law, although the characterisation task is also informed by context and the mischief at which the law is aimed.[25] In the case of a power conferred on the Executive to detain as an incident of other powers, the detention takes its character from those other powers.[26]

35. It may be accepted that the common law right of every Australian citizen to be at liberty means that, generally speaking, involuntary detention of a citizen would be characterised as penal and punitive.[27] But that characterisation must yield in the face of a non-punitive statutory purpose.[28] Analytically, it is therefore wrong to speak of citizens having a constitutional immunity from detention otherwise than consequent upon judicial adjudication of guilt, subject to a limited set of exceptions. In truth, the "exceptions" extend to any non-punitive purpose for which Parliament, in the exercise of any of its legislative powers, decides to authorise detention (quarantine, and detention on remand, being obvious examples). It is for that reason that the reference to "citizens" is significant, because the circumstances in which non-citizens may be detained are more readily characterised as being for a non-punitive purpose than those in which citizens are detained, a non-citizen being vulnerable to non-punitive processes (such as removal or deportation) to which a citizen is not subject.[29]

36. As in other areas, the character of the law is determined not only by its legal effect but also by its practical operation.[30] Accordingly, the mere fact that a law, on its face, is unconnected with punishment and criminal guilt is not the end of the analysis. Thus, a law of the kind mentioned by Brennan, Deane and Dawson JJ in *Lim* — purporting to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power is defined in terms divorced from both punishment and criminal guilt — might be characterised by its practical operation as, in truth, a law for the purpose of permitting punishment for breach of the law by the Executive and thus as an invalid attempt to confer judicial power. It is for this reason, not because of any constitutional immunity with limited exceptions, that a law of this kind would be invalid.

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24 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46–47 [47]; *Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529 at 538 [22], 555–556 [82]–[84]; *Stenhouse v Coleman* (1944) 69 CLR 457 at 471.

25 See *Al-Kateb* (2004) 219 CLR 562 at 651 [267] (Hayne J); *Woolley* (2004) 225 CLR 1 at 15 [28], [30] (Gleeson CJ), 26 [60], 27 [62] (McHugh J).

26 *Lim* (1992) 176 CLR 1 at 32 (Brennan, Deane and Dawson JJ).

27 *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 385 [206] (Kiefel and Keane JJ) (***Plaintiff M76***).

28 See also *Lim* (1992) 176 CLR 1 at 71 (McHugh J): "Although detention under a law of the Parliament is ordinarily characterized as punitive in character, it cannot be so characterized if the purpose of the imprisonment is to achieve some legitimate non-punitive object."

29 *Lim* (1992) 176 CLR 1 at 29 (Brennan, Deane and Dawson JJ) and 57 (Gaudron J); *Al-Kateb* (2004) 219 CLR 562 at 637 [219] (Hayne J); *Woolley* (2004) 225 CLR 1 at 12–13 [16]–[18], 14 [24] (Gleeson CJ); *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 at 499 [21] (Gleeson CJ); *Plaintiff M76* (2013) 251 CLR 322 at 385 [206] (Kiefel and Keane JJ).

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

37. Thus, while an object of the separation of judicial power is to guarantee liberty,[31] that guarantee does not have "an immediate normative operation in applying the Constitution".[32] The validity of a law purporting to authorise detention of a person by the Executive is not to be tested by reference to whether it falls within or is analogous to a previously recognised exception to any such guarantee. It is to be tested by reference to whether the law in question impermissibly confers the judicial power of the Commonwealth on the Executive.

38. It is therefore ***not*** the case that the only circumstances in which legislation may authorise the detention of an alien are for the purposes of deportation or expulsion. In *Lim*, Brennan, Deane and Dawson JJ held that detention for those purposes would be valid because it would not involve a conferral of judicial power.[33] However, they did not take the further step of holding that these were the ***only*** such permissible purposes.

