IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M47 of 2018

BETWEEN:

PLAINTIFF M47/2018
Plaintiff

and

MINISTER FOR HOME AFFAIRS
First Defendant

THE COMMONWEALTH OF AUSTRLAIA
Second Defendant

PROPOSED SUBMISSIONS OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION SEEKING LEAVE TO APPEAR AS AMICUS CURIAE

Part I: Publication

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

Part II: Basis of leave to appear

2. The Australian Human Rights Commission (**Commission**) seeks leave to appear as *amicus curiae* to make submissions in support of the Plaintiff in respect of question 1 of the Revised Special Case (**RSC**). The Court's power to grant leave derives from rule 42.08A of the *High Court Rules* 2004 (Cth) or, alternatively, the inherent or implied jurisdiction given by Ch III of the Constitution and s 30 of the *Judiciary Act 1903* (Cth).

3. These submissions are the submissions of the Commission and not of the Commonwealth Government.

Part III: Reasons for leave

4. The Commission has the statutory function of intervening in legal proceedings that involve human rights issues, where the Commission considers it appropriate to do so and with the leave of the court hearing the proceeding, subject to any conditions imposed by the court.[1] The term 'human rights' is

[1] *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**), s 11(1)(o).

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defined[2] to include the rights and freedoms recognised in the *International Covenant on Civil and Political Rights* (**ICCPR**).[3]

5. The Commission has expertise in relation to the interpretation and application of Australia's international human rights obligations, including those arising under the ICCPR. Question 1 of the RSC engages with the fundamental common law right to liberty, recognised in Art 9(1) of the ICCPR. While the question is directed towards the position of the Plaintiff, the answers to the question involve issues of general principle and public importance which may affect, to a significant extent, persons other than the Plaintiff including other people facing long term immigration detention.[4] Although question 2 also raises issues relating to the right to liberty, the Commission does not seek to make any submission in relation to the constitutional validity of the relevant provisions of the *Migration Act 1958* (Cth).

6. The Commission's submissions address matters of statutory construction and matters of international and comparative law not covered by the written submissions of the Plaintiff. In addressing those matters, the Commission's submissions aim to assist the Court in a way in which it may not otherwise be assisted.[5] The Commission has previously been granted leave to appear as *amicus curiae* in proceedings dealing with the validity of detention under the *Migration Act*.[6]

7. If the Commission is granted leave, its intervention will not unduly prolong the proceedings, nor lead to the parties incurring additional costs in a manner that would be disproportionate to the assistance that is proffered.[7]

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2 AHRC Act, s 3.

3 ICCPR, opened for signature 16 December 1966, [1980] ATS 23 (entered into force generally 23 March 1976, except Article 41, which came into force generally on 28 March 1979; entered into force for Australia 13 November 1980, except Article 41, which came into force for Australia on 28 January 1993).

4 *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520 at 534 (Davies, Wilcox and Gummow JJ).

5 *Levy v State of Victoria* (1997) 189 CLR 579 at 604 (Brennan CJ).

6 *Al-Kateb v Godwin* (2004) 219 CLR 562; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664; *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* (2004) 225 CLR 1; *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514.

7 *Levy v State of Victoria* (1997) 189 CLR 579 at 605 (Brennan CJ).

Part IV: Submissions

(a) Outline

8. Question 1 of the RSC[8] invites consideration of the proper construction of the provisions upon which the Defendants rely[9] to justify the present detention of the Plaintiff, namely ss 189 and 196 of the *Migration Act*. Question 2 of the RSC[10] invites consideration of whether, if ss 189 and 196 of the *Migration Act* do authorise the present detention of the Plaintiff, they are invalid to that extent. As noted above, these submissions are limited to question 1. Accordingly, we address the question on the assumption that neither of the competing constructions would result in invalidity.

9. These submissions are structured as follows. In part (b) below, some general principles are identified. They are drawn from previous decisions of this Court regarding the proper construction of ss 189 and 196 of the *Migration Act*. Because of the limit on the Commission's intervention, these points do not include any matters arising from Chapter III of the Constitution. Three specific issues, relevant principally to the question of statutory construction, are then addressed in parts (c), (d) and (e): amendments to the *Migration Act* since the decision in *Al-Kateb v Godwin*,[11] international law, and jurisprudence in comparable jurisdictions.

10. The Plaintiff seeks to distinguish or, alternatively, re-open the decision in *Al-Kateb*. The Commission's position is that if *Al-Kateb* cannot be distinguished, the matters canvassed below justify its overruling. To the extent that leave is necessary to re-open the decision, it should be granted for the reasons set out in the Plaintiff's submissions.

