IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M68 of 2015

BETWEEN

PLAINTIFF M68/2015

Plaintiff

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First Defendant

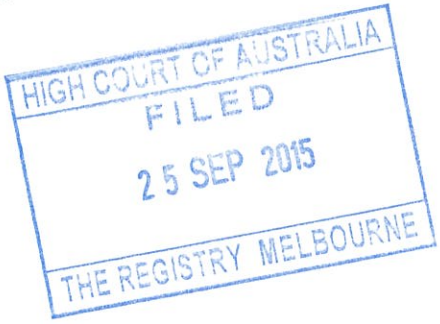
COMMONWEALTH OF AUSTRALIA

Second Defendant

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

Third Defendant

PLAINTIFF'S REPLY



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PART I CERTIFICATION

1. This reply is in a form that is suitable for publication on the internet.

PART II SUBMISSIONS IN REPLY

The *Lim* principles: doctrinal errors in the submissions of the defendants

2. The defendants each seek to eviscerate this Court's decision in *Lim.*[1] Having reduced that holding to a husk, they (unsurprisingly) discern that it presents no constitutional difficulty for them. Their analysis overlooks both later authority and underlying principle. This erroneous starting point has, in turn, infected the balance of the defendants' arguments on this issue. When those fundamental errors are corrected, the defendants' arguments wholly fail.

10 **3.** As explained in chief, the plaintiff's case is that the two interlocking *Lim* principles are properly regarded as a systemic constraint addressed to executive detention, which carefully delineates between the powers of all three branches of government for which the Constitution provides. The executive cannot authorise, enforce or direct the detention of any person (including an alien) absent clear statutory authorisation; and Parliament's power to confer such authorisation is, in turn, limited by reason of the structural separation of judicial from legislative and executive powers embedded in the Constitution. Those systemic constraints do not simply exist for their own sake. The basilar constitutional object that they serve was correctly identified by Gummow J in *Al-Kateb*[2] at 612 [137] as follows:

> The very core of liberty secured by our Anglo-Saxon system of separated powers has
20 been freedom from indefinite imprisonment at the will of the Executive.

4. His Honour adopted that passage from the reasons of Scalia J (with whom Stevens J concurred) in *Hamdi.*[3] He also there observed that Scalia J had referred to both Hamilton and Blackstone in formulating that proposition. The passage from Blackstone (also partially extracted in the joint reasons in *Lim* at 28) makes the following important point:

> To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.[4]

30 **5.** Those are the matters that animate the *Lim* principles. And they also explain why those principles are directed to the particular case of detention as the potential engine of arbitrary government: they are not more broadly concerned with other matters that might be regarded as legislative or administrative 'punishments' (although those matters may raise other Chapter III questions[5]). Nor do they rest upon a distinction between 'punitive' and 'non-punitive' measures (contra the first and second defendants' submissions (**CS**) at [58], [60] and the third

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[1] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (***Lim***).
[2] *Al-Kateb v Godwin and Others* (2004) 219 CLR 562 (***Al-Kateb***).
[3] *Hamdi v Rumsfeld* 542 US 507 (2004) 554-555 (***Hamdi***).
[4] W. Blackstone, *Commentaries on the Laws of England* 17th ed. (1830), Bk. 1, pars 132-133 (**Blackstone**).
[5] See eg *Duncan v New South Wales* (2015) 89 ALJR 462 (***Duncan***) at [41]-[51] per the Court. Significantly, and as Stellios correctly observes, the approach in *Lim* does not proceed by reference to the features commonly identified as underlying the characterisation of a law as a bill of attainder. In particular, it does not require a legislative determination of breach by some person of an antecedent standard of conduct: *Zines' High Court and the Constitution* (2015) at 313 and cf *Duncan* at [43], [49], [50] and the authorities there referred to. The analysis proposed at CS [58], [61] glosses over those differences and misses the "point" of *Lim* (that identified by Gummow J in *Al-Kateb* at [137]).

defendant's submissions (**TS**) at [44], [45]).[6]