39. Brennan, Deane and Dawson JJ also said that provisions authorising detention for those purposes will be valid only "if the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered".[34] As recognised by Crennan, Bell and Gageler JJ in *Plaintiff M76*,[35] that comment was directed only to the permissible ***duration*** of detention, not to whether detention is itself necessary to achieve the purpose for which it is imposed (cf plaintiffs' submissions at [24]–[25]). The reason for this limitation on the duration of detention is that, if the period of detention is longer than that which is reasonably capable of being seen as necessary to achieve the non-punitive purpose, the "true purpose"[36] of the detention cannot be that non-punitive purpose. Absent a non-punitive purpose, a law requiring detention will readily be characterised as punitive, and therefore as involving a purported conferral of power of a kind that is exclusively judicial on a body other than a court identified in s 71 of the Constitution.

40. It is against this background that the statement of the Court in *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (***Plaintiff S4***),[37] quoted in the plaintiffs'

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31 *Wilson v Minister for Aboriginal and Torres Straight Island Affairs* (1996) 189 CLR 1 at 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

32 cf *Re Minister for immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at 23 [72] (McHugh and Gummow JJ). What is in issue is whether the law infringes the structural separation of powers by conferring judicial power on the Executive, rather than the operation of a guarantee of individual rights: *R v Davison* (1954) 90 CLR 353 at 380–382 (Kitto J); *Kruger v The Commonwealth* (1997) 190 CLR 1 at 61, 68 (Dawson J, with McHugh J agreeing); *Thomas v Mowbray* (2007) 233 CLR 307 at 355 [111] (Gummow and Crennan JJ).

33 (1992) 176 CLR 1 at 32.

34 (1992) 176 CLR 1 at 33.

35 (2013) 251 CLR 322 at 369 [138].

36 See similarly, in the context of s 92 of the Constitution, *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 472–474 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 476–477 [98]–[102] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

37 (2014) 253 CLR 219.

submissions at [26], must be understood. Speaking of the Act, the Court said:[38]

> It follows that detention under and for the purposes of the Act is limited by the purposes for which the detention is being effected. And it further follows that, when describing and justifying detention as being under and for the purposes of the Act, it will always be necessary to identify the purpose for the detention. Lawfully, that purpose can only be one of three purposes: the purpose of removal from Australia; the purpose of receiving, investigating and determining an application for a visa permitting the alien to enter and remain in Australia; or, in a case such as the present, the purpose of determining whether to permit a valid application for a visa.

No issue concerning Ch III arose in *Plaintiff S4*, meaning it was not necessary for the Court to address that topic. In those circumstances, the reference to the lawful purposes of detention in that passage should be understood as referring to the purposes for which the Act authorised detention, not as an exhaustive statement of the purposes for which detention of aliens could be authorised consistently with Ch III (cf plaintiffs' submissions at [26]). If the Court took account of the operation of s 198AD and 198AH in making the statement quoted above, then it characterised any detention under ss 189 and 196 (operating in conjunction with ss 198AD and 198AH) as detention for "the purposes of removal from Australia". If, on the other hand, the Court did not have those provisions in mind in *Plaintiff S4*, then the quoted observations cannot properly be treated as directed to the permissibility of detention for the purpose of those provisions.

41. Once the true principle is identified, there are a number of reasons that the application of ss 189 and 196 of the Act to persons brought to Australia for temporary purposes pursuant to s 198B(1) does not infringe that principle.

VALIDITY OF THE IMPUGNED PROVISIONS

42. There can be no doubt that the detention required by ss 189 and 196 of the Act in cases of transitory persons brought to Australia pursuant to s 198B(1) is "under and for the purposes of the Act" (cf plaintiffs' submissions at [39]). Those provisions apply, on their face, to transitory persons, who are necessarily unlawful non-citizens (see ss 14, 42(2A)(ca) and 42(4)). If valid, they therefore both authorise and require the detention of transitory persons until such persons are removed from Australia. For the reasons that follow the operation of ss 189 and 196 with respect to such transitory persons — like all of the other operations of those provisions that have been challenged in this Court over many years — is valid.

Not the judicial power of the Commonwealth

43. In their application to persons brought to Australia pursuant to s 198B(1) of the Act, ss 189 and 196 do not confer upon the Executive any part of the judicial power of the Commonwealth.