(b) General principles

11. At the level of statutory construction, the principle of legality requires a presumption that Parliament does not intend to abrogate or curtail common law rights and freedoms unless it does so by legislation that is clear and

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8 Special Case Book (**SCB**) at 62.
9 RSC at [12] (SCB at 47).
10 SCB at 62.
11 (2004) 219 CLR 664.

unambiguous.[12] The right to liberty is one of the most fundamental rights.[13] Sections 189 and 196 do not, in their terms, provide for indefinite detention. Indefinite, and perhaps permanent, detention is not a matter to be dealt with by implication, particularly in circumstances where there is an alternative construction available.[14]

12. This point, which may be seen as an aspect of the principle of legality, supports the construction favoured by Gummow J in dissent in *Al-Kateb*.[15] The temporal obligation in s 198 to effect removal "as soon as reasonably practicable" operates as a restriction on the duration of detention under ss 189 and 196.[16] The construction propounded by the Plaintiff does not, as Hayne J suggested in *Al-Kateb*,[17] depend upon an impermissible transformation of the temporal restriction from one based on "reasonable practicability" to some other standard. Once it is accepted that the power to detain in ss 189 and 196 is, relevantly, limited to detention for the purpose of the fulfilment of the obligation to remove a non-citizen as soon as reasonably practicable, it follows that where removal is not reasonably practicable in the foreseeable future (or to adapt the language of Hayne J in *Al-Kateb*, where removal "appears [un]likely to be possible of proximate performance"[18]), the detention can no longer reasonably be capable of being seen as *necessary* for the permitted purpose.[19] For the same reasons, the length of detention may be so great that the connection with the purpose of removal becomes so tenuous that the detention cannot be lawfully sustained.[20]

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12 *Potter v Minahan* (1908) 7 CLR 277 at 304; *Bropho v Western Australia* (1990) 171 CLR 1 at 18; *Coco v The Queen* (1994) 179 CLR 427 at 436-437; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [30]; *Momcilovic v The Queen* (2011) 245 CLR 1 at 46-47; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 582 [17] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

13 See, e.g. *Trobridge v Hardy* (1955) 94 CLR 147 at 152 (Fullagar J); *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 520-523 (Brennan J).

14 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577-578 [21] (Gleeson CJ); see also at 607 [117] (Gummow J).

15 (2004) 219 CLR 562 at 608 [121] (Gummow J).

16 *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 233 [30] (*per curiam*); *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582 at 600 [44] (Gageler J).

17 (2004) 219 CLR 562 at 641 [237] (Hayne J, with whom McHugh J (at 581 [33]) and Heydon J (at 662 [303]) agreed).

18 (2004) 219 CLR 562 at 641 [237] (Hayne J, with whom McHugh J (at 581 [33]) and Heydon J (at 662 [303]) agreed).

19 *Cf. Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 111 [184] (Gageler J).

20 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 37 [88] (McHugh J).

13. Further, and apart from any limits imposed by Chapter III, Parliament should not lightly be taken to have intended to provide for the deprivation of liberty for a period that cannot be ascertained and enforced by the courts. This does not mean that detention must be for a fixed period; the duration of detention may instead be referable to fixed criteria applicable to a changing factual substratum.[21] Those criteria and their application to the underlying factual circumstances must, however, be capable of objective determination at any particular point in time.[22] The construction adopted by the majority in *Al-Kateb* permits the indefinite detention of a non-citizen regardless of the likelihood of removal in the foreseeable future. In such circumstances, however, the duration of detention ceases to be objectively determinable. This is because if removal is not likely to be reasonably practicable in the foreseeable future, as Hayne J identified in *Al-Kateb*, it is impossible to determine with any degree of certainty whether removal might occur and if so when.[23] In such a case, the duration of detention can only be identified either by speculation as to uncertain possibilities made in the absence of evidence[24] or, alternatively, by reference to the subjective intention of the Minister responsible for the detention.[25] Neither of these approaches satisfies the requirement of being an objectively ascertainable criterion capable of determining the duration of detention at any particular time.

14. Related to the previous point, Parliament should be taken to have intended that the lawful duration of detention be determined by the Court and not be made to depend on the unconstrained or unascertainable opinion of the Executive.[26] This proposition reflects the positions taken by Gummow and Kirby JJ in *Al-Kateb*.[27] It is inconsistent with the position taken by the judges forming the majority.[28] In particular, Callinan J expressly held that "the test" was whether the

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21 *Cf. Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582 at 597 [31]-[32] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ); *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 232 [29] (*per curiam*).

22 *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582 at 597 [31]-[32] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

23 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 639-640 [230]-[231] (Hayne J, with whom Heydon J agreed).

24 (2004) 219 CLR 562 at 639-640 [230]-[231] (Hayne J, with whom Heydon J agreed) and 660 [295] (Callinan J).

25 (2004) 219 CLR 562 at 662 [299] (Callinan J).

26 *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582 at 594 [31] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ) citing *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 258.

27 (2004) 219 CLR 562 at 599 [88] (Gummow J) and 616 [149] (Kirby J).

