IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M68 of 2015

BETWEEN

PLAINTIFF M68 / 2015

Plaintiff

10

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First Defendant

COMMONWEALTH OF AUSTRALIA

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Second Defendant

TRANSFIELD SERVICES (AUSTRALIA) PTY LTD (ACN 093 114 553)

Third Defendant

PLAINTIFF'S AMENDED SUBMISSIONS

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Amended on 23 September 2015 pursuant to order of Nettle J made on 21 September 2015

Date of document: 4 23 September 2015

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PART I CERTIFICATION

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

PART II ISSUES

2. The issue raised by this case is whether the Commonwealth can take persons, who are present in Australia and have the full protections of the Australian Constitution carefully prescribed by this Court, to a foreign country so as to subject them to extra-judicial, extra-territorial detention which is funded, caused and effectively controlled by the Commonwealth, but lacks those constitutional protections. The Commonwealth asserts that it has that power. Nevertheless, fundamental principle, history, authority, and the basal need to ensure that the Commonwealth cannot bypass the structural requirements of Chapter III, all entail that it is this Court should reject that assertion of power.

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

3. The Plaintiff has given notice under s 78B of the *Judiciary Act 1903* (Cth) and does not consider that further notice is required.

PART IV FACTS

4. The facts are set out in the Special Case (**SC**).

PART V ARGUMENT

5. In summary, the plaintiff says:

a) officers of the Commonwealth executive engaged in conduct (which includes entering into and exercising rights under the Contract in relation to the provision of Garrison and Welfare Services at Regional Processing at Regional Processing Countries dated 24 March 2014 between Transfield and the Commonwealth (**Transfield Contract**) which authorised, procured, caused and resulted in her detention at the Nauru Regional Processing Centre (**Nauru RPC**) and would (if she were returned to Nauru) engage in further conduct of that nature with the same result;

b) she has standing to challenge that conduct;

c) that conduct was required to be, but was not authorised, by a valid statutory provision enacted by the Commonwealth Parliament or by s 61 of the Constitution;

d) by reason of those matters (alternatively, by reason of those matters and the unlawfulness of the plaintiff's detention under the Constitution of Nauru), s 198AD(2) of the *Migration Act 1958* (Cth) (**Migration Act**) does not authorise or require that the plaintiff be taken to Nauru and the Transfield Contract is not authorised by s 198AHA of the Migration Act or any other law and is invalid.

A. STANDING

6. Question 1 concerns the plaintiff's standing to challenge whether the Commonwealth or the Minister was authorised to engage in certain 'past conduct' in so far as that conduct authorised, facilitated, organised, caused, imposed, procured or resulted in the detention of the plaintiff at the Nauru RPC. The Minister and the Commonwealth objected to the plaintiff's standing in respect of past conduct and on 26 June 2015 Nettle J gave reasons why he was not persuaded that the claim for declaratory relief sought in what is now [2] of the Further Amended Application to Show Cause should not be permitted to be filed.[1]

7. The plaintiff has standing to challenge the Commonwealth's past conduct for the following

[1] *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors; Plaintiff M80/2015 v Minister for Immigration and Border Protection & Ors* [2015] HCATrans 162 (**M68 Transcript**) at 24 to 29.

reasons. *First*, the declaratory relief sought is directed to the determination of a legal controversy; it is not a hypothetical question.[2] As Nettle J recognised, the plaintiff alleges, and the Commonwealth parties dispute, that her detention at the Nauru RPC was unlawful.[3] Further, the declaratory relief is directly related to the injunctions sought in [3] of the amended Application and concerns the validity of the Transfield Contract entered into on 24 March 2014 and of the payments continuing to be made under it.[4]

8. *Secondly*, a declaration of the nature sought would produce a foreseeable consequence for the plaintiff, for example, the possible entitlement to damages against the Commonwealth for causing her false imprisonment.[5] That any such future claim by the plaintiff might also be determined under Nauruan law is not determinative; as Nettle J acknowledged, there is a possibility that a declaration that the plaintiff's past detention was unlawful as a matter of Australian law might have some relevance in a Nauruan court's determination of any alleged tortious conduct.[6] In any event, to the extent the plaintiff might have a future claim for relief with respect to her allegedly unlawful taking from Australia to Nauru, that claim would be governed by Australian law. The declarations, if made, would have the consequence that the Commonwealth or the Minister was not authorised to take the plaintiff to Nauru pursuant to s 198AD(2) of the Migration Act on 22 January 2014.

9. *Thirdly*, there is utility and a public interest in the Court determining the lawfulness of the Commonwealth parties' past conduct, since declarations as to the question of lawfulness of that conduct will ensure those possessed of executive powers will in future exercise those powers in accordance with law.[7]

B. THE PLAINTIFF'S DETENTION IN NAURU

The framework for the plaintiff's transfer to Nauru

10. On 10 September 2012, the Minister designated Nauru as a regional processing country under s 198AB(1) of the Migration Act (**SC 37**). The Minister's Statement of Reasons noted that s 198AB was introduced following a recommendation by an independent expert panel that 'a capacity be established in Nauru as soon as practical to process the claims of IMAs [irregular maritime arrivals] transferred from Australia in ways consistent with Australian and Nauruan responsibilities under international law' (**SC 42, paras 10–11**).

11. The Statement of Reasons attached a Memorandum of Understanding dated 29 August 2012 between the Commonwealth and Nauru (**First MOU**), which noted that a Regional Processing Centre was being established in Nauru at the Commonwealth's request (**SC 50, point 5**) and expressed an objective of 'joint cooperation' (**SC 52, cl 2**). The First MOU

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[2] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 (***Ainsworth***) at 582 per Mason CJ, Dawson, Toohey, and Gaudron JJ.

[3] M68 Transcript at lines 1090–1095. *Cf Gardner v Dairy Industry Authority of New South Wales* (1977) 52 ALJR 180 (***Gardner***) at 188 per Mason J. There the past arrangements were superseded by later legislation; here, the impugned arrangements are ongoing. *Cf* also *Williams v Commonwealth* (2012) 248 CLR 156 at 291–293 [329]–[331] (***Williams No. 1***) per Heydon J. There, his Honour held the plaintiff had no standing to challenge certain past expenditure as his children were not at school during that period. Here, the plaintiff was detained at the Nauru RPC during the relevant period and is accordingly directly affected.

[4] The relief will also be relevant to any renewal of the Transfield Contract due to the decided upon in about October 2015.

[5] *Truth About Motorways Pty Ltd v Macquarie Infrastructure Management Ltd* (2000) 200 CLR 591 at 613 [52] per Gaudron J, citing *Gardner* at 188–189 per Mason J (with whom Jacobs and Murphy JJ agreed); *Ainsworth* at 582 per Mason CJ, Dawson, Toohey and Gaudron JJ; *Friends of the Earth, Inc v Laidlaw Environmental Services (TOC), Inc*, 528 US 167 (2000).

[6] M68 Transcript at lines 1137–1144.

[7] *Plaintiff M61 v Commonwealth* (2010) 243 CLR 391 at 359 [103] per curiam; see also *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157 [56] per Gaudron J and *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82 at 107 [55] per Gaudron and Gummow JJ.

noted that each government would conduct all activities in respect of the MOU in accordance with its Constitution and all relevant domestic laws (**SC 52, cl 4 and 5**); that the Commonwealth would 'bear all costs incurred under and incidental to [the] MOU as agreed' (**SC 52, cl 6**); and that the Commonwealth and Nauru would 'establish a processing centre at a site or sites to be jointly determined and agreed' (**SC 53, cl 10**).

12. The First MOU was replaced by a Memorandum of Understanding dated 3 August 2013 (**Second MOU**) which contained the same relevant terms, save that it contemplated multiple regional processing centres, community-based arrangements (**SC 71, cl 10**) and settlement opportunities for those determined to be refugees, subject to agreement between Nauru and the Commonwealth on arrangements and numbers (**SC 68, point 5 and SC 71, cl 12**).

13. From 11 April 2014, the Second MOU was supported by detailed Administrative Arrangements, under which: the Commonwealth agreed to bear all costs incurred under and incidental to the Second MOU (**SC 76, cl 1.1**), including agreed settlement support costs (**SC 82, cl 6.2.2**); the Commonwealth agreed to lodge an application for a Regional Processing Centre Visa (**RPC visa**) in respect of each transferee (**SC 77, cl 2.2.6**); Commonwealth-engaged service providers (identified at **SC 4 and 6, paras 14, 18 and 24**) were required to facilitate the arrival and transport of transferees to the Nauru RPC (**SC 78, cl 3.1–3.5**); Commonwealth-engaged service providers, who were at all relevant times under the management of an officer of the Commonwealth (**SC 11, para 35, and SC 79, cl 4.1.4**), were required to assist Operational Managers by providing security services and monitoring the conduct of the transferees (**SC 79, cl 4.1.3, 4.1.4 and 4.1.6**); the Commonwealth agreed to receive transferees at the request of Nauru (**SC 79, cl 4.1.8; SC 80, cl 4.2.4**); the Commonwealth agreed to engage and fund contractors to assist in the refugee status determination process, and also agreed to assist in the development of and to fund the process of merits review (**SC 81, cl 5.2.2, 5.2.5 and 5.3.2**); the Commonwealth and Nauru agreed to exchange information and data regarding transferees (**SC 81, cl 5.4.1**); and, the Commonwealth and Nauru agreed to the establishment of a Joint Advisory Committee (**SC 84, cl 8.1.1; SC 11, para 33** — subject to the terms of reference at **SC 87**) and the Joint Working Group (**SC 84, cl 8.2.1; SC 11, para 34** — subject to the terms of reference at **SC 89**).

The taking of the plaintiff to Nauru

14. On 29 July 2013, the Minister issued a direction under s 198AD of the Migration Act requiring officers to take unauthorised maritime arrivals to Papua New Guinea or Nauru (**SC 63**). As a result of that direction and the circumstances described at **SC 15–16, para 48**, officers of Commonwealth took the plaintiff to Nauru pursuant to s 198AD on 23 January 2014 (**SC 16, para 49**).

The restrictions on the plaintiff's liberty on arrival

15. Upon her arrival in Nauru, the plaintiff's detention was purportedly imposed by two interrelated statutory regimes.

16. ***First detention regime — Immigration Regulations:*** The imposition of restrictions under the first regime was set in train on 21 January 2014, when an officer of the Commonwealth applied for an RPC visa on behalf of the plaintiff (**SC 795**). That application was made without seeking the consent of the plaintiff (**SC 17, para 52**).

17. As a result of reg 9(3) of the *Immigration Regulations 2013* (Nr), such an application could only be made by an officer of the Commonwealth (**SC 293**). The Commonwealth was also required to pay the associated visa fee of $3,000: reg 5(7) of the *Immigration Regulations 2013* (Nr) (**SC 290; SC 358**). It has paid this fee for all transferees (**SC 8, para 26(e)**).

