IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S169 of 2014**

BETWEEN:

CPCF
Plaintiff

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Defendant

THE COMMONWEALTH OF AUSTRALIA
Second Defendant

PLAINTIFF'S AMENDED SUBMISSIONS IN REPLY

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PART I: SUITABILITY FOR PUBLICATION

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

PART II: REPLY TO THE ARGUMENT OF THE DEFENDANTS

2. Ultimately, the defendants' preferred construction of the MPA would permit a maritime officer to take a person to a place outside Australia, where there was an objective likelihood, or even a certainty, that the person would be killed or harmed following arrival. Should that construction be accepted absent intractable words? No. The relevant powers must be constrained as the plaintiffs contend.

~~A. Procedural fairness~~

3. The matters at PS [68]–[70] and [75]–[78] are properly before the Court. Those matters answer questions (2)(a)–(b). If, in taking or detaining the plaintiff, the officers were implementing an unlawful policy or were pursuing an impermissible purpose, those questions must be answered "no". There is certainly no "unfairness" in the Court determining those issues: cf DS [14]. ~~The defendants did not take the opportunity to raise the asserted "unfairness" with the plaintiff before filing their submissions.~~ Nor have the defendants identified any categories of fact which they say ought to have been before the Court. That is unsurprising: the matters arise directly out of SC [19] (SCB 60), which in turn reflects the defendants' own allegation at [50(c)(ix)] of the Further Amended Defence (SCB 42–43).[1]

A. Procedural fairness

4. The plaintiff submits that each contextual matter raised by the defendants is insufficient to displace the presumption identified in *Saeed*[2] (see PS [8], cf DS [84]–[94]). **First**, the person who makes the decision to take is bound to afford procedural fairness, although the hearing itself may be the subject of administrative delegation.[3] **Secondly**, as accepted at PS [19], in some circumstances, it may well be that only a limited opportunity to be heard applies to the power to detain or the power to place on a vessel or an aircraft. But not always. And, in any event, that could not bear on whether such an obligation applies to a taking decision: the defendants elide those distinctly different powers (DS [88]). **Thirdly**, as submitted at PS [13], the position regarding arrest under the MPA in fact favours the plaintiff's construction (cf DS [87]). **Fourthly**, interpreters and trained staff may be reached by telephone or other communications link, as the agreed facts demonstrated: SC 24(d), (i); PS [26]. The defendants' argument at DS [86] is a considerable overstatement. **Fifthly**, the hearing required need not be at the standard of an administrative tribunal and may be attenuated to fit the particular circumstances. **Sixthly**, there is no relevant distinction between taking and deportation. It is no answer to the plaintiff's submission to say that detainees' personal circumstances must simply be overridden by a political imperative. And, again, on the defendants' view there is seemingly nothing in the MPA to prevent taking a person to their country of origin, without enquiring whether they may there face death or persecution. **Seventhly**, the plaintiff's affected interests include life and liberty, as well as "relaxation of what otherwise would be the operation upon [him] of the [Australian] visa system" (cf DS [91]).[4]

5. As to procedural fairness in the exercise of any non-statutory executive power: the matters above apply equally. Further, that the exercise of any prerogative may "ordinarily" be guided by political or generalised considerations does not eviscerate the duty—what ultimately guides the decision will not be known ex ante and the content of procedural fairness "must be determined … before the final decision is reached".[5] In any event, what gives rise to the duty is the effect on the plaintiff's interests and not only the criteria guiding the decision.

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[1] Which in turn was admitted in the plaintiff's Amended Reply (at [10(b)], SCB 53–54).
[2] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 258–259 [12]. Cf DS [91].
[3] *Cassell v R* (2000) 201 CLR 189,193–194 [21] (Gleeson CJ, Gaudron, McHugh and Gummow JJ).
[4] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 659 [69] (Gummow, Hayne, Crennan and Bell JJ). The practical considerations raised at DS [95]–[98], [102] may be taken into account in ways other than reducing procedural fairness to nothing. Depending on circumstances, this may include short hearings, hearings by telephone with trained personnel, and appropriate framing of questions to avoid threats to safety.
[5] *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 96 [17] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