44. The purpose of any detention takes its character from the terms of ss 189 and 196, and from the other provisions of the Act concerning regional processing. Those provisions establish a scheme by which certain unauthorised maritime arrivals, being persons who

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[38] (2014) 253 CLR 219 at 231 [26].

entered Australia without a visa, are taken to other countries for the processing of their refugee claims. Unsurprisingly, the Executive is authorised, by s 198AHA, to have involvement in the regional processing arrangements in regional processing countries following the taking of unauthorised maritime arrivals to those countries. The validity of s 198AHA was upheld by this Court in *Plaintiff M68*.[39] The whole of Subdivision B of Division 8 of Part 2 of the Act, containing the regional processing provisions, is properly characterised as a law with respect to aliens, and therefore as supported by s 51(xix) of the Constitution.[40]

45. Circumstances may arise in which it is necessary or desirable to bring persons who have been taken to a regional processing country back to Australia as a temporary departure from the ordinary operation of the scheme. Examples of when that may be so were given in the extrinsic material quoted in the plaintiffs' submissions at [18]. Given the involvement of the Commonwealth in taking such persons to the regional processing country, and the ongoing involvement of the Commonwealth thereafter that is authorised by s 198AHA, the capacity to return non-citizens to Australia for temporary purposes is a natural element of the regime that enhances its flexibility to the potential benefit of all parties.

46. In this context, the detention of transitory persons during any period when they have been brought back to Australia for a temporary purpose is incidental to the scheme. It can readily be seen not to have any punitive purpose, or to involve any aspect of the judicial power of the Commonwealth. Each of the acts forming part of the scheme is quintessentially non-judicial, from the exclusion of aliens to the taking of steps to give effect to arrangements Australia has made with other countries.

47. In truth, the plaintiffs do not submit that any of the matters above can be characterised as an exercise of the judicial power of the Commonwealth. Rather, their submissions proceed by reference to previously recognised "exceptions" to an asserted immunity from extra-judicial detention (plaintiffs' submissions at [33]–[39]). For the reasons already addressed in paragraphs 27–41 above, that is a fundamentally wrong approach.

Permissible purpose

48. Even if that were the correct approach, the plaintiffs' attack would still fail. It is well established that legislation authorising executive detention of aliens for the purposes of removal from Australia does not infringe Ch III of the Constitution.[41] One aspect of this purpose is the segregation of non-citizens from the community pending their removal. In *Lim* itself, the plurality accepted that the exception would permit "a measure to prevent

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39 (2016) 257 CLR 42.

40 See, e.g., *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at 42–46 [22]–[38] (the Court) (addressing ss 198AB and 198AD); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 70 [42] (French, Kiefel and Nettle JJ), 79-80 [75]–[77] (Bell J), [182] (Gageler J),129-130 [259] (Keane J) (addressing s 198AHA).

41 See, eg, *Lim* (1992) 176 CLR 1 at 10 (Mason CJ), 32 (Brennan, Deane and Dawson JJ); *Al-Kateb* (2004) 219 CLR 562 at 571–572 [1], 573 [4] (Gleeson CJ), 583 [40] (McHugh J), 604–605 [110], 613 [139] (Gummow J).

entry into the community of a person whom the State does not wish to accept as a member of the community".[42] As Hayne J (with whom Heydon J agreed) put it in *Woolley*:[43]

> Once it is accepted ... that the aliens and immigration powers support a law directed to excluding a non-citizen from the Australian community (by segregating that person from the community) the effluxion of time ... will not itself demonstrate that the purpose of detention has passed from exclusion by segregation to punishment.

49. That passage was quoted with approval by Kiefel and Keane JJ in *Plaintiff M76*.[44] It aptly encompasses the purpose of the detention authorised by ss 189 and 196 of the Act in the case of transitory persons. *Ex hypothesi*, such persons are not intended to be in Australia permanently. They are intended to be removed, by being taken back to a regional processing country, on request (s 198(1)) or as soon as they no longer need to be in Australia for the temporary purpose for which they were brought here (s 198AH(1A)). Their detention during the time that it takes to pursue the temporary purpose segregates them from the Australian community, being a community that — absent a visa — they have no legal right to enter, so as to ensure that they are available for removal either once an officer is satisfied that the temporary purpose no longer requires that they be in Australia and it is reasonably practicable to take them to a regional processing country (ss 198AD, 198AH), or when they request removal and an officer is satisfied that it is reasonably practicable to remove them (s 198(1)). At either of those points, s 196(1) requires their detention to end.