18. On 23 January 2014, as a result of the application referred to in [16] above, an RPC visa

was issued in respect of the plaintiff (**SC 797**). Further visas were automatically issued on 23 April 2014 (**SC 17, para 54**) and 23 July 2014 (**SC 800**), seemingly on the basis of further requests made by an officer of the Commonwealth pursuant to reg 9(5A) of the *Immigration Regulations 2014* (Nr) (**SC 504**), which provides that such visas may be granted on such a request without submitting an application in the required form.

19. From 23 January 2014 (when the plaintiff was transferred to Nauru by the Commonwealth) until 2 August 2014 (when she was transferred to Australia by the Commonwealth), the plaintiff was, by the conditions of her RPC visa:

a) required to reside at the Nauru RPC (**SC 797 and SC 800**),[8] which was surrounded by a high metal fence through which entry and exit was possible only through a checkpoint permanently monitored by Wilson Security staff to determine whether ingress and egress was permitted by an Operational Manager, an authorised officer or another authorised person (**SC 19, para 68**);

b) permitted to leave the Nauru RPC only in an 'emergency or other extraordinary circumstances' or 'in circumstances where the absence [was] organized or permitted by a service provider *and* the [visa] holder [was] in the company of a service provider' (**SC 797 and 800–801**).[9]

20. Conditions of this nature were invariably included in RPC visas issued to transferees (**SC 8, para 26(dd)**) and continue to be included (**SC 788**), pursuant to the reg 9(6) of the *Immigration Regulations 2014* (Nr) (**SC 504–505**).

21. A breach of the conditions of the plaintiff's RPC visa would have enlivened the Secretary's discretion to cancel her visa under reg 19(1)(a)(iii) of the *Immigration Regulations 2014* (Nr) (**SC 513**) or reg 20(1)(a)(iii) of the *Immigration Regulations 2013* (Nr) (**SC 303**), exposing the plaintiff to a penalty of up to $10,000 under s 9(1) of the *Immigration Act 1999* (Nr) (**SC 138**) or s 10(1) of the *Immigration Act 2014* (Nr) (**SC 375**) if she remained in Nauru, and exposing her to a removal order under s 11(1) of the *Immigration Act 1999* (Nr) (**SC 138**) or s 11(1) of the *Immigration Act 2014* (Nr) (**SC 376**).

22. ***Second detention regime — RPC Act:*** The restrictions that were purportedly imposed under the second regime arose as a consequence of the plaintiff being taken by the Commonwealth to Nauru pursuant to s 198AD of the *Migration Act*. This action rendered the plaintiff a 'protected person' within the meaning of s 3 of the *Asylum Seekers (Regional Processing Centre) Act 2012* (Nr) (**SC 185**).

23. From 21 May 2014, as a result of s 18C(1) of the of the *Asylum Seekers (Regional Processing Centre) Act 2012* (Nr) (**SC 235** — inserted by the enactment that appears at **SC 201**), the plaintiff was prohibited from leaving, or attempting to leave, the Nauru RPC without the prior approval of an authorised officer, Operational Manager or other authorised persons. A breach of this section would have rendered the plaintiff liable to arrest by a police officer and, upon conviction, imprisonment for up to 6 months: s 18C(2).

24. The plaintiff's mandated detention at the Nauru RPC also rendered her subject to the exercise of powers at the RPC permitting authorised officers to conduct frisk and scan searches under the *Asylum Seekers (Regional Processing Centre) Act 2012* (Nr) s 18 (**SC 196**) and later strip searches under the amended form of s 19 (**SC 236**). Her residence at the Nauru RPC also rendered her subject to the exercise of powers of search and arrest by a police officer: ss 22 and 23 (**SC 198** and **SC 241**). Authorised officers and police were permitted to

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[8] See *Immigration Regulations 2013* (Nr) reg 9(6)(a) (**SC 294**); *Immigration Regulations 2014* (Nr) reg 9(6)(a) (**SC 401**).

[9] (Emphasis added). See also *Immigration Regulations 2013* (Nr) reg 9(6)(a) (**SC 294–295**); *Immigration Regulations 2014* (Nr) reg 9(6)(a) (**SC 401–402**).

use force in exercising their search and arrest powers, including by using 'instruments of restraint': ss 3 and 24(5) (**SC 184, 198, 223 and 242**).

25. The combination of the plaintiff's status as a 'protected person' and her residence at the Nauru RPC, as mandated by the RPC visa (**SC 18–19, para 66**), also gave rise to restrictions imposed by the Centre Rules: s 9(a) (**SC 191 and 229**). The Operational Manager was required to make such rules as a result of s 7(1) of the *Asylum Seekers (Regional Processing Centre) Act 2012* (Nr) (**SC 189 and 228**).

26. At all relevant times, s 7(2)(c) and (d) have provided that the Centre Rules may require a protected person who is not a refugee to be present at the Nauru RPC from 7.00 pm each day until 7.00 am the following day and permit the protected person to be absent at other times if the absence is approved by the Operational Manager *and* the protected person is under the care and control of a staff member or other approved person during the absence (**SC 189–190 and 228**).

27. From 16 July 2014, the Centre Rules (**SC 810**) relevantly required that transferees (**SC 811–812**):

a) not leave, or attempt to leave, the Nauru RPC without prior approval from an authorised officer, an Operational Manager or other authorised persons, except in cases of emergency or extraordinary circumstances (rule 3.1.3);

b) comply with all reasonable orders and directions from a service provider in the interests of the safety, good order and maintenance of the Nauru RPC (rule 3.1.2);

c) follow instructions of the service provider when on an 'excursion' (rule 3.1.9);

d) reside in accommodation allocated by the service provider and not change rooms without the permission of a service provider (rule 4.1.4); and

e) abide by such curfews as may be set from time to time (rule 4.1.6).

28. Breaches of the Centre Rules could result in 'penalties' in the form of the 'withdrawal of privileges' agreed between the Operational Managers and senior representatives of the service providers: rules 3.1 and 11.4 (**SC 811 and 815**). It can be inferred that such penalties may include transfer to restricted accommodation referred to at **SC 60**.

29. The restriction imposed by rule 3.1.3, and its exception for permitted absences, is largely consistent with the terms of s 18C of the *Asylum Seekers (Regional Processing Centre) Act 2012* (Nr). However, those provisions did not purport to relieve the plaintiff of her obligation to comply with the visa conditions identified above or with the requirements of reg 9(6) of the *Immigration Regulations 2013* (Nr) and *Immigration Regulations 2014* (Nr) (**SC 294–295 and 504–505**). The plaintiff could only obey <u>all</u> the requirements of the overlapping statutory and regulatory schemes that applied to her by remaining within the Nauru RPC save and except when her absence was organised and permitted by a service provider and she was in the company of a service provider.[10]

The position of the plaintiff on return to Nauru

30. On 2 August 2014, consistent with a well-established practice (**SC 13–15 [41–47]**), the plaintiff was brought to Australia by the Commonwealth, at its expense (**SC 21 [78]**). As a result of the circumstances described at **SC 21 [79]** she became an 'unlawful non-citizen' on arrival: see s 14 of the Migration Act.

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[10] A 'service provider' is defined in s 3 of the 2014 *Asylum Seekers (Regional Processing Centre) Act 2012* (Nr) and *2014* (Nr) as including a body engaged by the Commonwealth to provide services at the Nauru RPC. <u>It is noted that from 25 February 2015, by reason of the *Immigration (Amendment) Regulations 2015* (Nr), reg 9(6)(c)(ii) of the *Immigration Regulations 2014* (Nr) no longer requires a RPC visa holder, when absent from the Nauru RPC, to be in the company of a service provider.</u>

31. If the plaintiff is taken to a regional processing country, she will be required to be taken to Nauru pursuant to a declaration made by the Minister under s 198AD(5) of the *Migration Act* on 15 July 2014 (**SC 22 [83]; SC 66**). Her visa expired while the plaintiff was in Australia notwithstanding the practice of renewal described at **SC 13 [42]**. Accordingly, under reg 9(3) of the *Immigration Regulations 2014* (Nr) an officer of the Commonwealth would have to apply for a further RPC visa, again without her consent (**SC 22 [87]**). The visa would be issued for the purposes set out in reg 9(4) of the *Immigration Regulations 2014* (Nr) (**SC 504**), being the assessment of her claim to be a refugee and, depending on the outcome of that assessment and any reviews or appeals, to permit her to remain in Nauru pending her settlement in another country or her removal.

32. In the event the plaintiff was recognised as a refugee she would be permitted to reside in Nauru for 6 months under a temporary settlement visa issued pursuant to reg 9A of the *Immigration Regulations 2014* (Nr) (**SC 506**). The Commonwealth would be liable to pay a monthly fee of $3,000 pursuant to Sch 2 of those Regulations (**SC 553**; **SC 9 [26(p)]**). If the plaintiff could not be resettled she could be granted a further temporary settlement visa or an RPC visa: reg 9(4)(d) of the *Immigration Regulations 2014* (Nr) (**SC 503**).

33. Notwithstanding the 'open centre arrangements' referred to in the Special Case (**SC 22–24 [88–89]**) the restrictions referred to in [19]–[28] remain in place and would apply to the plaintiff on return (**SC 22 [87] and SC 25 [93]**), except for that restriction referred to in [19(b)] above. That is because, by reason of the *Immigration (Amendment) Regulations 2015* (Nr) (**Amendment Regulations**) which took effect from 25 February 2015, the plaintiff would, by conditions of her RPC visa, be permitted to be absent from the Nauru RPC without being accompanied by a service provider - see reg 9(6)(c)(ii) of the *Immigration Regulations 2014* (Nr) as amended.

34. The 'open centre arrangements' are said to have been made by the Operational Managers since the plaintiff's return to Australia under s 7 of the *Asylum Seekers (Regional Processing Centre) Act 2012* (Nr) (**SC 228**) (which, as noted above at [25], imposes a duty to make rules for the centre and deals with their content). They have not been reduced to writing (**SC 22–24 [88]**). There is plainly an inconsistency between the 'open centre arrangements' and:

~~a) the standard RPC visa conditions (outlined above at [19]);~~

a) s 7(2)(c) and (d) of the *Asylum Seekers (Regional Processing Centre) Act 2012* (Nr) (outlined above at [26]); and

b) the Operational Managers' duty under s 6(1)(b) of the *Asylum Seekers (Regional Processing Centre) Act 2012* (Nr) to reduce the Centre Rules to writing (**SC 187 and 226**).

35. The inconsistencies identified at [34](a)–(c) pose real questions as to the legal effect of the 'open centre arrangements'. Moreover, even if valid, those arrangements may be amended or terminated at any time without any obligation to give reasons (**SC 23 [88]**). ~~And even if valid and not terminated, participation in those arrangements, on the terms described at SC 23–24 [88]–[89] in the absence of an accompanying service provider would result in a breach of the plaintiff's visa conditions and expose the plaintiff to the consequences detailed at [21] above.~~ Finally, if the open centre arrangements still apply on her return to Nauru, the plaintiff must meet the eligibility requirements and her participation is still subject to the approval of the Operational Manager (**SC 23**). For all those reasons, those arrangements are largely immaterial to the issues that arise in this matter.