B. Taking power under the MPA

6. ***Non-refoulement obligations.*** It is surely insufficient for the defendants to contend that Australia's non-refoulement obligations, specifically referred to in relation to s 72(4) in the MPA's Explanatory Memorandum, were to be left to "operational procedures". For the reasons given at PS [59]–[60], the MPA's text and subject matter indicate that compliance with those obligations was to be ensured by statutory limitations. Moreover, even if the correct test in relation to Australia's non-refoulement obligations was whether effective protection was available[6] (cf DS [22]), there is no basis to suggest the plaintiff would have enjoyed effective protection in India.[7]

7. ***The meaning of "place" in Division 8, Part 3.*** The word "place" should be interpreted consistently within Div 8 (cf DS [36]). Div 8 contains provisions in relation to placing persons and moving persons. Section 71 relates to placing persons and provides, "a maritime officer ... may place … a person in a particular place on … land." This power would be necessary to permit removal of a person from a vessel so as to place them onto land. Section 72(4) provides only the power to "take". Taking must necessarily both precede and culminate in placing under s 71. Section 74 requires a maritime officer to hold a particular satisfaction prior to placing a person on land. There is no proviso on the requirement imposed by s 74 that the maritime officer need only be so satisfied if they will retain control over a person after the placing. To read such a requirement into s 74 would permit the absurd result of allowing the placing of a person in the ocean or on a deserted island, and leaving that person there, without regard to whether it "is safe" for a person to be in "that place".

C. The defendants cannot take a person to a place without being able lawfully to disembark them

8. Section 72(4) does not permit a decision to take a person to a place at which the person cannot lawfully be disembarked. **First**, the plaintiff's construction does not logically or legally necessitate taking to Australia (cf DS [58]). It only does so practically if the defendants have failed to put in place arrangements to effect the detention's purpose;[8] that the defendants have not done so ought not to entitle them to prolong detention on the basis of a possibility that they can put those arrangements in place after detention commences. It is the defendants' policy at SC [19] which subverts the purpose of s 72(4) (cf DS [61]). **Secondly**, if inquiries anterior to a taking decision cannot be completed as soon as reasonably practicable, the defendants must bring the s 72(4) detention to an end by any lawful means (cf DS [61]). What is "as soon as reasonably practicable" is affected by the subsisting detention at sea on a vessel, a matter the defendants omit at DS [57]. **Thirdly**, there is good reason why taking to a place other than Australia should not commence while negotiations occur (cf DS [60]): by taking the detainees away from Australia absent agreement with any foreign country, the defendants prolong possible eventuation of the only matter which can *definitely* terminate the s 72(4) detention. **Fourthly**, where the power to take is exercised on the basis of no more than a possibility of an agreement, the eventuation of such an agreement (and so the length of the detention) depends on what steps the defendants (in their unfettered discretion) take to secure agreement (cf DS [62]). **Fifthly**, s 40(a) only concerns the exercise of powers in another country: it says nothing about maritime detention; s 41(1)(j) concerns the exercise of powers in relation to foreign-flagged ships: it says nothing about agreements with countries receiving persons under s 72(4)(b) (cf DS [53]).[9]

D. The discretion in section 72(4)

9. ***The discretion is reposed in 'a maritime officer'.*** The NSC is not a repository of power under the MPA. Nor could the MPA support a construction of s 72(4) in a way which would reserve islands of non-discretionary power to the executive through a largely non-reviewable body such as the NSC, or

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[6] cf *Plaintiff M47/2012 v Director General of Security* (2012) 292 ALR 243, at [24] (French CJ) (***Plaintiff M47***); *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at [27–33] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).

[7] *Patto v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 119, 132 [40].

[8] As, eg, the defendants have done with Nauru and Papua New Guinea in respect of transferees under s 198AD of the *Migration Act 1958* (Cth).

[9] The facts at SC [16], [17] and [19]-[22] make the detention in the instant case analogous to the detention on the basis of 'the possibility' of an exercise of power under s 46A or s 195A considered in *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319, 348-349 [64]-[65].

one in which a maritime officer is simply intended to be "the instrument of the Commonwealth".[10] The text clearly indicates otherwise: the power conferred by s 72(4) is discretionary and personal: the maritime officer "may" exercise the power. Read with section 33(2A) of the *Acts Interpretation Act 1901* (Cth), it is clear that that confers a discretion upon the "person concerned",[11] being the maritime officer. Neither the Minister nor any other person is empowered to direct the officer, nor does the MPA permit the officer to act on such a direction.[12]