50. None of this is denied by the fact that transitory persons are brought to Australia pursuant to s 198B(1), as opposed to entering Australia as a result of their own actions (cf plaintiffs' submissions at [36]). As noted above, when transitory persons are brought to Australia, it is always intended that they be removed. While such persons are brought to Australia to pursue the relevant temporary purpose, the purpose of their detention whilst they are in Australia is distinct from the purpose for which they are brought to Australia. Thus, the detention of a transitory person is not detention in pursuit of the relevant temporary purpose, but detention for the purpose of removal (being a purpose that is to be achieved as soon as reasonably practicable once the person no longer needs to be in Australia for the temporary purpose).

51. Accordingly, contrary to the plaintiffs' submissions at [35], in the case of a transitory person brought to Australia for a temporary purpose pursuant to s 198B(1), the ***purpose of the detention*** authorised by ss 189 and 196, being a purpose that is determined objectively as a matter of construction of the Act, is ***not*** the same as the temporary purpose of the officer who brought the transitory person to Australia. It is wrong in principle to conflate the objectively determined purpose of detention with the subjective

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42 In *Woolley* (2004) 225 CLR 1 at 13 [19], Gleeson CJ pointed out that the key passage in *Lim* (1992) 176 CLR 1 at 32 cites cases that endorse that proposition.

43 (2004) 225 CLR 1 at 77 [227]. See also 75 [222] (Hayne J), 30-31 [71]–[73] (McHugh J), 85 [261]–[262] (Callinan J); *Al-Kateb* (2004) 219 CLR 562 at 584 [45] and 586 [49] (McHugh J), 648 [255]-[256] and 651 [267]-[268] (Hayne J, Heydon J agreeing), and 658 [289] (Callinan J).

44 (2013) 251 CLR 322 at 385 [207].

temporary purpose for bringing a person to Australia. For that reason, it is wrong to characterise the purpose of the detention of the plaintiffs as "the purpose of medical treatment" (cf plaintiffs' submissions at [35]). That was the purpose for which the first plaintiff was brought to Australia, but not the purpose of the detention that is both authorised and required by the Act whilst medical treatment is obtained.

52. These submissions are not answered by the submission that, while the plaintiffs continue to need to be in Australia for a temporary purpose, no obligation to remove them has been enlivened (cf plaintiffs' submissions at [34]). The same is true for a non-citizen who cannot make a valid visa application by reason of s 46A(1), but who is detained while inquiries are undertaken to determine whether the Minister will exercise his or her power under s 46A(2) to lift the bar and permit such an application to be made. In such a case, detention while the process occurs is lawful even though no obligation to remove crystallises until that process is completed adversely to the non-citizen.[45] There is similarly no crystallised obligation to remove a non-citizen who has made a visa application which has been rejected, until the circumstances make it reasonably practicable to remove them. That was the circumstance in *Al-Kateb*.[46] In that case, as in this, there is no present obligation to remove the non-citizen from Australia, but the detention remains detention for the purpose of segregation pending removal.[47]

53. The plaintiffs' complaint (plaintiffs' submissions at [41]) that the threshold for removal — that a transitory person no longer needs to be in Australia for the temporary purpose — is "divorce[d] from the achievement of that purpose" is curious. If removal could not occur until the temporary purpose was achieved, that might often lead to the prolongation of the period in which a person was detained. For example, a person might be brought to Australia for the purpose of treating a particular condition which can only be treated with specialist equipment not then available in the regional processing country. If the regional processing country subsequently obtains such equipment, it would follow that the transitory person no longer needs to be in Australia for the temporary purpose, even though his or her treatment is not complete. In that situation, the person would be required to be returned to the regional processing country under s 198AD (which would be engaged because of s 198AH), and hence to be released from detention under s 196, even though the temporary purpose had not been achieved, because their treatment could thereafter continue in the regional processing country.