The *Lim* detention principles

36. The plaintiff relies upon two established principles regarding executive detention. Each of those principles was identified or established in *Lim*[11] which remains the doctrine of this

[11] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (***Lim***).

Court. Those principles are related and are to be understood together: so understood, they reveal a systemic concern with the delineation of power between all three branches of government for which the Constitution provides. Those systemic constraints are correctly identified as core elements of the guarantee of liberty.[12]

37. *First*, both *Lim* and earlier authority[13] establish that any officer of the Commonwealth executive who purports to 'authorise or enforce' the detention in custody of a person (including an alien) without judicial mandate will be acting lawfully only to the extent that her or his conduct is justified by positive authority conferred by a valid statutory provision: *Lim* at 19. A number of important points regarding that principle should be made at once:

a) *First*, as with the case of the power of the executive to surrender any person (alien or citizen) to a foreign state, that is an example of what Gummow and Hayne JJ identified in *Vasiljkovic*[14] as a division under the Constitution between the competence of the executive and legislative branches of government.

b) *Secondly*, the concept of 'authorise or enforce' detention extends to a situation in which the detention is not actually implemented by the particular officer. That is also indicated by other aspects of the joint reasons: see the references to being 'imprisoned by Commonwealth authority' (at 28–29), 'conferral upon the Executive of authority to detain (or to direct the detention of) an alien' (at 32, emphasis added) and to 'requir[ing]' or 'authoris[ing]' detention (at 33 and see *Plaintiff M76*[15] at 369 [138]).

c) *Thirdly*, although *Lim* was dealing with detention within Australia, the principle applies equally where the detention or impugned executive conduct takes place outside Australian territory.[16]

d) *Fourthly*, to the extent the officer seeks to invoke a 'valid statutory provision' to justify her or his conduct in authorising or enforcing detention, that 'justification' must appear in clear terms: using unmistakable and unambiguous language.[17] General words will rarely suffice for that purpose.

e) *Fifthly*, in the absence of a legislative provision sufficiently justifying that conduct, an alien will have standing to invoke the intervention of this Court under ss 75(iii) and (v) of the *Constitution* in respect of the detention or that conduct.[18]

38. The *second*, interlocking, principle established by *Lim* concerns that which may be 'justified' by legislative authority under the Constitution. It is directed to the requirement that conduct of a member of the Commonwealth executive authorising or enforcing detention must be justified by a valid statutory provision, which is a matter that can only be conclusively determined by this Court.

39. That requires attention to the constraints upon legislative power that flow from the observation that the Constitution is structured upon, and incorporates, the doctrine of the

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[12] *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ. See also, referring to *Wilson*, *State of South Australia v Totani* (2010) 242 CLR 1 at 156 [423] per Crennan and Bell JJ and the other authorities there collected at footnote 598.

[13] See eg *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 (***Re Bolton***) at 521–522 per Brennan J and 528–529 per Deane J.

[14] *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614 (***Vasiljkovic***) at 634 [49].

[15] *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 (***Plaintiff M76***).

[16] See *CPCF v Minister for Immigration and Border Protection* (2015) 89 ALJR 207 (***CPCF***) at 240 [149], [150] per Hayne and Bell JJ (in dissent in the result).

[17] *Re Bolton* at 523 per Brennan J and 532 per Deane J; *Coco v The Queen* (1994) 179 CLR 427 (***Coco***) at 436–437 per Mason CJ, Brennan, Gaudron and McHugh JJ; *Momcilovic v The Queen* (2011) 245 CLR 1 (***Momcilovic***) at 46 [43] per French CJ.

[18] *Lim* at 19–20; *Plaintiff M76* at 369–370 [139] per Crennan, Bell and Gageler JJ.

separation of judicial from executive and legislative power. In giving effect to that doctrine, Chapter III constitutes an exhaustive statement of the manner in which the judicial power of the Commonwealth may be vested. In *Lim*, after referring to that constitutional bedrock, Brennan, Deane and Dawson JJ (with whom Mason CJ agreed) observed that there are some functions that, by reason of their nature or because of historical considerations, have become established as 'essentially and exclusively judicial in character'. The 'most important of them' was said by their Honours to be the 'adjudgment and punishment of criminal guilt',[19] the concept of 'punishment' including (perhaps as its archetypal example) the 'involuntary detention of a citizen in custody by the State' (at 27). It followed that leaving apart 'exceptional cases' there was 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' (at 28–29). Put another way, '[d]etention of a person in custody without just cause is ... prohibited'.[20]

40. The use of the term 'exceptional' reflects the fact that the exceptions that might supply a 'just cause' for executive detention are 'limited',[21] although the class of case that may constitute such an exception is not closed.[22] As with other constitutional constraints, the identification of those exceptions is to be approached by reference to historical antecedents, from which analogies may be developed using orthodox processes of legal reasoning.[23] The engagement of those exceptions depends upon the identification of the objective legislative purpose for which a person is detained — that being a matter to be arrived at by the ordinary processes of statutory construction.[24] Although sometimes said to involve a consideration of whether that purpose is 'punitive' as opposed to 'non-punitive',[25] that bifurcated analysis may obscure more than it reveals.[26] The central concern is rather with deprivation of liberty without adjudication of guilt and whether the detention is properly characterised as being for the purpose of one or more of the limited exceptions to that principle. Nevertheless, if it can be established that an enactment does purport to authorise or require executive detention for an objectively punitive purpose (acknowledging the difficulties inherent in that analysis) that will be a sufficient basis to conclude that the provision is invalid, although it is not necessary to establish the existence of such a purpose in every case.

41. A further matter arising from the authorities (equally apt to mislead) is that the beneficiaries of that principle have sometimes been described by reference to the criterion of 'citizenship'.[27] That may be seen to reflect the fact that, unlike a citizen, an alien is subject to detention for the purposes of 'deportation or expulsion' and as an incident to the executive powers to 'receive, investigate and determine an application by that alien for an entry permit'.[28] However, the principle identified above applies equally to aliens, save in the

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[19] *Lim* at 27 (emphasis added). See, suggesting a somewhat different formulation, *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 (***Fardon***) per Gummow J at 612 [79], [80].

[20] *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522 (***Emmerson***) at [53] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

[21] *Re Woolley*; Ex parte Applicants M276/2003 (2004) 225 CLR 1 (***Re Woolley***) at 12 [17], per Gleeson CJ.

[22] See eg *Vasiljkovic* at 648 [108] per Gummow and Hayne JJ.

[23] See, apparently adopting such an approach, *Vasiljkovic* per Gummow and Hayne JJ at 648 [108], [109] and 649 [113] and see Zines 'A judicially created bill of rights?' (1994) 16 SLR 166 at 174.

[24] *Unions NSW v State of New South Wales* (2013) 252 CLR 530 at 557 [50] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

[25] *Lim* at 27–8 per Brennan, Deane and Dawson JJ and at 71 per McHugh J; *Al-Kateb v Godwin* (2004) 219 CLR 562 (***Al-Kateb***) at 584 [44] per McHugh J; *Plaintiff M76* at 384 [205], 385 [207] per Kiefel and Keane JJ.

[26] *Al-Kateb* at 611–613 [135]–[139] per Gummow J; *Fardon* at 612–613 [81] per Gummow, at 647–648 [196] per Hayne J.

[27] See *Lim* at 27 per Brennan, Deane and Dawson JJ and *Re Woolley* at 12 [17] per Gleeson CJ.

[28] *Lim* at 32 per Brennan, Deane and Dawson JJ.

'particular area' of detention for those purposes.[29] That 'particular area' is properly regarded as no more than an example of an exception to that overarching principle (or a legitimate 'category of deprivation of liberty'), albeit one which applies only to a subset of the people entitled to the protection afforded by the Constitution. That explains the references in Lim to there being "limited" authority to detain an alien for certain purposes.[30] In other words, the fact a person is an alien does not mean that legislation may authorise her or his detention at any time and for any purpose without contravening Chapter III of the Constitution.

42. The outer limits of that permissible category of deprivation of liberty are those stated by Brennan, Deane and Dawson JJ in *Lim* at 33 (Mason CJ agreeing). As Crennan, Bell and Gageler JJ observed in *Plaintiff M76* at 369 [138], the views there expressed reflect the principles for which the case stands as authority. Their Honours further observed that the holding in *Lim* was that laws 'authorising or requiring' the detention in custody by the executive of non-citizens, being laws with respect to aliens within s 51(xix) of the Constitution, will not contravene Chapter III of the Constitution, and will therefore be valid, only if the detention which they require and authorise 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."[31]

43. Five further observations should be made about that proposition, as explained in more recent authority:

a) *First*, as with the requirement for positive statutory authority identified earlier in the joint reasons in *Lim*, that aspect of their Honours' reasons is not limited to the actions of the Commonwealth executive within Australia.[32]

b) *Secondly*, also like the first principle, the second principle is not merely concerned with the conduct of the executive that, in an immediate sense, implements the detention (see particularly *Lim* at 32 referring to the 'conferral upon the Executive of authority to detain (or to direct the detention of) an alien in custody…'): the two principles are concerned with matters of substance and, flowing from that, the same broadly drawn species of conduct.

c) *Thirdly*, the criterion of reasonable necessity applies at least to the period of detention.[33] That is, the temporal limits and the limited purposes are connected such that the power to detain is not unconstrained.

d) *Fourthly*, illustrating the point made by Deane J in *Re Bolton* at 529 to the effect that such matters are not merely 'the stuff of empty rhetoric', any person affected by a contravention of those temporal and purposive constraints will have standing to agitate those matters in this Court.

e) *Fifthly*, the purposes identified in *Lim* were those of the Commonwealth under its laws enabling deportation by the Commonwealth and an application for an entry permit to the Commonwealth.

44. As was also explained in the reasons of Crennan, Bell and Gageler JJ in *Plaintiff M76* at 369–370 [139], the third and fourth propositions are closely connected. After observing the connection between the temporal limits and limited purposes of detention, their Honours said

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[29] *Fardon* at 611–612 [78] per Gummow J; *Vasiljkovic* at 643 [84] per Gummow and Hayne JJ and 669 [189] per Kirby J.

[30] Per Mason CJ at 10 and Brennan, Deane and Dawson JJ at 32 and 33.

[31] The reasons of five members of this Court in *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 (***Plaintiff S4***) at 231 [26] similarly make clear that that proposition was established by *Lim*.

[32] *CPCF* at 258 [276] per Kiefel J.

[33] See *Plaintiff M76* at 369–370 [139] per Crennan, Bell and Gageler JJ; *CPCF* at 272 [374], 273 [381] per Gageler J.

this: 'The common law does not recognise any executive warrant authorising arbitrary detention. A non-citizen can therefore invoke the original jurisdiction of the Court under s 75(iii) and (v) of the *Constitution* in respect of any detention if and when that detention becomes unlawful. What begins as lawful custody under a valid statutory provision can cease to be so' (citations omitted).