28 E.g. (2004) 219 CLR 562 at 586 at [50] (McHugh J).

Minister, subjectively, continued to hold the intention of removing the non-citizen if and when that possibility became available.[29] His Honour also expressed doubt as to whether a Court could determine when removal would become reasonably practicable.[30] That doubt misses the point. The validity of the detention depends on the Court being able to make an objective determination. If it cannot, then the detention is invalid. In any event, courts are "well-equipped to assess whether it can be concluded that the achievement of a statutory purpose is a practical possibility or not, and [are] accustomed to doing so".[31]

15. It might be asked, how could the Plaintiff "claim a right of release into the country when [he has] no legal right to be here?"[32] Once it is recognised, however, that detention for the purpose of exclusion or segregation is not permitted under the *Migration Act*, it becomes obvious that the question is based on a false premise. In any event, the question elides the rights in issue. The Plaintiff does not claim a "right" to be released into the Australian community. He is, however, entitled to personal liberty except if detained pursuant to lawful authority (even if, because of an inability to travel to other countries, the only place in which he can exercise his liberty is within Australia). To put it another way, the Plaintiff has no right to resist removal from Australia (should it become practicable), but it does not follow that he is not entitled to be free from executive detention except for the recognised purposes mentioned above.

(c) Legislative amendments since Al-Kateb

16. The *Migration Amendment (Duration of Detention) Act 2003* (Cth) inserted subsections (4) to (7) into s 196 of the *Migration Act*. Those amendments, although in force at the time of the decision in *Al-Kateb*, were not applicable to

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29 (2004) 219 CLR 562 at 662 [299] (Callinan J), see also at 659 [291] ("It would only be if the respondents formally and unequivocally abandoned that purpose...").

30 (2004) 219 CLR 562 at 658-659 [290] and 662 [295] (Callinan J) ("...indeed as a practical matter it would probably not be possible for him to do so"); see also *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 140 [355] (Heydon J).

31 *CPCF v Minister for Immigration and Border Protection* (2014) 255 CLR 514 at 585 [218] (Crennan J); see also *Zaoui v Attorney-General* 1 NZLR 577 at 618 [196] (Hammond J).

32 *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 93 [228] (Heydon J), referring to the question posed in argument by McHugh J in *Al-Kateb v Godwin* (2004) 219 CLR 562 at 565; see also at 662 [299] (Callinan J) ("...that does not mean that a court is entitled to hold that a person who has no right to enter and reside in the community must be released into it").

the particular facts in that case.[33] As a result, those provisions were not considered in construing s 196(1) as they now must be.

17. Section 196(4) applies only to persons who have had their visas cancelled on character grounds. This does not include the Plaintiff. It prohibits the release of such a person only until after a "final determination" by the Court of the lawfulness of detention. Clearly enough, it proceeds on the basis that orders for the release of a person from immigration detention can be made in respect of persons who are not the subject of visa cancellations on character grounds or, in any case, where the lawfulness of detention has been finally determined.

10 18. Section 196(4A) is similarly directed at a class of persons that does not include the Plaintiff, ie persons to be deported under s 200, and in any event does not prevent release upon final determination of the lawfulness of detention.

19. Section 196(5) is important. It provides that ss 196(4) and (4A) apply, relevantly, "whether or not there is a real likelihood of the person detained being removed from Australia under section 198 or 199". The obvious inference to take from this provision, notwithstanding that it is expressed for the avoidance of doubt, is that, in cases not controlled by ss 196(4) or (4A), the likelihood of removal *is* a matter which bears upon the permissible duration of detention under s 196.

20. This analysis is confirmed by reference to extrinsic material.[34] The Migration
20 Amendment (Duration of Detention) Bill 2003 (Cth) was introduced in response to a series of decisions of the Federal Court where orders were made on an *interlocutory basis* releasing a person from immigration detention pending a final determination of the lawfulness of their detention.[35] The introduction of the Bill also post-dated the decision of the Full Court of the Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*[36] – a decision directly inconsistent with, and overruled by, *Al-Kateb*.[37] It is apparent from the extrinsic material that the amendments introduced by the *Migration*

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33 (2004) 219 CLR 562 at 606 [115] (Gummow J).
34 *Acts Interpretation Act 1901* (Cth), s 15AB(1)(a).
35 For example, *Applicant VFAD of 2002 v Minister for Immigration and Multicultural Affairs* [2002] FCA 1062 (Merkel J); *VHAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 122 FCR 270 (Gray J); *VJAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1253 (Marshall J); *Minister for Immigration and Multicultural and Indigenous Affairs v VFAD* (2002) 125 FCR 249 at [159] (Full Court).
36 (2003) 126 FCR 54.
37 (2003) 126 FCR 54 at 88 [136], 92 [155] (*per curiam*).