54. In any event, the list of permissible purposes for executive detention is not closed.[48] To the extent that the purpose of detention of a transitory person is said to be different from any purpose which has previously been recognised, the purpose of the detention of transitory persons is closely analogous to the existing categories. It is accepted that

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45 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 337–342 [21]–[35] (the Court).

46 (2004) 219 CLR 562.

47 See also *Al-Kateb* (2004) 219 CLR 562 at 644–645 [247] (Hayne J).

48 *Lim* (1992) 176 CLR 1 at 55 (Gaudron J); *Al-Kateb* (2004) 219 CLR 562 at 648 [257]–[258] (Hayne J); *Woolley;* (2004) 225 CLR 1 at 12 [17] (Gleeson CJ), 24 [57], 26 [60] (McHugh J), 85 [264] (Callinan J); *Vasiljkovic v Commonwealth* (2006) 227 CLR 614 at 648 [108] (Gummow and Hayne JJ); *Plaintiff M68* (2016) 257 CLR 42 at 87 [100]–[101] (Bell J), 111–112 [185] (Gageler J).

detention to ensure the availability for removal of a non-citizen who has sought to enter Australia unlawfully and is to be removed is permissible. Focussing on the purpose of detention, it is difficult to see any real distinction between detention to ensure availability for removal of a non-citizen who previously sought to enter Australia without a visa but was removed, and that of a non-citizen who has been brought back temporarily but is once again to be removed when the exigency that led to their return comes to an end.

55. The contrary submission of the plaintiffs would have a stark consequence. Once the Commonwealth has taken a non-citizen who entered Australia without a visa to a regional processing country, the plaintiffs' argument has the consequence that the Commonwealth must leave them there, no matter how much there might be a need for them to be brought to Australia or how willing they may be for that to occur, unless the Commonwealth is willing to allow them to enter the Australian community for the duration of their stay. A fetter on freedom of executive action of that kind would be far removed from proper area of operation of Ch III of the Constitution.

Duration of detention

56. In *North Australian Aboriginal Justice Agency Ltd v Northern Territory*,[49] Gageler J said:

> More recent cases indicate that no form of executive detention in the exercise of a statutory power to detain can escape characterisation as punitive unless the duration of that detention meets at least two conditions. The first is that the duration of the detention is reasonably necessary to effectuate a purpose which is identified in the statute conferring the power to detain and which is capable of fulfilment. The second is that the duration of the detention is capable of objective determination by a court at any time and from time to time.

The plaintiffs rely on this formulation (plaintiffs' submissions at [27]).

57. As explained in paragraph 39 above, the first condition is, in part, a consequence of the prohibition against conferral of power to detain for a punitive purpose absent judicial authority. The suggested requirement that the purpose be "capable of fulfilment" is consistent with the conclusion of this Court in *Al-Kateb* only because that case recognised that a permissible purpose of detention is the purpose of segregating non-citizens from the Australian community pending their removal once that becomes reasonably practicable (whenever that may be). Understood in that way, the relevant purpose was "capable of fulfilment". The requirement that the purpose of detention be "capable of fulfilment" does not deny the possibility that fulfilment of that purpose may take a long time, or that it is not known when it will occur.

58. The second condition is not so immediately to be understood as supported as a matter of principle. The only authority which supports it in terms is the *dictum* in *Plaintiff S4/2014 v Minister for Immigration and Border Protection*.[50] As noted above, no issue concerning Ch III arose in that case, and there was no argument directed to this point by the parties. To the extent that the second condition suggests that the actual duration of detention must be able to be determined at any time, adoption of that condition would

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49 (2015) 256 CLR 569 at 612 [99].

50 (2014) 253 CLR 219 at 232 [29].

be a radical departure from previous authority. In those circumstances, the second condition is to be understood as recognising that if the legislative criteria authorising detention are so vague that it is impossible for a Court to determine, at any specific point in time where it is asked to do so, whether the end point of the detention that is authorised under the statute has been reached, then it would ordinarily be difficult to demonstrate that detention under that regime had a non-punitive purpose, with the result that it would be characterised as punitive. Understood in that way, the second condition is consistent with the principles explained above.