45. That, in turn, points to a further matter of importance for present purposes, which requires further attention to the point made above about the systemic or functional concern that animates the *Lim* detention principles: as that passage suggests, the constitutional validity of extra-judicial detention depends on the availability of effective judicial control of the detention. That position is consistent with this Court's holding that the availability of judicial control is essential to the validity of the exercise of powers which are subject to proportionality constraints.[34] It is of course not enough that judicial control exist in theory; it must be practically efficacious.[35] This is because there is a special need for "legal control of punishments".[36]

46. The ability of Chapter III courts to exercise legal control over detention is impaired where that detention occurs extra-territorially.[37] Potential defendants are less amenable to the writ of Australian courts. Compulsory process, such as subpoenas and discovery, is less effective. Some issues arising out of foreign detention may, because of the enmeshment of foreign officials in the course of conduct, be non-justiciable. The extra-territoriality of the detention also means that Australian tort law will have at best a limited role in ensuring respect for the limits imposed by the Australian Constitution.[38]

47. The exercise of control over detention is also impaired where that detention is, in whole or in part, for the purpose of an exercise of executive power by a foreign State—here, a decision by the Nauruan executive government to admit or exclude. Chapter III courts do not and cannot control the exercise of the foreign State's executive power—even where, as here, it is that exercise of executive power which may fix an endpoint for the non-citizen's detention.

48. Noting again that the *Lim* detention principles are concerned with the powers of all three branches of government, it is important to observe that the loss of control is not confined to loss of judicial control. The constitutionally-prescribed systems of representative and responsible government, which ensure fidelity to constitutional limits, are also impaired where detention is in whole or in part for the purpose of an exercise of foreign executive

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[34] *See Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 614 per Brennan J; *Commonwealth v Tasmania* (1983) 158 CLR 1 (***Tasmanian Dams Case***) at 237 per Brennan J; *Cunliffe v Commonwealth* (1994) 182 CLR 272 (***Cunliffe***) at 303 per Mason CJ, 331–332 per Brennan J, 381 per Toohey J. See also *Wotton v Queensland* (2012) 246 CLR 1 (***Wotton***) at 10 [13] per French CJ, Gummow, Hayne, Crennan and Bell JJ, 33–34 [88]–[89] per Kiefel J.

[35] *See Hughes and Vale Pty Ltd v State of New South Wales (No 2)* (1955) 93 CLR 127 at 158–159 per Dixon CJ, McTiernan and Webb JJ, 187–188 per Williams J, 202–204 per Fullagar J, 243 per Taylor J; *Cunliffe* at 303 per Mason CJ, 331–332 per Brennan J.

[36] *Pollentine v Bleijie* (2014) 88 ALJR 796 at 801 [21] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

[37] Indeed, since at least the *Habeas Corpus Act of 1679*, constitutional principle has abhorred "[i]mprisonments beyond the [s]eas" and "other shifts" by the executive to "avoid ... obedience" to restraints on detention: see short title and preamble to the *Habeas Corpus Act of 1679* (31 Car. 2, c. 2). See also cl 2(11) proscribing the sending of prisoners, being subjects of the realm, "beyond the seas". The Commonwealth Constitution does not, in this respect, distinguish between citizens and non-citizens: *Vasiljkovic* at 642–643 [83]–[84] per Gummow and Hayne JJ, 669 [189] per Kirby J, 676 [222] per Heydon J.

[38] *Cf Northern Territory v Mengel* (1995) 185 CLR 307 at 350–353 per Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ, 372–373 per Deane J; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (***Lange***) at 563 per curiam. Also, the applicable law typically being that of the foreign jurisdiction, Australian courts may often be a clearly inappropriate forum, leaving those detained to foreign justice.

power. Take the present case. The decision will not be one for which a Commonwealth Minister, who is a member of and accountable to Parliament, has ultimate responsibility.[39] Parliament's coercive authority to summon witnesses or require production of documents concerning the visa process, any visa decisions and the detention itself is limited.[40] The extra-territoriality of the detention impedes the capacity for "concerns and grievances" to be brought "to the attention of legislators".[41] The burden on the "flow"[42] of communication caused by the extra-territoriality of the detention and the fact that it is for a foreign state's purposes is magnified here by the strict secrecy provisions imposed by Pt 6 of the *Australian Border Force Act 2015* (Cth). Consistently with fundamental principle, there is a special need for 'judicial vigilance where ... political accountability is inherently weak or endangered'.[43]

49. The exercise of control is still further impaired where the Commonwealth interposes a private contractor between itself and the custody. The contractor may not be amenable to this Court's s 75(v) jurisdiction, thus undermining the rule of law assumed by the Constitution.[44] Again, the constitutionally-prescribed systems of representative and responsible government are less able to control power exercised by contractors. Freedom of information laws do not extend to documents held by them. As the plurality said in *Plaintiff S157*, this Court must be vigilant to protect against attempts by the Parliament or the Executive "to impair ... [or] to avoid ... judicial review": at [104]. That vigilance extends to protecting against "colourable evasion" of s 75(v).[45]

50. At least two things follow from that:

a) *First*, consistent with the emphasis given in *Lim* to the importance of substance over form (see at 27) and with what has been said above, the question of whether the Commonwealth or its officers have authorised, directed, required or enforced extra-territorial detention at the hands of third parties is not to be approached in any narrow sense.

b) *Secondly*, the Court should approach novel legislative schemes involving such detention with caution. In particular, it would not countenance the proposition that the Commonwealth may, whether directly or indirectly (eg by contract), authorise or engage in conduct procuring, causing or effectively controlling detention which is extra-territorial, under contract and for a purpose of an exercise of foreign executive power. That is not detention with "just cause".

Application of the *Lim* detention principles

51. In the submissions that follow, the *Lim* detention principles are applied to the plaintiff's position, seeking to establish the following propositions:

a) She was detained and would be detained again if returned to Nauru.

b) Her detention has been (and would be) authorised, required or enforced (or, as put above, procured, caused and effectively controlled) by officers of the Commonwealth executive, which leads to a requirement for justification by positive authority; conferred by a valid

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[39] Cf *Lange* at 558 per curiam; *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (***Engineers Case***) at 147 per Knox CJ, Isaacs, Rich and Starke JJ.

[40] Cf *Lange* at 558–559 per curiam.

[41] Cf *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 198–199 [83] per Gummow, Kirby and Crennan JJ.

[42] See *Unions NSW v State of New South Wales* (2013) 252 CLR 530 at 578 [135] per Keane J.

[43] Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32 *Australian Bar Review* 138 at 152 and see also *Engineers Case* at 151–152 per Knox CJ, Isaacs, Rich and Starke JJ.

[44] Cf *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 (***Plaintiff S157***) at 482–483 [5] per Gleeson CJ, 513–514 [104] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

[45] *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 367 per Dixon J.

statutory provision; using clear words.

c) No such authority exists, either as a matter of construction or by reason of invalidity arising from the constraints upon legislative power identified above.

The plaintiff was (and would be) detained

52. This issue is straightforward. Objectively, the arrangements described above have the features of both confinement and custody, including dominance and control of the liberty of the person and the state of her being guarded and watched to prevent escape. The unlawfulness of any attempt to leave and foreseeability of police intervention constitute compulsion. Such compulsion is sufficient to constitute detention, as a person may be in custody when given to understand that he or she will be restrained from going where he or she may want to go by force, if necessary.[46] The degree of physical confinement of the plaintiff and criminalisation of any attempt to depart the place of confinement are analogous to the restrictions considered in *Kruger v The Commonwealth*, which were not doubted to constitute involuntary detention within the meaning of *Lim*.[47] For the reasons given above, none of that would be altered by the possible application of the 'open centre arrangements' to the plaintiff, were she returned to Nauru.[48]

The plaintiff's detention has been (and would be) authorised, directed, required or enforced by the Commonwealth or its officers

53. By various acts and conduct the subject of questions 1 and 6 in the **Special Case SC 25 and 28**, officers of the Commonwealth have procured, caused and effectively controlled the detention of the plaintiff (and would do so again were she returned to Nauru). That is sufficient to attract the first principle derived from *Lim* identified above.

54. *First*, the Commonwealth procured or caused the creation of the Nauru RPC and the legal regime which purportedly supports the detention of the plaintiff by requesting that Nauru host a regional processing centre, following a recommendation that such a capacity be established (see [10]–[11] above). The Nauru RPC and the relevant legal regimes exist only to accommodate persons that the Commonwealth selects, takes to Nauru and causes to be detained in the Nauru RPC.

55. *Secondly*, the Commonwealth procured the construction and maintenance of physical barriers including a perimeter fence, other security infrastructure and dwellings (**SC 10 [30]**) which physically enclosed the plaintiff and delimit the boundaries of the Nauru RPC, its constituent compounds and allocated accommodation for the purposes of the restrictions imposed by the *Asylum Seekers (Regional Processing Centre) Act 2012* (Nr) and *2014* (Nr), the RPC visa conditions and the Centre Rules.

56. *Thirdly*, all restrictions purportedly imposed on the plaintiff under the Nauruan laws described above were predicated upon the Commonwealth taking particular actions. In the case of the *Immigration Regulations 2013* (Nr), *Immigration Regulations 2014* (Nr) and RPC visas, the event which set in train the restrictions on the plaintiff's liberty was the submission of an application by an officer of the Commonwealth for the RPC visa and the assumed requests by an officer of the Commonwealth for the further RPC visas (on the expiry of the previous RPC visa) without the plaintiff's consent. In the case of the *Asylum Seekers (Regional Processing Centre) Act 2012* (Nr), it was the taking of the plaintiff to Nauru by the Commonwealth under s 198AD(2) of the Migration Act. In both cases only the

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[46] *Eatts v Dawson* (1990) 21 FCR 166 at 178–179 per Morling and Gummow JJ.

[47] *Kruger v Commonwealth* (1997) 190 CLR 1 at 80 per Toohey J, 109–110 per Gaudron J, 161–162 per Gummow J.

[48] See in that regard *Surrey County Council v P* [2014] AC 896 at 920 [49] per Baroness Hale, 924 [63] per Lord Neuberger, 929 [87] per Lord Kerr.

Commonwealth by its officers could perform the relevant act and each of the acts had the inevitable consequence of restraints being imposed upon the plaintiff's liberty at the time the relevant step was taken.

57. *Fourthly*, employees of Commonwealth contractors, who under the contracts were effectively managed and overseen by officers of the Commonwealth, had effective control over various aspects of the plaintiff's movement within and outside the centre by virtue of their status as 'service providers', 'other authorised persons' and, in the case of 138 Wilson Security employees, 'authorised officers' under s 17(1) of the *Asylum Seekers (Regional Processing Centre) Act 2012* (Nr) and *2014* (Nr) (**SC 19 [67]**). Under the *Immigration Regulations* regime and Centre Rules, service providers and/or authorised officers were empowered to: grant and refuse to grant permission to leave the RPC; withhold their company whilst outside the RPC (thus effectively rendering it impossible for a detainee to comply with their visa conditions under Nauruan law in respect of being lawfully outside the RPC); issue instructions whilst outside the RPC; issue orders and directions for 'good order'; designate accommodation within which the plaintiff was required to reside; and set curfews (**SC 294, reg 9(6); SC 401, reg 9(6); SC 811, rules 3.1.2 to 3.1.9; SC 812, rule 4.1.4 and 4.1.6**).