Amendment (Duration of Detention) Act were intended to reverse the effect of the authorities regarding release on an interlocutory basis (at least in respect of persons whose visas had been cancelled on character grounds or who were to be deported under s 200[38]), but not to disturb the holding in *Al-Masri.*

21. The Explanatory Memorandum acknowledged that detention would be unlawful if the Court decided on a final basis there is no real likelihood that an unlawful non-citizen will be removed from Australia in the reasonably foreseeable future.[39] The effect of what became ss 196(4) and (5)(a) was therefore intended to be that a final order for release could be made, as such detention would be unlawful, but that a person subject to those provisions could not be released on an interlocutory basis pending a final determination of whether detention was lawful (eg, whether the relevant cancellation decision was valid).[40] This position was reflected in the second reading speech for the Bill. The Minister said that the amendments were directed at "the interlocutory release of a person from immigration detention" and did not affect "the court's powers to finally determine the lawfulness of a person's detention".[41]

22. It is apparent that Parliament did not intend to seek to overcome the decision in *Al Masri.* Indeed, Parliament would appear to have accepted the consequences of that decision. It is in this context that the amendments introduced by the *Migration Amendment (Detention Arrangements) Act 2005* (Cth) must be understood. It may be accepted that one of the purposes for the introduction of s 195A by that Act was to confer power upon the Minister to grant a visa to a person in detention in circumstances where removal under s 198 was not practicable.[42] None of the relevant extrinsic material, however, refers to the decision in *Al-Kateb* or the construction of s 196(1) endorsed by the majority in that case. In the absence of express words, there is no reason to attribute to Parliament an intention to accept the construction adopted in *Al-Kateb.* Indeed,

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38 In the initial version of the Bill, the amendments applied to all persons in immigration detention.
39 Explanatory Memorandum, Migration Amendment (Duration of Detention) Bill 2003, at 4 [1].
40 Explanatory Memorandum, Migration Amendment (Duration of Detention) Bill 2003, at 4 [3]. For an application of these provisions, see: *Ongel v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 239.
41 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 June 2003, p 16,774 (the Hon Phillip Ruddock MP, Minister for Immigration, Multicultural and Indigenous Affairs).
42 Explanatory Memorandum, Migration Amendment (Detention Arrangements) Bill 2005 (Cth) at 3 [10]; see also 9 [21].

the introduction of s 195A should be seen as an attempt to overcome the undesirable consequences of the construction adopted in *Al-Kateb*.

23. The presence of s 195A feeds into the question of how s 196 is to be construed. It can scarcely be said, now, that a construction in which s 196(1) ceases to apply, if the assumption that removal is reasonably practicable does not hold, leads to some form of insoluble conundrum.

(d) International law

24. ***The relevance of international law:*** So far as its language permits, a statute should be construed so as to be consistent with international law, including any international convention to which Australia is a party.[43] The force of this principle lies in the fact that the Court should not lightly infer that Parliament has chosen to legislate in a manner contrary to Australia's international obligations.

25. In cases concerning consistency with the ICCPR, for three reasons, this principle should be given particular importance.

26. *First,* the ICCPR is incorporated as Schedule 2 to the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**). A person may make a complaint to the Commission that an act or practice by or on behalf of the Commonwealth was inconsistent with or contrary to any of the rights under the ICCPR.[44] The Commission is required to inquire into such complaints and may report to the Attorney-General if it finds that the act or practice was inconsistent with or contrary to any human right.[45] The Commission may also conduct examinations of enactments for the purpose of ascertaining whether they are inconsistent with

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[43] This principle was first stated in the Commonwealth context in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363. It has since been reaffirmed by the High Court on many occasions: *Zachariassen v Commonwealth* (1917) 24 CLR 166 at 181 (Barton, Isaacs and Rich JJ); *Polites v Commonwealth* (1945) 70 CLR 60 at 68-69 (Latham CJ), 77 (Dixon J), 80-81 (Williams J); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 (Brennan, Deane and Dawson JJ); *Dietrich v R* (1992) 177 CLR 292 at 306 (Mason CJ and McHugh J); *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 (Mason CJ and Deane J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 384 (Gummow and Hayne JJ); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 33 (McHugh and Gummow JJ); *Al-Kateb v Godwin* (2004) 219 CLR 562; *Coleman v Power* (2004) 220 CLR 1 at 27-28 [19] (Gleeson CJ), 91 [240] (Kirby J); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 189-190 [90]-[91], 191-192 [96]-[98] (Gummow, Hayne, Crennan and Bell JJ), 234 [247] (Kiefel J); *Momcilovic v The Queen* (2011) 245 CLR 1 at 37 [18] (French CJ); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 527 [8] (French CJ); *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31 at 50 [44] (French CJ and Kiefel J); *D'Arcy v Myriad Genetics Inc* (2015) 258 CLR 334 at 353 [31] (French CJ, Kiefel, Bell and Keane JJ).

[44] AHRC Act, s 20(1)(b).