6. As regards the last point, it is not right to suggest that *Al-Kateb* is authority for the proposition that the analysis turns upon consideration of whether detention is or is not punitive (contra CS [58]; TS [44], footnote 48). The defendants there overlook the carefully worded qualifications expressed by Hayne J (with whom Heydon J agreed): see in particular at 649 [261] – "If the line to be drawn [based on the holding in *Lim*] attaches importance to the characterisation of the consequences as punitive..." (emphasis added). It is plain that his Honour was not endorsing that bifurcated analysis and was, in fact, seeking to highlight its difficulties. That is certainly how he later explained his own reasons in *Al-Kateb*: see particularly *Re Woolley*[7] at 77 [227] where his Honour said that he had sought, in *Al-Kateb*, to "demonstrate that the line between detention which, because it is 'penal or punitive in character', can be imposed only in the exercise of judicial power, and detention which is not of that character, is difficult to draw".[8] The suggestion that that criterion has been "adopted" as the doctrine of this Court is considerably overstated.

7. The defendants' argument is also at odds with more recent statements by members of this Court, in particular that of Crennan, Bell and Gageler JJ in *Plaintiff M76*.[9] Eschewing any suggestion that the touchstone for validity is the question of whether detention is punitive or non-punitive, their Honours there made plain that the analysis will turn upon essentially two matters: ***first***, consideration of whether the detention is for one of the "limited purposes" identified in *Lim* and ***secondly***, the duration of the detention. The executive detention of aliens is permissible *only if* it is for one of those "limited purposes" (at [138], [139]) and, even then, *only if* it is limited in duration to the period of time that is reasonably capable of being seen necessary for the completion of administrative processes directed to those purposes (at [139], [140]). The Commonwealth suggests that that passage from *Lim*, as explained in *Plaintiff M76*, was merely "directed to the permissible length of the period of detention": CS [63]. That was certainly the particular issue that arose in *Plaintiff M76*. But that submission overlooks the fact that their Honours expressly referred (twice) to the "limited purposes" to which those temporal limits are "connected" (those "limited purposes" plainly being the two permissible purposes identified in *Lim* – see *Plaintiff M76* at [138]). Justice Crennan made a similar observation in *CPCF*[10] (at [217]).

8. The term "limited purposes" means what it says: the circumstances in which a deprivation of liberty may be imposed upon a person by the State, otherwise than as a consequence of the adjudication of criminal guilt by a Court, are "limited".[11] It is therefore wrong to suggest that "any non-punitive statutory purpose" will suffice (cf CS [60], our

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[6] Although, as submitted at PS [40], where it can be established that an enactment purports to authorize or require detention for a punitive purpose (acknowledging the difficulties posed by that analysis), that will be sufficient to establish invalidity. For the reasons given at PS [93], [94], that is why s198AHA cannot validly pick up the MOUs. In addition to the matters there referred to, this Court can have regard to the fact that it is the avowed intention of the Commonwealth never to resettle the Transferees in Australia (cf TS [57]). The intention of the Commonwealth in this regard is a notorious fact to which it is expected the Commonwealth and Transfield will agree. For the reasons given at PS [93], [94], the current case supplies an example.

[7] *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 (***Re Woolley***).

[8] It is plainly wrong to suggest that his Honour was there 'adopting' that distinction: cf CS [58] and footnote 66. His Honour made similar observations in *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 ***(Behrooz)*** at 542 [171]; in *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 (***Fardon***) (at 647-648 [196]), where he seemingly agreed with Gummow J as to the difficulty presented by such a criterion – see at 612-613 [81], [82]; and in *Vasiljkovic v Commonwealth of Australia* (2006) 227 CLR 614 where he joined with Gummow J in referring (at 648 [108]) to Gummow J's alternative formulation of the *Lim* principle in *Fardon*, without in any way suggesting that it is in some fashion inconsistent with the "fundamental basis of the analysis in *Lim*" (cf CS footnote 67).

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

[10] *CPCF v Minister for Immigration and Border Protection* (2015) 89 ALJR 207 (***CPCF***).