58. The 138 staff of Wilson Security appointed as 'authorised officers' were additionally empowered to subject transferees to searches, including strip searches, and the use of force, including the use of 'instruments of restraint'. Pursuant to the Administrative Arrangements discussed at [13] above, an officer of the Commonwealth occupying the position of Program Coordinator managed the service providers present at the Nauru RPC (**SC 79, [4.1.4]**). Also, officers of the Commonwealth assigned duties at the RPC or assisting in the management or operation of the Centre were 'staff members' (**SC 12 [37], SC 224**). The third defendant was under a contractual obligation to comply with directions made by the Contract Administrator (**SC 613, clause 4.3.1**). The Commonwealth also exercised control over the identity of the individuals selected by the third defendant and its subcontractors to act as service providers as a result of the Contract (**SC 613, cl 5.4.2; SC 614, cl 5.7.1; SC 626, cl 1.4.4**), and has step-in rights in the event the Contract is terminated (**SC 620, cl 15.3.1**).

59. In addition to the general control exercised by the Commonwealth in its management of the Transfield Contract, Transfield was under a number of specific obligations, including requirements that it:

a) take reasonable steps to ensure that transferees behaved in accordance with the provisions of their RPC visa (**SC 640, cl 4.2.1(a)**);

b) ensure the security of the perimeter of the Nauru RPC was maintained at all times in accordance with departmental policies and procedures (**SC 642, cl 4.18.1**);

c) verify the presence of transferees at least twice per day (**SC 642, cl 4.14.1**);

d) operate surveillance systems (**SC 640, cl 4.4.3**);

d) develop entry and egress procedures (**SC 641, cl 4.8.3**);

e) implement processes and procedures for random identification checks and movement restrictions to be able to better account for transferees (**SC 642, cl 4.14.2**); and

f) provide a transport and escort service (**SC 646, cl 11.1.1(b) and SC 647, cl 11.2.1 (a)**).

60. The third defendant was required to secure the compliance of its subcontractors and personnel (**SC 614–615, cl 6.2.2**) with each of the obligations described at [58]–[59], including the obligation to obey directions discussed in [58]. The obligations referred to at [59(a)]–[59(e)] were also among the obligations specifically reflected in the Wilson Subcontract (**SC 755, cl 3.2.1(a); SC759, cl 3.18.1; SC 758, cl 3.14.1; SC756, cl 3.4.3(b); SC 757 cl 3.8.3**).

61. *Fifthly*, the Commonwealth exercised oversight and control of the activities of the Nauru

RPC through its involvement in the Ministerial Forum, Joint Advisory Committee and Nauru Joint Working Group (**SC 10–12 [31]–[37]**).

62. *Sixthly*, the Commonwealth has the ability to remove transferees from the Nauru RPC and has done so on 691 occasions after consulting with the Operational Manager (**SC 13 [41] and [43a]**). To the extent any requirement for permission exists, Nauru has never withheld permission for a transferee to leave the Nauru RPC in order for a transferee to be brought to Australia (**SC 15 [47]**).

63. *Seventhly*, the Court can and should find as a constitutional fact that, but for conduct of the Commonwealth and its officers, the plaintiff would not have been detained and would not be in jeopardy of detention in Nauru. The Court also can and should find as a constitutional fact that, but for the conduct of the Commonwealth and its officers, the Republic of Nauru would have had no interest in the detention of the plaintiff in Nauru.

64. As we have said above, *Lim* makes plain that one is to approach those matters by reference to substance as well as form. That has been more recently reaffirmed by this Court in the context of Chapter III,[49] together with the related proposition that it is necessary to consider the practical as well as legal effect. And the substance (and practical effect) of the matters set out above is that officers of the Commonwealth have engaged in conduct that, on any common sense analysis,[50] authorises, enforces, directs or requires the detention of the plaintiff (in the sense identified in *Lim*). Indeed, so much is seemingly acknowledged by the insertion of s 198AHA into the Migration Act, which purports to authorise the Commonwealth to 'take, or cause to be taken, any action in relation to the arrangement or the regional processing functions of the country', including the 'action' of 'exercising restraint over the liberty of a person' (subsections 2(a) and (5) — although it is contended that attempt has not been successful for the reasons given below).

65. By the making of the visa application and paying the requisite fee for that visa, within the factual framework of the Nauru RPC arrangements, members of the Commonwealth executive caused the plaintiff to be detained. In the manner described at **SC 20–21 [77]–[79]**, members of the Commonwealth executive determined to temporarily bring that detention to an end for the temporary purpose identified at **SC 21, para 78(c)** and secured that result (such that the plaintiff is now detained under a different regime of executive detention created by the Migration Act and for a Commonwealth purpose). In the circumstances identified at **SC 21–22 [81]–[83] and [87]** (but subject to the non-compellable power of the first defendant to decide otherwise under s 198AE(1) of the Migration Act if she or he determines it is in the public interest to do so) the plaintiff will be returned to her former detention on Nauru, with members of the Commonwealth executive again making an application for an RPC visa and paying the requisite fee (if necessary) and continuing to maintain the circumstances identified above that attend and define her detention. But the Minister could equally make a new direction under s 198AD(5) of the *Migration Act* requiring that the plaintiff be taken to a different regional processing country (being a decision to which the rules of natural justice would not apply – see s 198AD(9)), or indeed revoke the designation of all regional processing countries under s198AD(6) such that s198AD does not apply to the plaintiff (see s 198AF). It can also be inferred that should the Commonwealth once more determine to remove the plaintiff from Nauruan detention and to take her to either Australia or Papua New Guinea, it could do so in the manner set out at **SC 13–15 [43]–[45]** (noting that any permission necessary for the Commonwealth to obtain that result has never been denied — **SC 15 [47]**).

66. It would be a triumph of form over substance~~substance over form~~ (or synthetic and unreal)

[49] See eg *Crump v New South Wales* (2012) 247 CLR 1 at 26–27 [60] per Heydon J.

[50] *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 (***Stramare***) at 515 per Mason CJ.

to conclude that members of the Commonwealth executive are not legally responsible for the plaintiff's detention when they have obtained for themselves almost complete control over the body and destiny of the plaintiff in all relevant respects, and for such purposes that they may choose.[51] It is of some significance in that regard that the (demonstrated) capacity of the Commonwealth to exercise at the least de facto control over the detention of the plaintiff would suffice to found the issue of a writ of habeas corpus; control for the purposes of habeas corpus exists where there is either actual physical custody of the detainee or the means of procuring the person's release.[52] That is so whenever the respondent to the writ has actual power to produce the person the subject of the writ, even if the custody could be viewed as "under colour" of another authority.[53] That submission does not turn upon some erroneous inversion of the relationship between rights and remedies akin to that identified in *McBain*.[54] It rather reflects the important point made by Brennan J in *Re Bolton* (at 520–521): that is, that those 'ancient principles of the common law' and 'ancient statutes' are part of the 'accepted constitutional framework' by which '[m]any of our fundamental freedoms are guaranteed'. Indeed, the extension of the *Habeas Corpus Act 1679* to which his Honour there referred was to curb similar excesses of executive power undertaken by Lord Clarendon in sending persons to 'remote islands, garrisons and other places, thereby to prevent them from the benefit of law'.[55] Attention to those considerations explains why this Court has discerned a close connection between the constraints upon detention identified in *Lim* and the long history of judicial supervision of such constraints: see again *Lim* at 19–20, *Plaintiff M76* at 369–370 [139] per Crennan, Bell and Gageler JJ and *CPCF* at 249 [218] per Crennan J. And, here as elsewhere, those matters of history reveal that the power of the Commonwealth executive under s 61 is not the unbounded power of Plantagenet monarchs:[56] it cannot undertake the conduct the subject of questions 1 and 6 absent clear legislative authority under a valid enactment.

67. Alternatively, if it be concluded that the principles in *Lim* would need to be developed to accommodate the facts of the current matter (the facts of *Lim* involving custody by the Minister or officers of his Department for purposes that are those of the Commonwealth) then this Court should do so. Such a development is readily made when one has regard to the operation of the similar principle concerning the surrender of aliens to a foreign power identified above. If clear statutory authorisation is required for the surrender by the Commonwealth executive of an alien to a foreign power (and associated detention), then the position is *a fortiori* as regards conduct of the Commonwealth executive that procures, causes or effectively controls the detention of the plaintiff, on an ongoing basis, in a foreign territory.

68. It is not to the point that the restrictions applied to the plaintiff may also be regarded as a product of the independent exercise of sovereign legislative and executive power by Nauru. Nor does it matter that, had Nauru not directly imposed those restrictions, the defendants

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[51] Cf *Ruddock v Vadarlis* (2001) 110 FCR 491 at 513 [85] per Black CJ.

[52] *Rahmatullah* v *Secretary of State for Defence* [2013] 1 AC 614 at 636 [42]–[44] per Lord Kerr; *Al-Saadoon and Mufdhi v United Kingdom*, No 61498/08, ECHR 2010 at [88].

[53] *Munaf v Green*, 553 US 674 (2008); 128 S.Ct. 2207 (2008) at 2217.

[54] *Re McBain; Ex Parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 406–407 [66] per Gaudron and Gummow JJ.

[55] See also the more detailed account of the history of the writ (including its application to extra-territorial detention) in *Boumediene v Bush*, 553 US 723 (2008); 128 S.Ct. 2229 (2008) (***Boumediene***) at 2244–2251 per curiam.