[45] AHRC Act, ss 3, 11(1)(f) and 20A.

or contrary to any human right.[46] Whilst these provisions do not give the ICCPR binding effect in domestic law, the purpose of establishing the Commission was to ensure that "Commonwealth ... laws, acts and practices conform with the [ICCPR]".[47]

27. *Secondly*, Australia is a signatory to the Optional Protocol to the ICCPR.[48] Pursuant to the Optional Protocol, Australia recognises the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by Australia of any right contained in the ICCPR.[49] The "opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol ... brings to bear on the common law the powerful influence of the [ICCPR] and the international standards it imports".[50]

28. *Thirdly,* in many cases, including this one, the rights the subject of protection under the ICCPR are the same fundamental common law rights and freedoms given protection by the principle of legality.

29. ***Consideration of international law in Al-Kateb:*** The judges constituting the majority in *Al-Kateb* all referred to the principle that, where the language permits, statutes should be construed in conformity with international law:

    a. McHugh J said that the presumption "bears no relationship to the reality of the modern legislative process", but held that the principle was "too well established to be repealed now by judicial decision".[51] His Honour, however, did not seek to apply the presumption in the course of construing ss 196 and 198, instead stating that the language of the provisions was "unambiguous".[52]

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46 AHRC Act, s 11(1)(e).
47 Commonwealth, House of Representatives, *Parliamentary Debates*, 1 June 1977, the Hon Bob Ellicott, Attorney-General, second reading speech for the Human Rights Commission Bill 1977 (Cth) in which the complaints mechanism was first proposed in relation to the Human Rights Commission, the predecessor body to the present Commission.
48 *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, [1991] ATS 39 (entered into force generally 23 March 1976; entered into force for Australia 25 December 1991).
49 *Optional Protocol to the International Covenant on Civil and Political Rights*, art 1.
50 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42 (Brennan J).
51 (2004) 219 CLR 562 at 590-591 [65] (McHugh J).
52 (2004) 219 CLR 562 at 581 [33] (McHugh J).

b. Hayne J assumed that the principle applied, but, like McHugh J, concluded that the language of the provisions would not yield to a contrary conclusion.[53] Although his Honour found it unnecessary to consider opinions of the Human Rights Committee,[54] Hayne J expressed some doubt as to whether the system of mandatory detention under the *Migration Act* could contravene Art 9 of the ICCPR in circumstances where it was established by law and could be tested in Court.[55] In doing so, his Honour made no reference to the prohibition on *arbitrary* detention in Art 9(1).

c. Callinan J, like Hayne J, assumed the principle to operate, but found that the language was "clear and unambiguous".[56]

d. Heydon J agreed with Hayne J save that his Honour reserved any decision on whether s 196 should be interpreted in a manner consistent with treaty obligations that had not been incorporated into domestic law.[57]

30. The difficulty with the approach of the majority is that, with the exception of some brief comments by Hayne J, none of them attempted (at least expressly) to engage with the content of the relevant principles of international law. Unless the content of international law is first identified, the domestic law presumption is unlikely to be given full effect because it will not be possible to determine how a construction in conformity with international law might be achieved. Ambiguity in this sense should not be viewed narrowly or technically. As with matters of context,[58] the operation of the presumption is to be considered as part of the ascertainment of meaning, rather than treating the words as having some natural or objective meaning, divorced from context, which is asserted to be "unambiguous". "If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument

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53 (2004) 219 CLR 562 at 642 [238]-[239] (Hayne J).
54 (2004) 219 CLR 562 at 642 [239] (Hayne J).
55 (2004) 219 CLR 562 at 642 [238] (Hayne J).
56 (2004) 219 CLR 562 at 661 [298] (Callinan J).
57 (2004) 219 CLR 562 at 662 [303] (Heydon J).
58 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

and the obligations which it imposes on Australia, then that construction should prevail".[59]

31. ***The content of international law:*** Article 9(1) of the ICCPR prohibits "arbitrary arrest or detention". The opinions of the United Nations Human Rights Committee (the **Committee**), which is established by Art 28 of the ICCPR, should be given considerable weight in determining the content of Australia's international obligations under Art 9.[60] The Committee's opinions in respect of individual complaints are generally considered to be an authoritative interpretation of the treaty obligations.[61]

10 32. The opinions of the Committee make clear that "detention" for the purposes of Art 9 includes immigration detention under the *Migration Act.*[62] Detention that was hitherto lawful may become arbitrary for the purposes of Art 9 when the duration of detention becomes unjust, unreasonable or disproportionate to a legitimate aim.[63] Arbitrariness is not to be equated with conduct "against the law"; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability.[64]

33. Further, although administrative detention is permissible in some circumstances, given the importance of the right to liberty any deprivation of liberty must be necessary to achieve a particular legitimate aim. The degree to
20 which liberty is infringed must be proportionate to achieving that aim.[65] This

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59 *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 (Mason CJ and Deane J).

60 *CRI026 v Republic of Nauru* (2018) 92 ALJR 529 at 535 [22] (*per curiam*); *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 at 91 [148] (*per curiam*); *Minister for Immigration and Citizenship v Anochie* (2012) 209 FCR 497 at 508-510 [45]-[49] (Perram J).