[11] See again, albeit referring to the position of citizens, *Re Woolley* at 12 [17] (Gleeson CJ) and note PS [40].

emphasis). Let it be assumed that that is so: relying upon s 51(vi) of the Constitution and an asserted purpose of incapacitating dangerous persons in a time of perceived terrorist threats, the Commonwealth could legislate to indefinitely incarcerate Australian citizens based solely upon perceived "dangerousness" (ie a non-punitive prophylactic purpose) and without any antecedent finding of criminal guilt: see *Hamdi* at 556-557. Blackstone's "dangerous engine of arbitrary government" would thereby be perfected and engaged.

9. Those possibilities find no foothold in the jurisprudence of this Court. It should rather be accepted that the propositions identified in *Plaintiff M76* represent "the constitutional principle for which *Lim* remains authority": at 370 [141]. Indeed, that is how *Lim* was apparently understood by all members of the Court in *Plaintiff S4*[12] (see particularly at [25]). While it may accepted that *Plaintiff S4* was concerned with the statutory purposes of the Act, those purposes were identified by reference to that constitutional context and the holding in *Lim*: see the first sentence at [26] (which the Commonwealth selectively omits from the passage extracted at CS [64]).

10. Once that is acknowledged, the defendants' arguments largely reduce to semantic quibbles. For that understanding of *Lim* necessarily involves: **a rule**: being that executive detention absent judicial warrant is generally impermissible – that is, a negative limitation upon power which might equally aptly be described as an "immunity" (see, by way of analogy, *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 at 560 per the Court and cf CS [55], [56]); and **exceptions to that rule**, which are defined by <u>both</u> purpose and duration in the manner just identified.

11. The plaintiff accepts (see PS [40]) that the class of case that may constitute an exception is not closed. But that does not mean that the exceptions eat the rule or that the *Lim* principles are in fact a circular exercise in futility. And for the reasons given at PS [79]-[84] and further below, no such exception is applicable here.

12. The passage from Gaudron J's reasons in *Kruger*[13] that the Commonwealth seeks to set in place of the holding in *Lim* has never commanded acceptance by a majority of this Court. The passages from the reasons of individual justices said to have cited Gaudron J's reasons with "approval" are in some cases more equivocal than the Commonwealth has suggested.[14] Indeed the passage from Gleeson CJ's reasons in *Mowbray*[15] at 330 [18] makes no reference to *Kruger* at all and does not otherwise endorse Justice Gaudron's approach: cf CS fn 62. The correct approach is that explained above.

The First *Lim* Principle and the need for legislative authority

13. Those doctrinal matters set out above highlight the difficulties with the attempt by the defendants to rely upon the law of Nauru and its status as a sovereign nation. These difficulties commence with the defendants' approach to the first *Lim* principle. Whilst seemingly accepting that principle, Transfield asserts that it has no application where the executive seeks to detain a person outside its own territorial jurisdiction because "the authority to detain may be conferred by the law of the place where detention occurs": TS [40]. A similar approach is seemingly adopted by the Commonwealth: see CS [16] and [67] and note also CS [84]-[87].

14. There are four fundamental flaws in that submission: ***First***, it is axiomatic that another polity (be it a State or a foreign government) cannot unilaterally invest functions or powers in

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[12] *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 (***Plaintiff S4***).
[13] *Kruger v Commonwealth* (1997) 190 CLR 1 (***Kruger***).
[14] See eg *Al-Kateb* at 648 [258] (Hayne J) (observing only that the passage from *Kruger* demonstrates that "that assumption [that there are only a limited class of cases in which executive detention can be justified] is at least open to doubt").
[15] *Thomas v Mowbray* (2007) 233 CLR 307 (***Mowbray***).

officers of the Commonwealth: *Hughes*[16] at 553 [31] (quite apart from s 109 of the Constitution vis a vis the States, that passage indicates that Commonwealth officers are not to be regarded as receptacles standing ready to receive powers purportedly conferred by any polity that may choose to do so). So, even if a local law is necessary to avoid tortious liability, that does not answer the question as to the authority of Commonwealth officers to participate in such conduct: cf TS [40].