[56] See similarly, *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 60, [127] per French CJ and 74 [183], 75-83 [187]-[210] per Gummow, Crennan and Bell JJ; *Williams No 1* at 189 [30] per French CJ, 236-238 [150]-[159] per Gummow and Bell JJ; 251-252 [197]-[198], 267 [241]-[243] and 271 [252] 272 [256] per Hayne J; 349-355, [508]-[534] per Crennan J 368-374 [576]-[595] per Kiefel J; Vasiljkovic at 634 [49] per Gummow and Hayne JJ.

would not have sought to impose those restrictions or asserted a right to do so (although the inevitable consequence would have been that officers of the second defendant would have then done so directly in Australia). The position is analogous to the example given by Black CJ in *Vardarlis*: if a person has decided to shut the door of a room and keep it shut, that can provide no answer to a claim against another person who, knowing those facts, then closes the only other door with the consequence that the people inside cannot get out (at [85]). Indeed, not only is the Commonwealth in this case the second 'door keeper', it has funded and constructed the room and is also entirely responsible for all of those within the locked room being detained there in the first place, and without their consent. And the time has long passed since the law embraced the doctrine of sole cause.[57]

69. For the reasons given above, the Court would be cautious in such circumstances to protect against "colourable evasion" of ss 75(iii) and (v). The principles to be applied are somewhat similar to those that operate in respect of the exercise of the executive power of the Commonwealth to enter into governmental agreements between the Commonwealth and the States. While that may enable the Commonwealth to achieve that which it could not otherwise achieve (including through joint legislative or executive action) the Court will be vigilant to ensure that both the end to be achieved and the means by which it is to be achieved are consistent with and not contravene the Constitution.[58] As *ICM* also indicates (see at 167–168 [36]), similar constraints apply to the range of permissible terms and conditions that may be applied to a grant of financial assistance to the States under s 96 of the *Constitution*.[59] Constitutional doctrine as to those matters is still developing:[60] but it is clear from existing authority that it is not right to suggest that the involvement of third parties (including other polities) in conduct that would otherwise exceed constitutional constraints is sufficient to enable the Commonwealth to slip through the constitutional net. And here one is not merely dealing with something akin to the matters that might be 'required' under terms and conditions attached to a s 96 grant: not only do the terms of the Administrative Arrangements and the Transfield Contract specifically contemplate executive detention of people in the position of the plaintiff, the Commonwealth is the essential actor at all stages in that detention.[61] The Court should not permit the Commonwealth substantially to by-pass the structural requirements of Chapter III that such detention occur only as a result of adjudication by a Court.[62]

Authority for the Commonwealth's past and future conduct — legislative authority

70. The question that then arises is whether that conduct of members of the Commonwealth executive is 'justified by a valid statutory provision'. For the following reasons, neither s198AHA of the Migration Act nor the Financial Framework Provisions supply that justification, as a matter of construction.

71. Properly construed, s 198AHA does not extend to laws giving effect to "arrangements" with "countries". Thus, the Memoranda of Understanding is not an "arrangement" for the purposes of the application of the section.

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[57] *Stramare* at 515 per Mason CJ; *I&L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at 128 [57], 130 [62] per Gaudron, Gummow and Hayne JJ.

[58] *R v Hughes* (2000) 202 CLR 535; see also *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 (*ICM*) at 164–165 [29] per French CJ, Gummow and Crennan JJ.

[59] See also the 'qualification' identified in *Williams No 1* at 235 [147] per Gummow and Bell JJ.

[60] See, in the course of discussing *ICM* (and also *Spencer v Commonwealth* (2010) 241 CLR 118) Mortimer J in *Spencer v Commonwealth* [2015] FCA 754 at [465].

[61] With all the usual caveats that apply to US constitutional jurisprudence, there is also an analogy to be drawn with the Supreme Court's 'state action' doctrine: see eg *American Manufacturers Mutual Insurance Co v Sullivan*, 526 US 40 (1999).

[62] See *Magaming v R* (2013) 252 CLR 381 at 408 [82] per Gageler J (in dissent in the result).

72. The application of s 198AHA is restricted to where the Commonwealth enters into an "arrangement with a person or body in relation to the regional processing functions of a country".[63] The "Participants" to the Memorandum of Understanding are the Commonwealth and "the Republic of Nauru". The plaintiff submits that the Republic of Nauru is not a "person" or "body" for the purposes of s 198AHA(1) for the following reasons.

73. *First*, s 198AHA(1) itself makes a distinction between "person or body" and "country". The term "country", read in the context of the Migration Act, and in particular Pt 2 Div 8 Sub-div B, refers to a "regional processing country" designated by the Minister, by legislative instrument, under s 198AB. "Country" is defined (at least for the purposes of s 198AB) non-exhaustively in s 198AB(9). Section 198AHA(1) does not say that the section has application if the Commonwealth enters into an arrangement with a "country" or a "regional processing country"; rather, it refers to the Commonwealth entering into an arrangement with a "person or body in relation to the regional processing functions of a country". If the legislature had intended s 198AHA to cover an arrangement with a "country" it easily could have said so.

74. *Secondly,* whilst there is no doubt that the Republic of Nauru is a foreign body politic,[64] the word "person" in s 198AHA(1) is not an expression chosen by Parliament to denote "persons generally" such that the presumption in s 2C of the *Acts Interpretation Act 1901* (Cth) applies. As just noted, a distinction is made between "person", "body" and "country" in s 198AHA(1) itself. Further, the distinction in s 198AHA between "person" and "body" also tends against Parliament intending to denote "persons generally"; if that were the case, then the word "body" would have no work to do.

75. That the Explanatory Memorandum to the Bill that introduced s 198AHA restates the effect of s 2C of the *Acts Interpretation Act*[65] is not determinative. This extrinsic material cannot be used to displace the clear meaning of the statutory text, considered in its context.[66] That is the surest guide to legislative intention.[67]

76. *Thirdly*, the requirement identified above for unmistakeable and unambiguous language and the principle of legality tend against s 198AHA being construed broadly such that the words "person or body" encompass foreign body politics such as the Republic of Nauru. Indeed, in addition to what has already been said above, the requirement for unmistakable and unambiguous language applies with particular force where the detention is extra-territorial such that there is impaired access to Australian courts: see *Re Bolton* at 523 per Brennan J. Further, as regards the principle of legality, section 198AHA(2)(a) purports to give the Commonwealth power to take, or cause to be taken, any action in relation to the arrangement or the regional processing functions of the country. "Action" includes exercising restraint over the liberty of a person.[68] The statutory provision expressly engages the common law right to liberty, which is strongly resistant to legislative encroachment absent clear legislative

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[63] *Migration Act 1958* (Cth) s 198AHA(1).

[64] 'Body politic' is used 'generically to describe a social group, which may or may not have legal personality, but has constitutional significance, in the broadest sense of that term' (*Hoxton Park Residents Action Group Inc v Liverpool City Council* (2011) 256 FLR 156 at 169 [50] per Basten JA, with whom Allsop P and Beazley JA agreed). It includes a State or part of a State, such that 'undoubtedly, the Commonwealth is a body politic' (*Coochey v Commonwealth* (2005) 149 FCR 312 at 327 [67] per Madgwick J; see also *Lipohar v The Queen* (1999) 200 CLR 485 at 506 [48] per Gaudron, Gummow and Hayne JJ where the Court framed the source of the power to enforce orders made by a State Supreme Court as being derived from 'the State as a body politic'). The Republic of Nauru is a State in the broadest sense of the word and is therefore a foreign body politic.

[65] Explanatory Memorandum, Migration Amendment (Regional Processing Arrangements) Bill 2015 (Cth) at 6.

[66] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)*(2009) 239 CLR 27 at 46–47 [47] per Hayne, Heydon, Crennan and Kiefel JJcuriam; *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 388–390 [23]–[26] per French CJ and Hayne J.

[67] Ibid.

[68] *Migration Act 1958* (Cth) s 198AHA(5).

intention.[69] Section 198AHA cannot, in those circumstances, be construed as if it stands isolated from the wider legal context in which it operates, such that the words "person or body" in s 198AHA bear the "largest meaning its words could bear".[70] In circumstances where s 198AHA purports to provide statutory authority for engagement in what would otherwise be tortious conduct, the words "person or body" in s 198AHA(1) do not unmistakably and unambiguously encompass a foreign body politic. As such, they should not be read to capture a Memorandum of Understanding which is an "arrangement" between the Commonwealth and a foreign body politic.

77. Putting aside s 198AHA, the only possible source of statutory power was the "Financial Framework Provisions" referred to in question 2 of the questions reserved (**SC 27**). They comprise s 32B(1) of the *Financial Framework (Supplementary Powers) Act 1997* (Cth), read with reg 16 and items 417.021,[71] 417.027,[72] 417.029[73] and/or 417.042[74] of Sch 1AA of the *Financial Framework (Supplementary Powers) Regulations 1997* (Cth) (**FFSP Regulations**). None of those items expressly or impliedly authorises the making of arrangements or payments concerning detention, or at least not with the requisite clarity. Neither can contracting or expenditure for detention be said be to "in relation to" or "incurred under" the MOU: cf items 417.029, 417.042. The MOU does not provide for detention. Further, the FFSP Regulations use express language when they evince any intention to authorise arrangements and contracting for or in connection with detention: see items 417.018, 417.019 and 417.020.

78. Accordingly, questions (2)(b) and (c), (4)(b) and (c), 6(b) and (c) and 8(b) and (c) should each be answered 'no'.

Validity

79. If any of the legislative provisions just identified do (properly construed) purport to authorise the relevant acts or conduct, then the plaintiff submits they are invalid. That submission is put at two levels. *First*, it follows from the second *Lim* detention principle identified above that any attempt to authorise such acts or conduct would be invalid. *Secondly*, there are a number of specific further difficulties with the (belated) legislative repair attempted by the enactment of s198AHA of the *Migration Act*.

Not for a permissible purpose that would attract the exception regarding aliens identified in Lim

80. As submitted above, an enactment that requires or authorises executive detention of aliens or that allows the executive to 'direct' the detention of those persons) will only be a valid law with respect to the subject matter enumerated in s 51(xix) of the *Constitution* if it is limited to

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[69] *Re Bolton* at 523 per Brennan J; *Coco* at 436–437 per Mason CJ, Brennan, Gaudron and McHugh JJ; *Momcilovic* at 46 [43] per French CJ.

[70] *CPCF* at 229 [76] and 230 [89] per Hayne and Bell JJ (in dissent in the result).

[71] "Regional Cooperation and Capacity Building ... Objective: To strengthen the migration and border management capabilities of governments in the Asia-Pacific region and parts of South East Asia and the Middle East by providing advice on, developing and providing a range of support and other services in respect of regional cooperation and associated activities".

[72] "Offshore Asylum Seeker Management ... Objective: To provide for capital works to ensure appropriate accommodation for asylum seekers and for upgrades and enhancements to essential amenities and security at existing facilities".

[73] "Memoranda of Understanding with Foreign Nations ... Objective: To provide funding in relation to Memoranda of Understanding arrangements with foreign nations".

[74] "Regional Processing and Resettlement Arrangements ... Objective: To provide funding for costs associated with regional processing and resettlement arrangements, including costs incurred under the memoranda of understanding between Australia and regional processing countries. This includes funding for accommodation, support, health, management services and claims processing for unauthorised maritime arrivals transferred to regional processing countries and for resettlement, returns and reintegration assistance".

one of three permissible 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 the purpose of determining whether to permit a valid application for a visa.

81. For the reasons given above in respect of the first *Lim* detention principle, that second principle is attracted by the acts and the conduct that are the subject of questions 1 and 6 in the Special Case (again, there is symmetry in the operation of the two principles, reflecting the common systemic and structural concerns to which they are each directed). To the extent that those acts and that conduct were authorised by s 198AHA or the Financial Framework Provisions (properly construed), the objective statutory purpose could not be that of removal from Australia: that purpose was already achieved by the time the plaintiff was disembarked in Nauru. Removal (like deportation or extradition) requires the relinquishment of control of the detention. There can be no continued involvement. Such matters have been distinguished in early jurisprudence from the colonial concept of transportation (being a punishment) and a factual scenario where the transporting power maintains control.[75] It appears settled that extradition requires "surrender" to another sovereign state, justified by the international pursuit of the administration of criminal law and the punishment of wrongdoers.[76]

82. Nor could it be suggested those provisions (to the extent they authorised the relevant acts and conduct) were directed to a permissible purpose of allowing the Commonwealth to receive, investigate or determine an application from the plaintiff to enter and remain in Australia; or for determining whether to permit a valid application for a visa. Indeed, even if the permissible purposes of executive detention were to extend as far as that mooted by some members of the Court (although now seemingly disavowed in *Plaintiff S4* and *Plaintiff M76*) — namely to prevent aliens from entering the general community, working, or otherwise enjoying the benefits that Australian citizens enjoy[77] — that could not possibly be a purpose of continuing to detain a person in a regional processing country.