61 See M Nowak, *UN Covenant on Civil and Political Rights* (2nd ed 2005), p XXVII [21]; United Nations Human Rights Committee, General Comment 33 (2009) *Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, UN Doc CCPR/C/GC/33 at [11]-[13].

62 United Nations Human Rights Committee, General Comment 8 (1982) *Right to liberty and security of persons (Article 9)*. See also: *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002); and *Baban v Australia*, Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2003).

63 United Nations Human Rights Committee, General Comment 31 (2004) at [6]. See also Joseph, Schultz and Castan 'The International Covenant on Civil and Political Rights Cases, Materials and Commentary' (2nd ed, 2004) p 308, at [11.10].

64 *Manga v Attorney-General* [2000] 2 NZLR 65 at [40]-[42], (Hammond J). See also the views of the United Nations Human Rights Committee in *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990); *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997); *Spakmo v Norway*, Communication No. 631/1995, UN Doc CCPR/C/67/D/631/1995 (1999). See also *Mabo v Queensland* (1988) 166 CLR 186 at 217 (Brennan, Toohey and Gaudron JJ).

65 United Nations Human Rights Committee, *General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add. 13 (26 May 2004), at [6]; United Nations Human Rights Committee, *General Comment No. 35, Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (16 December 2014) at [10]-[12].

entails consideration of whether there are 'less invasive means' of achieving the aim.[66] There is an obligation on a State Party to demonstrate that there was not a less invasive way than detention to achieve the ends of the State Party's immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention is arbitrary.[67]

34. The decision to detain must consider relevant factors in the particular case and must be subject to periodic re-evaluation.[68] The discretionary power of the Minister under the *Migration Act* to grant a visa to a person in detention or to make a residence determination, does not of itself operate to justify detention – one must consider whether and how those measures are used in a particular case.[69]

35. Administrative detention may not continue beyond the period for which a State party can provide appropriate justification.[70] Accordingly, a period of detention may become arbitrary over time, in the absence of appropriate justification for its continuance.[71] In the specific context of detention pending return to another country, detention will be considered arbitrary for the purposes of Art 9(1) where it assumes "an indefinite character" because the prospects of removal are poor.[72] This is so whether or not the detained person is responsible for prolonging the period of detention, by, for example refusing to return to a particular country voluntarily.[73] This position is consistent with comparable decisions considering Art 5(1)(f) of the European Convention on Human Rights,

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66 *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 at [8.2].

67 United Nations Human Rights Committee, *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002); *Shams v Australia*, Communication No. 1255/2004, UN Doc CCPR/C/90/D/1255/2004 (2007); *Baban v Australia*, Communication No. 1014/2001, CCPR/C/78/D/1014/2001 (2003); *D and E v Australia*, Communication No. 1050/2002, UN Doc CCPR/C/87/D/1050/2002 (2006).

68 United Nations Human Rights Committee, General Comment 35 (2014), *Article 9: Liberty and security of person*, UN Doc CCPR/C/GC/35 at [18]. See also *F.K.A.G v Australia*, Communication No. 2094/2011, UN Doc CCPR/C/108/D/2094/2011 (2013) at [9.3] and *M.M.M v Australia*, Communication No. 2136/2012, UN Doc CCPR/C/108/D/2136/2012 (2013) at [10.3].

69 *Shams v Australia*, Communication No. 1255/2004, UN Doc CCPR/C/90/D/1255/2004 (2007) at [4.12] and [7.2]; *Kwok v Australia*, Communication No. 1442/2005, UN Doc CCPR/C/97/D/1442/2005 (2009) at [9.3].

70 *A v Australia*, Communication No. 900/1993, UN Doc CCPR/C/76/D/900/1993 (1997) (the fact that the author may abscond if released into the community was not a sufficient reason to justify holding the author in immigration detention for four years); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002).

71 See *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 at [8.2].

72 *Abdi v United Kingdom of Great Britain and Northern Ireland*, Working Group on Arbitrary Detention, Opinion No. 45/2006, UN Doc A/HRC/7/4/Add.1 at 40 (2008) at [29].

73 *Abdi v United Kingdom of Great Britain and Northern Ireland*, Working Group on Arbitrary Detention, Opinion No. 45/2006, UN Doc A/HRC/7/4/Add.1 at 40 (2008) at [19].

which have held that detention for the purpose of deportation remains justified only where deportation procedures are pending and are being prosecuted with due diligence.[74]

36. The Committee has been clear that the inability of a State party to the ICCPR to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention.[75] In its concluding observations on the most recent report submitted by Australia pursuant to Art 40 of the ICCPR, the Committee noted available safeguards against arbitrary detention, but expressed its concern about the lengthy and at times indefinite detention of asylum seekers in practice.[76]

37. The approach to the construction of ss 196 and 198 of the minority in *Al-Kateb* is thus more consistent with Art 9 of the ICCPR than that adopted by the majority. The approach of the minority does not permit indefinite detention regardless of the circumstances of the particular case, and without regard to whether the purpose of removal is practicable. The minority position also recognises conditional release as an alternative to detention. Consistent with established principle, that construction ought to be preferred because it is more consistent with Australia's international obligations.