15. ***Secondly***, as Professor Saunders has persuasively argued (referring to, inter alia, the cooperative arrangements in issue in *Hughes*), the very existence of such arrangements raises "difficulties for the underlying principles of the constitutional system unless these are taken into account", including the principles of "legal and political accountability for administrative action".[17] That is the point that is made in PS [45]-[50]. And, particularly in the area of detention (having regard to Blackstone's observations in the passage extracted above), those considerations highlight the special need for judicial vigilance in this area.

16. ***Thirdly***, as *Hughes* also indicates, any attempt to confer such powers on the Commonwealth executive is subject to the operation of Chapter III, which, in the current context, immediately directs attention to the *Lim* principles.

17. ***Fourthly***, as regards those principles, the doctrinal matters identified above and in chief make plain that the animating concern is that of 'freedom from indefinite imprisonment at the will of the [Commonwealth] Executive' (see again the passage from *Hamdi* adopted by Gummow J in *Al Kateb*). That, in turn, points to the importance of the matters of substance identified at PS [53]-[66], which (taken together) demonstrate that the Commonwealth has secured for itself almost complete control over the body and destiny of the plaintiff, having first procured or caused her detention. On any common sense analysis, that is detention or imprisonment at the Commonwealth's will: see the submissions at PS [65]-[69], which none of the defendants address in any meaningful fashion.

18. Indeed, it is notable that, save for the formulaic incantations regarding Nauruan law and sovereignty (which here, as elsewhere, mask deeper questions about their meaning and application – see *CPCF* at [143]), the defendants actually dispute very few of those matters of substance relating to the Commonwealth's role in the plaintiff's detention. As regards the significance to be attributed to that material, there are two levels at which the Commonwealth's degree of involvement precludes the Commonwealth from attributing exclusive causal responsibility for the detention of the plaintiff to foreign law. First, the direct control, by the Commonwealth, over the fact of the detention of the plaintiff under Nauruan law. Second, the Commonwealth's position of influence over the day to day conduct of the plaintiff's detention under Nauruan law.

19. The Commonwealth's direct control is first expressed through its control over the transfer of the plaintiff to Nauru, including the application for a Regional Processing Centre Visa (**RPC visa**) made on behalf of the plaintiff Special Case (**SC**) [52]-[87]. That RPC visa connects the Nauru detention regime (the requirement to reside at the Nauru RPC) with the individual transferee[18] who is, without their consent (SC [26](c)), endowed with a visa: the fees for which had cost the Commonwealth $27,893,633.00 as at 30 March 2015 (SC [26](e)),

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[16] *R v Hughes* (2000) 202 CLR 535 (***Hughes***)

[17] Saunders, Cheryl "Administrative Law and Relations Between Governments: Australia and Europe Compared", (2000) 28 FLR 263 at 290 (Note also *Australian Securities and Investments Commission v Ednesor* (2001) 204 CLR 559 at [11], [12], referring to Professor Saunders' article and the issues of principle she identified).

[18] The plaintiff's RPC visa specified that the plaintiff must reside at the Nauru RPC pursuant to reg 9(6)(a) of the *Immigration Regulations 2013* (Nr) and subsequently reg 9(6)(a) of the *Immigration Regulations 2014* (Nr) SC [53]-[55]; and all transferees have in fact resided at the Nauru RPC [SC [26](f)].