83. Nor, particularly having regard to the matters of principle identified above at [48] to [53], would this Court accept the development of a novel category of permissible extra-judicial detention directed to regional processing by Nauru. The Commonwealth seemingly suggests that one might develop such an exception by reference to what is incidental to ss 51(xxix) and 51(xxx). It can be noted that the external affairs power has not previously been considered by any authority to permit extra-judicial executive detention (and nor has 51(xxx) which largely overlaps with s51(xxix)). The detention provided for by the laws upheld under s 51(xxix) of the *Constitution* in *Sharkey*,[78] *Polyukhovic*[79] and *XYZ v Commonwealth*,[80] was dependent upon (and a consequence of) the prior adjudication of criminal guilt. Moreover, the development of the exception in *Lim* is to be understood by reference to the fact that detention of aliens is at the core of the aliens power.[81] Extra-judicial executive detention has never been held to be at the core of the external affairs power. So, notwithstanding the fact that the asserted non-statutory executive power of detention in *CPCF* had an extra-territorial aspect,

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[75] See *Robtelmes v Brenan* (1906) 4 CLR 395 at 407 per Barton J.

[76] Quick & Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 635, cited in *Vasiljkovic* at 633 [45] per Gummow and Hayne JJ.

[77] See eg *Al-Kateb* at 658 [289] per Callinan J. See also *Fardon* at 654 [217] per Callinan and Heydon JJ.

[78] *R v Sharkey* (1949) 79 CLR 121 (***Sharkey***).

[79] *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 530 per Mason CJ, 605 per Deane J, 641–642 per Dawson J, 696 per Gaudron J and 712 per McHugh J, holding that the laws were a valid exercise of the external affairs power (criminalising conduct that had occurred outside the Commonwealth).

[80] *XYZ v Commonwealth* (2006) 227 CLR 532.

[81] *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 88 ALJR 690 (***Plaintiff S156***) at 696 [24] per curiam.

three members of this Court held that no such power existed: Hayne and Bell JJ at 240 [150] and Kiefel J at 255 [258]–[276] (cf Keane at [483]–[484]). Moreover, any such detention would be directed (at least in part) to a purpose of an exercise of foreign executive power. For the reasons given above, such a purpose is not a permissible one.

84. It follows that neither s 198AHA nor the Financial Framework Provisions could validly authorise the acts and conduct referred to in questions 1 and 6. Questions 5 and 9 should be answered 'yes' for those reasons alone. In addition, for the reasons that immediately follow, four further specific issues of validity arise as regards s 198AHA and its operation.

Further issues of validity as regards s 198AHA

85. *First*, s 198AHA(2) cannot validly authorise conduct "in relation to ... the regional processing functions of the [relevant] country". The trigger for the section is the existence of a s 198AHA(1) arrangement. On no view of the external affairs or Pacific Islands powers can the Commonwealth's entry into an arrangement in relation to a subject matter (ie the regional processing functions of a country) bring everything "in relation to" that subject matter (as distinct from matters in relation to the relevant arrangement) within the purview of Commonwealth power. A fortiori, those powers do not authorise the Commonwealth to enter into an arrangement on a subject matter and then do anything incidental to anything in relation to that subject matter: cf s 198AHA(2)(c). As Dixon J said in *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 674–5, "under colour of carrying out an external obligation the Commonwealth cannot undertake the general regulation of the subject matter to which it relates".

86. *Secondly*, s 198AHA(1) is not a valid or effective trigger for Commonwealth power. The only possibly available sources of power are the external affairs, Pacific Islands and aliens powers.

87. In assessing the availability of these powers, the legal and practical context of s 198AHA must be kept firmly in mind. A central feature of that context is that the non-citizens who are the subject of regional processing arrangements are persons who were physically in Australia and who were then taken overseas by the Commonwealth: see ss 198AB, 198AD, 198AHA. A further central feature of that context is that, but for the regional processing provisions of the Act, those non-citizens would have been detained and processed in Australia—in a process subject to the constitutional and statutory protections recognised by this Court in *Lim* and *Plaintiff S4*. The effect of the regional processing regime is, therefore, to permit the Commonwealth to generate an external affair—to take persons physically in Australia and render them physically external to Australia, and to do so in circumstances where the processing of those persons would otherwise have been a domestic matter. That context also includes that s 198AHA is a retrospective law, purporting to give retrospective legislative authority to conduct that occurred well before its enactment.

88. As to s 198AHA(1)'s reliance on the external affairs and Pacific Islands powers, the Commonwealth cannot rely on the treaty implementation aspect of those powers. That aspect of the power does not permit the Commonwealth to implement any treaty or arrangement. For example, the power is not enlivened by a treaty or arrangement unless "the treaty [or arrangement] has itself defined with sufficient specificity ... the general course to be taken": *Victoria v Commonwealth* (1996) 187 CLR 416 at 486 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) (***Industrial Relations Act Case***). Also, the power is not enlivened by a treaty which was "entered into merely to give colour to an attempt to confer legislative power upon the Commonwealth Parliament": *Tasmanian Dams Case* at 218–219 per Brennan J, 259 per Deane J; *Burgess* at 687 per Evatt and McTiernan JJ. Also the power, if enlivened, does not extend to any laws in relation to the treaty or arrangement; it extends only to laws which select "means which are reasonably capable of being considered appropriate and

adapted to achieving the purpose or object of giving effect to the" treaty or arrangement: *Industrial Relations Act Case* at 488 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ. Section 198AHA cannot be read down so that it applies only to arrangements which have the constitutionally-necessary character; neither can it be read down so that it applies only to laws which have the purpose of giving effect to such arrangements. The very breadth of the concept of "arrangement", which includes "arrangement[s]" and "understanding[s]" whether or not legally binding, demonstrates that point.

89. Neither can the Commonwealth rely on any general "external relations" element of the external affairs power: cf *Sharkey* at 136 per Latham CJ, 157 per McTiernan J, 163 per Webb J. That power should not be understood to authorise the making of any laws in relation to any arrangement between the Commonwealth and a foreign country. Certainly, it should not be understood to authorise the making of any laws in relation to a subject matter of such an arrangement. That is so at least because any "external relations" aspect of the external affairs power should not be understood to be capable of being enlivened by arrangements which do not meet the *Industrial Relations Act Case* conditions set out in paragraph 88. Otherwise, those conditions, carefully prescribed in the *Industrial Relations Act Case*, would be set to naught.

90. Neither can the Commonwealth rely on the extra-territoriality element of the external affairs power. The breadth of the definition of "regional processing functions" in s 198AHA(5) means that the section cannot be confined to ensure that it is with respect to physically external conduct. It is also significant that the Commonwealth itself generates any physical externality by first rendering people overseas under s 198AD.

91. As to s 198AHA(1)'s reliance on the aliens power, the definition of "regional processing functions" in s 198AHA(5) is too broad to apply only to functions in relation to aliens. The breadth of that definition, coupled with the breadth of the powers in s 198AHA(2), also means that the section does not have discriminatory operation in respect of aliens. The power to restrain (without judicial imprimatur) purportedly authorised by s 198AHA(2)(a) extends well beyond the purposes recognised in *Plaintiff S4* and (as submitted above) beyond the core of the power referred to in *Plaintiff S156* at [23]–[25] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

92. *Thirdly*, even if s 198AHA(1) is valid in and of itself, it does not pick up or does not validly pick up the MOUs. The MOUs lack the specificity necessity to generate an external affair. A fortiori, s 198AHA(2) (and s 198AHA as whole) cannot be said to "prescribe a regime" which the MOUs have defined with sufficient specificity: cf *Industrial Relations Act Case* at 486. Not least, nothing in the MOUs contemplates that transferees will be detained: cf s 198AHA(2)(a), (5).

93. *Fourthly*, that result also follows by reason of the fact that the MOUs have a deterrent and punitive purpose, and cannot therefore generate Commonwealth power to cause extra-judicial detention. As submitted above, punishment is not one of the purposes for which the executive can detain a person. As has been acknowledged above, the line between punitive and non-punitive purposes can of course be difficult to draw.[82] However, deterrence is on the punitive side of the line: *Re Woolley* at 26 [61] per McHugh J. General deterrence bears a punitive character because it is a "kindred concept of retribution or punishment"[83] and it has a close historical and contemporary connection to criminal sentencing and punishment for criminal guilt. It can be accepted that general deterrence will often overlap with non-punitive

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[82] *Al-Kateb* at 611–612 [135] per Gummow J. See also *Fardon* at 613 [82] per Gummow J, 647–648 [196] per Hayne J; *Re Woolley* at 26 [61] per McHugh J, 77 [227] per Hayne J.

[83] *Muldrock v The Queen* (2011) 244 CLR 120 at 138–139 [53] per curiam, citing *R v Mooney* (unreported, Court of Criminal Appeal (Vic), 21 June 1978) at 5.

protective purposes, but the two concepts are distinct.; see also *Veen v The Queen (No 2)* (1988) 164 CLR 465, 476.[84] The key test emerging from the case law is the test proposed by McHugh J in *Re Woolley*: that a law will be characterised as punitive in nature if "deterrence is one of the principal objects of the law, and the detention can be regarded as punishment to deter others".[85]

94. Here, the substantial purpose is plain on the face of the MOU: the Ministerial Conference prior to the MOU agreed (among five matters), that "any arrangements should seek to undermine the People Smuggling model and create disincentives for irregular travel, including through possible transfer and readmission arrangements in appropriate circumstances"; and in reaching the "common understanding" giving rise to the arrangements whereby the Commonwealth would "Transfer persons to Nauru…", of four matters recognised, three related to deterrence (two expressly and one impliedly).[86] There is an analogy to be drawn with a deportation order made for the sole or substantial purpose of deterring others: such an order consists of impermissible punishment.[87]

Section 61 of the *Constitution*

95. In the absence of clear statutory authorisation, s 61 of the *Constitution* could not authorise the acts and conduct referred to in questions 1 and 6. That follows from the first of the *Lim* detention principles identified above.