(e) Comparative law

38. In *Al-Kateb*, various members of the Court[77] referred to the then leading authorities from comparable jurisdictions: the United Kingdom,[78] Hong Kong[79] and the United States.[80] As Gleeson CJ noted in *Al-Kateb*, in considering such authorities, it is important to be mindful of the differing statutory and constitutional contexts.[81] With that caution in mind, however, it is possible to

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74 *Chahal v United Kingdom* (1997) 23 EHRR 413 at [113]; see also *Saadi v United Kingdom* (2008) 47 EHRR 17 at [72]; *A v United Kingdom* (2009) 49 EHRR 625 at [164]; *Aime v Bulgaria* (2013) Application No. 58149/08 at [72]; *JN v United Kingdom* (2016) Application No. 37289/12 at [82].

75 United Nations Human Rights Committee, General Comment 35 (2014), *Article 9: Liberty and security of person*, UN Doc CCPR/C/GC/35 at [18]. See also *F.K.A.G v Australia*, Communication No. 2094/2011, UN Doc CCPR/C/108/D/2094/2011 (2013) at [9.3] and *M.M.M v Australia*, Communication No. 2136/2012, UN Doc CCPR/C/108/D/2136/2012 (2013) at [10.3].

76 United Nations Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, UN Doc CCPR/C/AUS/CO/6 (2017) at [37].

77 (2004) 219 CLR 562 at 572 [3] (Gleeson CJ), 587-588 [52]-[54] (McHugh J), 219 [118] (Gummow J), 619-620 [159]-[161] (Kirby J); 642-643 [240] (Hayne J); 654-657 [283]-[286] (Callinan J).

78 *R v Governor of Durham Prison; Ex parte Hardial Singh* [1984] 1 WLR 704.

79 *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97.

80 *Zadvydas v Davis* 533 U.S. 678 (2001).

81 (2004) 219 CLR 562 at 572 [3] (Gleeson CJ).

make some general observations regarding the comparative jurisprudence, including authorities decided since *Al-Kateb*.

39. The courts have read down statutes so as not to conflict with core principles protecting liberty.[82] The courts have also required statutes to be read in a way that is consistent with their purpose and, accordingly, held that detention can only be justified if it is, relevantly, for the purpose of removal.[83] It is for the Court to determine whether the detention is being imposed for a permissible purpose, and that is a question upon which the detaining authority bears the onus.[84] The Courts have, therefore, rejected an approach which might permit indefinite detention regardless of the prospects of removal even though the laws in question have contained no express time limit on detention.[85]

40. It has consistently been held that the power to detain can only be exercised where removal can be effected within a reasonable time.[86] With this comes a concomitant responsibility on the detaining authority, in order to justify the detention, to take the steps required to achieve removal as soon as possible.[87] The authorities also suggest that a detainee's refusal to cooperate with attempts

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82 *Lumba v Secretary of State for the Home Department* [2011] 2 WLR 671 at 704 [108] (Lord Dyson), 723 [181] (Lord Walker), 730 [206] (Baroness Hale), 733-734 [219] (Lord Collins); *R (Kambadzi) v Secretary of State for the Home Department* [2011] 1 WLR 1299 at 1320 [49] (Lord Hope); *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 at 111E (*per curiam*); *Zadvydas v Davis* 533 U.S. 678 (2001) at 690 (Breyer J with whom Stevens, O'Connor, Souter and Ginsberg JJ agreed).

83 *R v Governor of Durham Prison; Ex parte Hardial Singh* [1984] 1 WLR 704 at 706D (Woolf J); *Lumba v Secretary of State for the Home Department* [2011] 2 WLR 671 at 683 [22] (Lord Dyson); *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 at 111C (*per curiam*); *Zaoui v Attorney-General* 1 NZLR 577 at 599 [87]-[88] (McGrath J); *Chief Executive of Department of Labour v Yadegary* [2009] 2 NZLR 495 at 525 [126] (Baragwanath J); *Zadvydas v Davis* 533 U.S. 678 (2001) at 699 (Breyer J with whom Stevens, O'Connor, Souter and Ginsberg JJ agreed).

84 *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 at 114B (*per curiam*); *R (Kambadzi) v Secretary of State for the Home Department* [2011] 1 WLR 1299 at 1327 [73] (Baroness Hale).