which figure has by now no doubt risen.[19] In addition to bringing the transferees into detention on Nauru, it is apparent from the Special Case that the Commonwealth can remove, at will, any transferee it chooses out of the Nauruan detention regime, either by transferring them to Australia or to a third country. While the Commonwealth may have no express or direct legal right to do so enshrined by Nauruan law, the Court should not ignore the fact that as a matter of practical reality, the Commonwealth has removed large numbers of persons – over whom they have no technical legal dominion – from detention on Nauru (SC [41]-[47], [78]). One way in which they may lawfully do this, without seeking the permission of Nauru, is by instructing Transfield to instruct Wilson Security authorised officers to escort a particular person out of the Nauru RPC, since the Centre rules permit a person leaving the Nauru RPC if they are permitted or accompanied by an authorised officer (SC Book p 811). The Administrative Arrangements contemplate that a Transferee will remain subject to Commonwealth control throughout their time in Nauru – for example 5.4.3 of the Administrative Arrangements (SC Book p 82) permits Australia to provide information to a third country for the purposes of arranging the involuntary return of a Transferee to that country. Moreover, the Commonwealth has contractual control over Wilson Security, 138 of whose staff have been designated "authorised officers" with the power to use reasonable force to search, question and require to produce documents, persons who desire to enter or leave Nauru: *Immigration Act 2014* (Nr) s 6(1). Obstructing or hindering an authorised officer carries criminal sanction under Nauruan law: *Immigration Act 2014* (Nr) s 6(6). Further, the necessary physical preconditions of the detention: being the construction and maintenance of the security infrastructure, are provided exclusively by the Commonwealth (SC [30]).

20. The Commonwealth's influence over the day to day conduct of the detention regime in Nauru, even though that regime ultimately purports to be sanctioned by Nauruan law, demonstrates that the detention remains, as a matter of fact, Commonwealth detention. It is not simply that the Commonwealth funds all aspects of the detention through the Transfield contract. Officers of the Australian Border Force (wearing the Commonwealth Coat of Arms) occupy an office at the Nauru Regional Processing Centre (**Nauru RPC**) and carry out functions in relation to Transferees or the Nauru RPC (SC [37]). Complaints about Transfield or Wilson staff are reported to the Commonwealth (SC [39]-[40]), and the Commonwealth meets regularly with the contractors running the Nauru RPC (SC [36]). The Commonwealth retains step-in rights under the contracts covering all aspects of the detention "services" provided (SC [24]-[25]), including the ability to directly instruct the Wilson Security authorised officers. The Commonwealth is provided information about individual detained transferees (SC [30](d)). While the Nauruan Operational Manager technically has oversight of the running of the detention centre, the bilateral committees on which the Commonwealth has a number of representatives, also have functions in relation to the operation of the Nauru RPC (SC [31]-[34]). Commonwealth representatives are involved in committees that address the most minute details of the detention, such as activities for the Transferees, as well as more weighty matters such as legal challenges and overall operation of the RPC (SC [33]-[34]). In addition, the "Programme Coordinator" role under the Administrative Arrangements has at all times been filled by a Commonwealth officer (SC [35]). The detention is therefore caused, procured and effectively controlled by the Commonwealth: no less so because Nauruan officers are also involved in the detention or that the detention is purportedly imposed to satisfy the requirements of Nauruan laws.

21. The Commonwealth also submits (at [68]) that to "enter the territory of *Lim*", it is

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[19] It is immaterial that there is a statutory "duty" under s 198AD of the *Migration Act 1958 (Cth)* (**Migration Act**) to remove to a regional processing country: the fact of the removal connects the continuing detention to the Commonwealth and its purposes. Moreover, the plaintiff is only to be taken to Nauru because of a Ministerial direction to that effect (SC [83]).

necessary for the legislation in question to authorise "detention in custody" and that there is no detention of the plaintiff in custody by the Commonwealth here. To the extent that this is merely a further iteration of the appeal to Nauruan law and sovereignty, the answer is that given above. Moreover, *Eatts v Dawson* (1999) 21 FCR 166 (***Eatts***), to which the Commonwealth refers, illustrates the breadth of the notion of "custody".[20] In particular, it confirms that custody may subsist without immediate physical control. Morling and Gummow JJ held that to confine the meaning of "custody" to "that state which follows arrest or similar official act" was "to pay too close a regard to legal forms rather than the substantive character or quality of police activity".[21] The same point applies here: see PS [66].