10. Other textual indicia strongly tell against the defendants' argument. **First**, a maritime officer includes the highest ranks of the ADF, AFP and Customs, up to and including the Chief of the Defence Force,[13] the Commissioner of Police[14] and the CEO of Customs[15] (s 104). The discretion can be exercised at the highest levels of command as the circumstances may require: the power need not be exercised by the officer on board the ship, since s 72(4) permits the decision-maker to "take or cause a person to be taken". Thus, any relevant chain of command is able to be accommodated under the MPA regime (cf DS [49], [51]). **Secondly**, the MPA gives the Minister the flexibility to designate any person as a "maritime officer" (s 104(1)(d)) — eg, the Secretary of the Department. **Thirdly**, the Minister's power under the MPA is express and limited (eg, ss 16(1)(e), (2), 91(1), 104(1)(d)), and it is only in respect of these powers that the Minister may issue directives that must be complied with (s 121(2)). **Fourthly**, it would be unusual if a discretion did not exist where the exercise of the power to take directly affects the liberty or rights of a person or persons.[16]

11. ***Exercising the discretion requires consideration of factors beyond the NSC's directive***. The criteria governing the exercise of the s 72(4) discretion arise from the MPA's subject matter, scope and purpose.[17] At the very least, matters of practicality and safety (such as weather conditions and remaining fuel or provisions on board) must be mandatory considerations—so much appears from ss 29 and 74. The plaintiff relies on its submissions in chief in relation to the other mandatory considerations which qualify the s 72(4) discretion (see esp PS [74]), and notes that its construction would not preclude government policy, or an NSC directive, being permissible considerations. However, a maritime officer may not blindly and inflexibly to apply NSC directives or government policy.[18]

E. Non-statutory executive power of the Commonwealth

12. Consideration of the existence of any relevant non-statutory executive power starts from the proposition that the executive power of the Commonwealth is exercised by the Commonwealth as a polity and through the executive branch of its government.[19] That puts in proper perspective the statements in the authorities upon which the defendants seek to rely.[20] It is undoubtedly correct that the fact of its sovereignty indicates that the Australian polity has power to determine who may come to Australia. But, as Professor Zines observed, that does not dictate whether a particular constituent organ (the executive) has inherent power to prevent the entry of aliens under the Constitution or whether that power can only be exercised if authorized by an act of Parliament.[21] More analysis is therefore required as to the relationship between the powers of those constituent organs.[22] Such an analysis has led this Court to conclude that equally important attributes of sovereign power (eg the

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[10] See *Cubillo v Commonwealth (No 2)* (2000) 103 FCR 1 at [1130] (O'Loughlin J) (***Cubillo***).
[11] *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162 at [134] (Gummow J).
[12] Cf eg *Migration Act 1958* (Cth), s 198AD(5)–(6)).
[13] *Defence Act 1903* (Cth) ss 4 (definitions of 'member' and 'officer'), 9.
[14] *Australian Federal Police Act 1979* (Cth) s 4 (definition of "member of the Australian Federal Police").
[15] *Customs Act 1901* (Cth) s 4 (definition of 'Officer of Customs').
[16] See *Attorney-General (NSW) v Perpetual Trustee Co Limited* (1952) 85 CLR 237, 252 (Dixon J).
[17] *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45, 50; see also *Plaintiff M47* at 1473 [506] (Bell J).
[18] By analogy, in *Cubillo*, O'Loughlin J held that, 'Neither the Administrator, the Minister nor the Commonwealth could tell the Director what to do. Guidelines could be laid down, policies such as Sir Paul Hasluck's 1952 policy, could be promulgated but, in the final analysis, the decision was that of the Director': at [1122] (emphasis added).
[19] *Williams v Commonwealth* (2012) 248 CLR 156 at 184 [21] per French CJ (***Williams No 1***).
[20] See *Attorney General for the Dominion of Canada v Cain* [1906] AC 542, 546-547 (***Cain***); *Ruddock v Vardarlis* (2001) 110 FCR 491 at 543 [193] per French J (***Vadarlis***).
[21] Zines, 'The inherent executive power of the Commonwealth' (2005) 16 PLR 279 at 291. (See also PS [85]).
[22] That is suggested by *Cain* itself — see the reference to the 'supreme power' of every State having the power to 'make' and 'enforce' 'laws' (at 546).

power of extradition) require clear legislative authority. The same result follows here (see PS [83]-[85]).