85 *R v Governor of Durham Prison; Ex parte Hardial Singh* [1984] 1 WLR 704 at 706D-E (Woolf J); *Lumba v Secretary of State for the Home Department* [2011] 2 WLR 671 at 683 [22] (Lord Dyson); *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 at 111C (*per curiam*); *Zaoui v Attorney-General* 1 NZLR 577 at 599 [87]-[88] (McGrath J); *Chief Executive of Department of Labour v Yadegary* [2009] 2 NZLR 495 at 523 [112]-[113] and 526 [135] (Baragwanath J); *Zadvydas v Davis* 533 U.S. 678 (2001) at 689 (Breyer J with whom Stevens, O'Connor, Souter and Ginsberg JJ agreed).

86 *R v Governor of Durham Prison; Ex parte Hardial Singh* [1984] 1 WLR 704 at 706E (Woolf J); *Lumba v Secretary of State for the Home Department* [2011] 2 WLR 671 at 683 [22] (Lord Dyson); *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 at 111C (*per curiam*); *Zadvydas v Davis* 533 U.S. 678 (2001) at 699 (Breyer J with whom Stevens, O'Connor, Souter and Ginsberg JJ agreed).

87 *R v Governor of Durham Prison; Ex parte Hardial Singh* [1984] 1 WLR 704 at 706F (Woolf J); *Lumba v Secretary of State for the Home Department* [2011] 2 WLR 671 at 683 [22] (Lord Dyson); *R (Kambadzi) v Secretary of State for the Home Department* [2011] 1 WLR 1299 at 1320 [49] (Lord Hope) and 1324 [64] (Baroness Hale); *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 at 111C (*per curiam*).

by the detaining authority to effect removal, although relevant, will not of itself justify indefinite detention.[88]

41. In the United Kingdom, Hong Kong and New Zealand, the construction of statutes conferring powers of detention has been undertaken by reference to the principle of legality.[89] The same principle applies with equal force under Australian law. In the United States, the principle of construction applied is the canon of "constitutional avoidance", by which an interpretation that would avoid a breach of the Constitution is preferred.[90] Again, that is a technique of statutory construction familiar to Australian law.[91]

10 42. The reasoning in the authorities from the United Kingdom cannot be distinguished on the basis that the statutes under consideration involved the conferral of a discretionary power to detain pending removal rather than a mandatory obligation.[92] Subsequent authority suggests that the same approach is to be adopted where the statute is expressed in mandatory terms.[93] In any event, as noted above, amendments to the *Migration Act* since the decision in *Al-Kateb* are such that detention pending removal can now properly be characterised as discretionary (or, at least, subject to the Minister's discretionary powers to release a person from detention).

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88 *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 at 111E and 114-115 (*per curiam*); *Lumba v Secretary of State for the Home Department* [2011] 2 WLR 671 at 707-710 [121]-[128] (Lord Dyson); *Chief Executive of Department of Labour v Yadegary* [2009] 2 NZLR 495 at 523 [112]-[113] (Baragwanath J), 533-534 [168] and 538 [193] (O'Reagan J), 554 [256] (William Young P); *cf. Lema v Immigration and Naturalization Service* 341 F 3d 853 (2003) at 856-857.

89 *R v Secretary of State for the Home Department; ex parte Simms* [2000] 2 AC 115 at 131 (Lord Hoffmann); *Lumba v Secretary of State for the Home Department* [2011] 2 WLR 671 at 704 [108] (Lord Dyson), 723 [181] (Lord Walker), 730 [206] (Baroness Hale), 733-734 [219] (Lord Collins); *R (Kambadzi) v Secretary of State for the Home Department* [2011] 1 WLR 1299 at 1306-1307 [11]-[12] (Lord Hope); *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 at 111E (*per curiam*); *Zaoui v Attorney-General* 1 NZLR 577 at 611 [156] (Hammond J), 646 [44] and 650 [52] (*per curiam*); *Chief Executive of Department of Labour v Yadegary* [2009] 2 NZLR 495 at 507-508 [35]-[36] (Baragwanath J).

90 *Clark v Martinez* 543 U.S. 371 (2005) at 385 (Scalia J) and 391 (Thomas J).

91 *Acts Interpretation Act 1901* (Cth), s 15A; *New South Wales v Commonwealth* (2006) 229 CLR 1 at 161 [355] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Attorney-General (Vic) v The Commonwealth* (1945) 71 CLR 237 at 267 (Dixon J).

92 *Cf. Al-Kateb v Godwin* (2004) 219 CLR 562 at 572 [3] (Gleeson CJ), 642-643 [240] (Hayne J).

93 *R (on the application of O) v Secretary of State for the Home Department* [2016] 1 WLR 1717 at [48]-[49] (Lord Wilson, with whom the remaining members of the Supreme Court agreed); *R (Nouazli) v Secretary of State for the Home Department* [2016] 1 WLR 1565 at [65] (Lord Clarke, with whom the remaining members of the Supreme Court agreed); *cf.* the position in the United States – *Jennings v Rodriguez* 138 S. Ct. 830 (2018).

Part VI: Timing of oral argument

43. If the Commission is given leave to make oral submissions, it estimates it will require 20 minutes.

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