59. In any case, even if the matter is approached by reference to the two conditions stated by Gageler J, they are satisfied here.

60. *First*, the duration of detention is reasonably necessary to effectuate the purpose of removing a transitory person from Australia as soon as reasonably practicable once an officer is satisfied that they no longer need to be in Australia for the temporary purpose for which they were brought here under s 198B(1) (possibly because that purpose has been achieved, but perhaps also because conditions or circumstances have changed in the regional processing country such that the transitory person no longer needs to be in Australia for the temporary purpose even though that purpose has ***not*** been achieved). Upon that being so, an officer must take the person to a regional processing country as soon as it is reasonably practicable to do so. The duration of detention is thus closely linked to the cessation of the identified need for the person to be in Australia, and to the reasonable practicability of removal (being a criterion of the same kind that has bounded the duration of detention in many other cases where ss 189 and 196 have been held not be infringe Ch III).

61. There is no allegation in this case that it will be impossible to return the plaintiffs to Nauru in the future. Accordingly, no occasion arises to consider how ss 189 and 196 would operate in a case where it becomes impossible, or exceedingly unlikely, that it will ever be the case that an officer could reasonably be satisfied that the temporary purpose no longer requires a transitory person's presence in Australia.

62. *Secondly*, the ultimate limits of the detention which is authorised by ss 189 and 196 are able to be superintended by the courts and, ultimately, this Court. That is so for the reasons explained in paragraphs 19–26 above. While those limits turn, in part, on the state of satisfaction of an officer, detention does not become punitive simply because its termination depends on such a state of satisfaction, as opposed to wholly objective criteria (cf plaintiffs' submissions at [40]). The requisite state of satisfaction can be identified and the lawful boundaries of such satisfaction can be enforced by judicial review in the ordinary way.[51] That is far removed from detention at the "unconstrained detention of the Executive" (cf plaintiffs' submissions at [40]).

63. It is not necessary that the purpose for which a transitory person was brought to Australia be recorded or communicated, or precisely articulated (cf plaintiffs' submissions at [40]).

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[51] See paragraph 16 above.

If made the subject of judicial review, that purpose will need to be proved by evidence and, in the event of dispute, found by the court.

64. Certainly, the judicial enforcement of the limits of detention in this case seems no more difficult than presented in *Plaintiff M68*. There, as Gageler J said:[52]

> I would not read the definition of "regional processing functions" in s 198AHA(5) as extending beyond the implementation of a law or policy, or the taking of an action, by a regional processing country that is in connection with the role of that country specified in the arrangement which satisfies the precondition for the application of the section under s 198AHA(1). The extent to which action taken on the authority of s 198AHA(2)(a) may involve detention is, on that reading, limited to ***detention that is in connection with the role of the regional processing country as specified in the arrangement***. The requisite connection with that role would be broken were the duration of the detention to extend beyond that reasonably necessary to effectuate that role or were that role to become incapable of fulfilment. ***The duration of the detention is in the meantime capable of objective determination by a court by reference to what remains to be done by the regional processing country to fulfil its role as specified in the arrangement***. [emphasis added]

If circumstances of this kind were sufficiently precise as to be capable of objective determination by a court, that must equally be so in the present case.

65. None of this is denied by the fact that the duration of detention may be influenced by matters not entirely within the control of the Commonwealth, including for example the speed with which a person responds to medical treatment (cf plaintiffs' submissions at [43]). That was equally so in *Al-Kateb* and *Plaintiff M68*, and will frequently be so where the question is whether it is reasonably practicable for an unlawful non-citizen to be removed.

ORDERS

66. It follows that the plaintiffs' challenge to the validity of the application to them of ss 189 and 196 of the Act must fail. The demurrer should be allowed and, accordingly, the proceeding dismissed with costs.