96. There is a further reason why that is so as regards the Commonwealth's conduct in entering into, performing and making payments under the Transfield Contract so far as the contract had the purpose or effect of causing detention. Commonwealth executive power does not extend generally to the entry into contracts and expenditure of public moneys: see *Williams No 1* and *Williams v Commonwealth* (2014) 252 CLR 416 (***Williams No 2***). Nor, as was established in *Pape*,[88] does the appropriation of moneys in accordance with the requirements of ss 81 and 83 of the *Constitution* confer some form of substantive spending and contracting power. Such authority must rather be found elsewhere in the *Constitution* or the statutes made under it: *Williams No 2* at [25]. Having regard to the antipathy towards non-statutory executive detention, it cannot be located in the *Constitution*, absent statutory authority. For that reason also, that conduct could not have been valid unless supported by a valid statute. It follows that each of questions 2(a), 4(a), 6(a) and 8(a) should be answered 'no'.

Restrictions constitute deprivation of liberty for the purposes of the Constitution of Nauru

97. For the reasons given below, it is submitted that in any event the operation of ss 198AD

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[84] *Veen v The Queen (No 2)* (1984) 164 CLR 465 (*Veen (No 2)*) at 476 per Mason CJ, Brennan, Dawson and Toohey JJ, cited in *Al-Kateb* at 612 [136] per Gummow J and *Fardon* at 608–609 [69] per Gummow J.

[85] *Re Woolley* at 26 [61] per McHugh J (emphasis added). Also *Emmerson* at 550 [138] per Gageler J (dissenting the result).

[86] To wit, "The need for practical action to provide a disincentive against Irregular Migration, People Smuggling syndicates and transnational crime and intended to promote orderly migration and humanitarian solutions" and "The impact that an arrangement could have in providing a disincentive for Irregular Migration and creating increased protection and settlement opportunities for those in need of international protection" and "The need to ensure, so far as is possible, that no benefit is gained through circumventing regular migration arrangements."

[87] See *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1 at 8–9 [28]–[31] per Allsop CJ and Katzman J. Referring to *Re Sergi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 224 at 231 per Davies J; *Re Gungor and Minister for Immigration and Ethnic Affairs* (1980) 3 ALD 225 at 232 per Smithers J; and see *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292 at 312 [76] per curiam and *Tuncok v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 172 at [42] per curiam. *Re Saverio Barbero and Minister for Immigration and Ethnic Affairs* (1980) 3 ALD 1 at 15 per Davies J.

[88] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.

and 198AHA of the Migration Act are constrained by matters relating to the lawfulness of detention under the domestic law of the regional processing country. Put simply, s 198AD(2) cannot properly be construed as authorising a taking into unlawful detention in Nauru and s 198AHA cannot properly be construed as authorising an unlawful restraint on liberty. If that is right, it is necessary to consider (albeit not to declare) whether the plaintiff's detention at Nauru was (and will be) unlawful under the law of Nauru. The Court has power to make such findings; they are justiciable as they constitute only steps "along the way" to a determination as to whether s 198AD operates with respect to the plaintiff and whether s 198AHA can operate to authorise her detention.[89] As Perram J observed in *Habib v Commonwealth*, whenever a question as the limits of Commonwealth power arises, as it does here, it is justiciable; the Court cannot "shy away from determining the question of legality when it arises".[90] That a breach of a foreign law might constitute a finding "along the way" does not mean the Court should or indeed can decline to exercise the jurisdiction conferred on it by Parliament. Further, they are also steps 'along the way' to a determination as to whether the plaintiff's detention is pursuant to the laws of Nauru in the manner relied upon by the defendants in their respective defences.[91]

98. The plaintiff was deprived of her liberty and detained in Nauru (**SC [52–76]**), within the meaning of art 5(1) of the Constitution of Nauru, for the reasons set out at [14] to [29] above. In summary, *first*, the plaintiff was not entitled to leave the Nauru RPC without permission (**SC [66]**). *Secondly*, the plaintiff was confined in a limited and finite area isolated from the residential and urban areas of Nauru (**SC [65]**). In this regard, the Nauru RPC was surrounded by a high metal fence through which entry and exit was possible only through a checkpoint (**SC [68–69]**). *Thirdly*, the plaintiff's movement within the Nauru RPC, whilst not continuously monitored (**SC [71]**), was closely regulated (**SC [72]**). *Fourthly*, the plaintiff did not consent to these restrictions (**SC [73]**). Those circumstances are materially identical to those considered in *AG v Secretary for Justice* [2013] NRSC 10 where it was held that similar restrictions on the applicants in that case amounted to a deprivation of personal liberty for the purposes of art 5(1) of the Constitution of Nauru.[92] Further, the exception in art 5(1)(h) has no operation, as the plaintiff's detention is not 'for the purpose of effecting [her] expulsion ... or other lawful removal from Nauru', but for determining whether the plaintiff should be granted a temporary settlement visa,[93] meaning that that detention infringed art 5. The reason is that unlike the situation considered by von Doussa J under the previous statutory regime, under the statutory regime in place under the *Asylum Seekers (Regional Processing Centre) Act 2014* (Nr) the detention was for the purpose of regional processing of protected persons rather than (as was the case previously) for the purpose of their lawful removal. The regional processing and the temporary settlement regime discussed at [31]–[32] above makes that quite clear.

99. If the plaintiff were taken to Nauru and was eligible to participate in the 'open centre arrangements', she would still be deprived of her personal liberty contrary to art 5(1) of the Constitution of Nauru. The plaintiff relies on her submissions at [34]–[35] above in respect of

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[89] *Habib v Commonwealth of Australia* (2010) 183 FCR 62 (***Habib***) at 96–97 [114]–[115] per Jagot J with whom Black CJ agreed; *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 370 per Gummow J; *W S Kirkpatrick Co, Inc v Environmental Tectonics Corp, International*, 493 US 400 (1989) at 409–410 per Scalia J who delivered the Opinion of the Court.

[90] *Habib* at 73-74 [28] per Perram J.

[91] See also SC 18 [66] and SC 25 [93] which directly raise the constitutional issue.

[92] *AG v Secretary for Justice* [2013] NRSC 10 at [35], [41] and [54] per von Doussa J. See also *Mahdi v Director of Police* [2003] NRSC 3 and *Amiri v Director of Police* [2004] NRSC 1.

[93] Cf *Amiri v Director of Police* [2004] NRSC 1 at [13] and [20] per Connell CJ; *AG v Secretary of Justice* [2013] NRSC 10 at [75] per von Doussa J.

those arrangements and makes the following additional submissions. Whilst the question of deprivation of liberty is one of degree or intensity to be considered on a case by case basis,[94] it has been held that a special supervision order accompanied by an order for compulsory residence, in a limited geographical area, with few opportunities for social contacts and the imposition of a curfew amounted to a deprivation of liberty for the purposes of art 5 of the European Convention on Human Rights.[95] Such a finding is informative with respect to the question of whether there is a deprivation of liberty under art 5(1) of the Constitution of Nauru.[96] The circumstances of *Guzzardi* are somewhat analogous to the "open centre arrangements" to which the plaintiff might be subject if she were taken to Nauru. *First*, she would still be required to live in the Nauru RPC (**SC [88]**). *Secondly*, her ability to leave the Nauru RPC is subject to her being granted the relevant permission (**SC [88]**). *Thirdly*, her time outside the Nauru RPC would be subject to time restrictions and a curfew. *Fourthly*, the plaintiff cannot leave the island, cannot work and cannot be visited by family members from outside Nauru.[97] *Fifthly*, the plaintiff does not consent to the "open centre arrangements" (**SC [91]**). Furthermore, the 'open centre arrangements' may be terminated at any time (**SC [88]**), in which circumstances a limited permission to leave the Nauru RPC will not prevent the arrangements from amounting to detention.[98] These restrictions that would be imposed on the plaintiff if she were taken to Nauru would also amount to a deprivation of liberty contrary to art 5(1) of the Constitution of Nauru. Questions 3(a) and (b); 7(a) and (b) and 11(a) and (b) should be answered 'yes'.

Section 198AD(2) of the Migration Act

100. Turning then to s 198AD(2), it obliges an officer of the Commonwealth to take an unauthorised maritime arrival to whom the section applies from Australia to a regional processing country. If the submissions at [54]–[96] above are correct, the otherwise mandatory language of s 198AD(2) does not extend the officer's obligation to remove an unlawful non-citizen to a place in which the Commonwealth officer knows or ought to know that the Commonwealth will be involved (in the manner described above) in the continued detention or deprivation of liberty of the plaintiff without a lawful Constitutional purpose. The section lacks the unmistakably clear language that would be required for s 198AD to authorise detention if that detention had the purpose of being antecedent to an unlawful detention in which the Commonwealth was instrumental. A taking into unlawful detention in Nauru is not authorised by s 198AD. Question 10 should be answered 'no' for that reason.

101. Further, if the alternative submissions at paragraphs [97]–[99] above are correct, the duty under s 198AD does not operate with respect to the plaintiff. If a Commonwealth officer knows or ought reasonably to know that the plaintiff's detention in Nauru would be unlawful and otherwise than in accordance with the domestic law of the regional processing country, any removal to that country would not be, within the terms of the statute, 'reasonably practicable'. That is because the act of taking the person would constitute tortious conduct on the part of the Commonwealth: namely, surrender to unlawful detention and therefore complicity or knowing involvement in unlawful imprisonment.[99] This could not favour a construction of s 198AD that would require an officer to detain a person, and coercively take

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[94] *Guzzardi v Italy* (1981) 3 EHRR 333 (***Guzzardi***) at [93] per curiam; *Ashingdane v United Kingdom* (1985) 7 EHRR 528 at [41] per curiam.

[95] *Guzzardi* at [90]–[95]. See also *Secretary of State for the Home Department v JJ* [2008] 1 AC 385 at [24] per Lord Bingham.

[96] *AG v Secretary of Justice* [2013] NRSC 10 at [39]–[41] per von Doussa J.

[97] See Dastyari, A 'Detention of Australia's Asylum Seekers in Nauru: Is Detention by Any other Name Just as Unlawful?' (2014) 38(2) *UNSW Law Journal* 669 at 678ff.

[98] *Stanev v Bulgaria* (2012) 55 EHRR 696 at [132].

[99] *CPCF* at 229 [76] per Hayne and Bell JJ.

them to a place where they will be treated otherwise than in accordance with law of that place. Such a construction is supported by the fact that the assurances given to Australia by the putative regional processing country are a factor to which the Minister must have regard when making a designation under s 198AB, and that those assurances must relate, at least in part, to the domestic law situation in that country at the time of the designation. Further, at **SC 25, para 93b**, the Commonwealth and Transfield implicitly, if not explicitly, appear to accept that their reliance on the requirement that the plaintiff reside at the Nauru RPC is subject to that requirement not being declared invalid. Question 12 should be answered 'no'.

PART VI LEGISLATIVE PROVISIONS

10 **102.** See attachment.

PART VII ORDERS SOUGHT

103. The plaintiff says that the questions reserved for the opinion of this Court should be answered in the manner indicated above. The plaintiff seeks the relief claimed in the Further Amended Application for and Order to Show Cause (**SC 858–860**).

PART VIII HOURS

104. It is estimated that 4 hours will be required for the presentation of the plaintiff's oral argument.

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