13. Additionally: **first**, the Commonwealth correctly accepts that one cannot begin from a premise that the ambit of the executive power of the Commonwealth is no less than the executive power of the British executive. Yet, that is seemingly precisely what the Commonwealth assumes at DS [71], [72], relying on the position at common law and in more recent United Kingdom authorities. **Secondly**, even if that reasoning did not involve a false premise, at the highest those authorities suggest that the existence of the prerogative is uncertain.[23] **Thirdly**, as Professor Zines has suggested, that lack of certainty and the coercive nature of that uncertain power suggest that one should simply 'deny the prerogative'.[24] **Fourthly**, so far as the Commonwealth seeks to support its argument with implications derived from the character and status of the Commonwealth as the national government, it overlooks this Court's jurisprudence confining any such implication where one is dealing with coercive powers.[25] **Fifthly**, it is not enough for the defendants to show prerogative power to expel from Australian territory: they must show power to expel from the "contiguous zone", which DS [71]-[73] fail to do.

14. As to abrogation, the Commonwealth accepts that an objective intention to displace the prerogative may arise by necessary implication, as indicated by the fact that the statute "comprehensively" regulates the relevant ground. That, for the reasons at PS [86], is the nature of the scheme here. The Commonwealth does not take issue with those submissions but says instead that s 5 of the MPA indicates otherwise. That submission fails to grapple with s 3 of the MPA which provides that the Act binds the Crown and also with the limitations on the effect of a (general) legislative statement of that nature. It cannot 'of itself' provide the answer to the question of statutory construction that arises here.[26] **Further**, the proposition upon which the *Anthony Hordern* principle depends is also applicable: the MPA, in conferring a specific, but limited, power to take imports a negative, namely that the same matter is not to be done according to some other course, namely the prerogative.[27] **Finally**, the defendants' actual exercise of power in respect of the Indian vessel was under ss 30, 32(1)(a), 41(1)(c)(ii) and 69 of the MPA, for which a notice under s 80 was required (and may be assumed to have been given): SC [12], [13]-[15]; and the later detention of the plaintiff and other persons on the Indian vessel was under s 72(4). The maritime officers, having chosen to exercise those powers must abide by the constraints on the powers. These circumstances leave no room for the prerogative,[28] and any non-statutory executive power was abrogated in a manner akin to operational inconsistency.

15. If the non-refoulement obligations identified in PS section E form part of the common law of Australia (PS [54]–[57]), which applies to all, including the Commonwealth executive (cf DS [94]). The defendants otherwise seemingly assume that any non-executive statutory power that exists and has not been abrogated is not relevantly constrained. For the reasons given at PS [89]–[90], that is not so.

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[23] The observations in *Cain* were plainly obiter (see PS [84]), as were observations in each of the authorities of this Court cited at DS fn 68 and 69. Indeed in *Robotelmes v Brenan* (1906) 4 CLR 395 both Griffiths CJ (at 403) and Barton J (at 414-415) expressed or noted doubts about the exercise of such a power absent statutory authority. As regards *Vardarlis*, this Court on special leave application observed that, "the question of executive and prerogative power examined in the Full Court" might, in an appropriate case, attract the grant of special leave: Transcript of proceedings, *Vadarlis v Minister for Immigration and Multicultural Affairs* [2001] HCA Trans 625 (27 November 2001). Note also the observations of Lord Bingham in *R (European Roma Rights Centre) v Immigration Officer of Prague Airport* [2005] 2 AC 1 at [11] on which the defendants seek to rely and the survey of relevant cases and authoritative materials undertaken by Black CJ in his dissenting reasons in *Vardarlis* at [9]-[29].

[24] Zines, fn 21 above at 292.

[25] *Commonwealth v Tasmania* (1983) 158 CLR 1 at 203 (Wilson J), 253 (Deane J); *Davis v Commonwealth* (1988) 166 CLR 79 at 112–113 (Brennan J) (see also at 100 per Mason CJ, Deane and Gaudron JJ); *Pape v FCT* (2009) 238 CLR 1 at 24 [10] per French CJ; *Williams (No 1)* at 352 [521] per Crennan J.

[26] See *Momcilovic v The Queen* (2011) 245 CLR 1, 134 [316] (Hayne J); see also at 119-120 [266]-[272] (Gummow J).

[27] cf *Plaintiff S4/2014 v Minister for Immigration and Border Protection* [2014] HCA 34 at [42-51], *Plaintiff M70* at [236]-[239] (Kiefel J).

[28] cf: *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 88 ALJR 324 at [98]-[103] (Hayne J).