PART VII ESTIMATE

67. The defendants estimate that they will require 1.5 hours for the presentation of oral argument.

Dated: ~~20 December 2016~~ 3 March 2017

Stephen Donaghue
Solicitor-General of the Commonwealth of Australia
Tel: 02 6141 4139 ~~03 9225 7919~~
Email: stephen.donaghue@ag.gov.au
~~s.donaghue@vicbar.com.au~~

Perry Herzfeld
Tel: 02 8231 5057
Fax: 02 9232 7626
Email: pherzfeld@elevenwentworth.com

52 (2016) 257 CLR 42 at 111–112 [185].

Migration Act 1958

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Volume 1:	**sections 1–261K**
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	Schedule
	Endnotes

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Prepared by the Office of Parliamentary Counsel, Canberra

Subdivision B—Regional processing

198AA Reason for Subdivision

This Subdivision is enacted because the Parliament considers that:

(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

(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.

198AB *Regional processing country*

(1) The Minister may, by legislative instrument, designate that a country is a ***regional processing country***.

(1A) A legislative instrument under subsection (1):

(a) may designate only one country; and

(b) must not provide that the designation ceases to have effect.

(1B) Despite subsection 12(1) of the *Legislation Act 2003*, a legislative instrument under subsection (1) of this section commences at the earlier of the following times:

(a) immediately after both Houses of the Parliament have passed a resolution approving the designation;

(b) immediately after both of the following apply:

(i) a copy of the designation has been laid before each House of the Parliament under section 198AC;

(ii) 5 sitting days of each House have passed since the copy was laid before that House without it passing a resolution disapproving the designation.

(2) The only condition for the exercise of the power under subsection (1) is that the Minister thinks that it is in the national interest to designate the country to be a regional processing country.

(3) In considering the national interest for the purposes of subsection (2), the Minister:

(a) must have regard to whether or not the country has given Australia any assurances to the effect that:

(i) the country will not expel or return a person taken to the country under section 198AD to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; and

(ii) the country will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country under that section is covered by the definition of ***refugee*** in Article 1A of the Refugees Convention as amended by the Refugees Protocol; and

(b) may have regard to any other matter which, in the opinion of the Minister, relates to the national interest.

(4) The assurances referred to in paragraph (3)(a) need not be legally binding.

(5) The power under subsection (1) may only be exercised by the Minister personally.

(6) If the Minister designates a country under subsection (1), the Minister may, by legislative instrument, revoke the designation.

(7) The rules of natural justice do not apply to the exercise of the power under subsection (1) or (6).

(9) In this section, ***country*** includes:

(a) a colony, overseas territory or protectorate of a foreign country; and

(b) an overseas territory for the international relations of which a foreign country is responsible.

198AC Documents to be laid before Parliament

(1) This section applies if the Minister designates a country to be a regional processing country under subsection 198AB(1).

(2) The Minister must cause to be laid before each House of the Parliament:

(a) a copy of the designation; and

(b) a statement of the Minister's reasons for thinking it is in the national interest to designate the country to be a regional processing country, referring in particular to any assurances of a kind referred to in paragraph 198AB(3)(a) that have been given by the country; and

(c) a copy of any written agreement between Australia and the country relating to the taking of persons to the country; and

(d) a statement about the Minister's consultations with the Office of the United Nations High Commissioner for Refugees in relation to the designation, including the nature of those consultations; and

(e) a summary of any advice received from that Office in relation to the designation; and

(f) a statement about any arrangements that are in place, or are to be put in place, in the country for the treatment of persons taken to the country.

(3) The Minister must comply with subsection (2) within 2 sitting days of each House of the Parliament after the day on which the designation is made.

(8) The only condition for the performance of the duty under subsection (5) is that the Minister thinks that it is in the public interest to direct the officer to take an unauthorised maritime arrival, or a class of unauthorised maritime arrivals, under subsection (2) to the regional processing country specified by the Minister in the direction.

(9) The rules of natural justice do not apply to the performance of the duty under subsection (5).

(10) A direction under subsection (5) is not a legislative instrument.

Not in immigration detention

(11) An unauthorised maritime arrival who is being dealt with under subsection (3) is taken not to be in ***immigration detention*** (as defined in subsection 5(1)).

Meaning of officer

(12) In this section, ***officer*** means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

198AE Ministerial determination that section 198AD does not apply

(1) If the Minister thinks that it is in the public interest to do so, the Minister may, in writing, determine that section 198AD does not apply to an unauthorised maritime arrival.

Note: For specification by class, see the *Acts Interpretation Act 1901*.

(1A) The Minister may, in writing, vary or revoke a determination made under subsection (1) if the Minister thinks that it is in the public interest to do so.

(2) The power under subsection (1) or (1A) may only be exercised by the Minister personally.

(3) The rules of natural justice do not apply to an exercise of the power under subsection (1) or (1A).

(4) If the Minister makes a determination under subsection (1) or varies or revokes a determination under subsection (1A), the Minister must cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination, the determination as varied or the instrument of revocation; and

(b) sets out the reasons for the determination, variation or revocation, referring in particular to the Minister's reasons for thinking that the Minister's actions are in the public interest.

(5) A statement under subsection (4) must not include:

(a) the name of the unauthorised maritime arrival; or

(b) any information that may identify the unauthorised maritime arrival; or

(c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person or any information that may identify that other person.

(6) A statement under subsection (4) must be laid before each House of the Parliament within 15 sitting days of that House after:

(a) if the determination is made, varied or revoked between 1 January and 30 June (inclusive) in a year—1 July in that year; or

(b) if the determination is made, varied or revoked between 1 July and 31 December (inclusive) in a year—1 January in the following year.

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (1) or (1A) in respect of any unauthorised maritime arrival, whether the Minister is requested to do so by the unauthorised maritime arrival or by any other person, or in any other circumstances.

(8) An instrument under subsection (1) or (1A) is not a legislative instrument.

(2) Subsection (1) of this section applies whether or not the transitory person has been assessed to be covered by the definition of ***refugee*** in Article 1A of the Refugees Convention as amended by the Refugees Protocol.

198AHA Power to take action etc. in relation to arrangement or regional processing functions of a country

(1) This section applies if the Commonwealth enters into an arrangement with a person or body in relation to the regional processing functions of a country.

(2) The Commonwealth may do all or any of the following:
  (a) take, or cause to be taken, any action in relation to the arrangement or the regional processing functions of the country;
  (b) make payments, or cause payments to be made, in relation to the arrangement or the regional processing functions of the country;
  (c) do anything else that is incidental or conducive to the taking of such action or the making of such payments.

(3) To avoid doubt, subsection (2) is intended to ensure that the Commonwealth has capacity and authority to take action, without otherwise affecting the lawfulness of that action.

(4) Nothing in this section limits the executive power of the Commonwealth.

(5) In this section:

action includes:
  (a) exercising restraint over the liberty of a person; and
  (b) action in a regional processing country or another country.

arrangement includes an arrangement, agreement, understanding, promise or undertaking, whether or not it is legally binding.

regional processing functions includes the implementation of any law or policy, or the taking of any action, by a country in connection with the role of the country as a regional processing country, whether the implementation or the taking of action occurs in that country or another country.

198AI Ministerial report

The Minister must, as soon as practicable after 30 June in each year, cause to be laid before each House of Parliament a report setting out:

(a) the activities conducted under the Bali Process during the year ending on 30 June; and

(b) the steps taken in relation to people smuggling, trafficking in persons and related transnational crime to support the Regional Cooperation Framework during the year ending on 30 June; and

(c) the progress made in relation to people smuggling, trafficking in persons and related transnational crime under the Regional Cooperation Framework during the year ending on 30 June.

198AJ Reports about unauthorised maritime arrivals

(1) The Minister must cause to be laid before each House of the Parliament, within 15 sitting days of that House after the end of a financial year, a report on the following:

(a) arrangements made by regional processing countries during the financial year for unauthorised maritime arrivals who make claims for protection under the Refugees Convention as amended by the Refugees Protocol, including arrangements for:

(i) assessing those claims in those countries; and

(ii) the accommodation, health care and education of those unauthorised maritime arrivals in those countries;

(b) the number of those claims assessed in those countries in the financial year;