10 **22.** For those reasons and those given in chief, it should be accepted that the first *Lim* principle is engaged by the conduct the subject of questions 1 and 6. Attention is then required to the second *Lim* principle, which is concerned with whether that conduct is justified by a valid Commonwealth law.

Construction of s 198AHA

23. Section 198AHA of the *Migration Act* does not extend to statutorily authorising the Memorandum of Understanding (**MOU**): see PS [70]-[76]. The Commonwealth submits that such a construction is "perverse" as it allows the Commonwealth to enter into arrangements with persons and companies within countries and supra-national entities, but not arrangements with countries (CS [34]). But the "perversity" the Commonwealth discerns cannot displace
20 the clear meaning of the statutory text, read in its statutory context.[22] In the context of Division 8, Subdivision B of the *Migration Act*, the word "country" or "regional processing country"[23] is consistently used to identify a foreign body politic so designated. Belated appeals to extrinsic materials or the supposed motives of the legislature cannot supply what is lacking from the statutory text, which marks out and confines, exhaustively, the area in which the task of construction takes place. Transfield submits that in addition to the MOU, the Transfield Contract is also an "arrangement" that triggers the operation of s 198AHA (TS [26]). The plaintiff accepts that may be so. However, as Transfield also correctly accepts, the provision cannot have a self-levitating effect if the operation of the provision is not first triggered by entry into the MOUs. For the reasons given below and in chief, it does not
30 validly pick up those instruments.

24. Both the Commonwealth and Transfield make too much of the supposed limiting effect of s 198AHA(3): CS [41]-[42], TS [24]. The distinction the Commonwealth seeks to draw at CS [40] is too simplistic; a statute can make things "rightful" or "lawful" for some purposes, but not for others.[24] And so it is not to the point whether s 198AHA(2) does or does not purport to operate as a "defence" to tortious conduct. What is important is that it purports to supply the authority to participate in conduct that engages the first *Lim* principle (see above).

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[20] See also *R v Goodwin* [1993] 2 NZLR 153 at 161 per Cooke P.

[21] *Eatts v Dawson* at 179 (Morling and Gummow JJ). As submitted in chief (PS [66]) that is consistent with the approach taken in the habeas cases. For example, in *Rahmatullah* Lord Kerr said this (at [43]): The effectiveness of the remedy would be substantially reduced if it was not available to require someone who had the means of securing the release of a person unlawfully detained to do so, simply because he did not have physical custody of the detainee – "actual physical custody is obviously not essential" per Atkin LJ in Ex p O'Brien [1923] 2 KB 361, 398 and Vaughan Williams LJ in R v Earl of Crewe, Ex p Sekgome [1910] 2 KB 576, 592, stating that the writ "may be addressed to any person who has such control over the imprisonment that he could order the release of the prisoner.

[22] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 at 46-47 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Zheng v Cai* [2009] HCA 52; (2009) 239 CLR 446 at 455-456 [28]; *Newcrest Mining Limited v Thornton* [2012] HCA 60; (2012) 248 CLR 555 at 581 [70] (Crennan and Kiefel JJ); *King v Philcox* [2015] HCA 19, [31] (French CJ, Kiefel and Gageler JJ), [120] (Nettle J).

[23] "Regional processing country" is also defined in s 5 of the *Migration Act* as "a *country* designated by the Minister under subsection 198AB(1) as a regional processing country".

[24] See, by way of analogy, *State of NSW v Kable* (2013) 252 CLR 188, [52] (Gageler J).

That then requires consideration of whether that authorisation is valid, which falls for consideration under the second *Lim* principle to which it is now convenient to turn.

The second *Lim* principle and the validity of the impugned enactments

25. For the reasons already given, it is not right to suggest that the questions of validity that arise from the second *Lim* principle as regards s 198AHA and the Financial Framework Legislation[25] are to be answered (perfunctorily) in the affirmative upon the identification of "any" non-punitive statutory purpose. That, as the Commonwealth effectively concedes (CS [61]) will usually reduce to nothing more than a question of whether there is a sufficient connection with a head of power. As this Court has made clear in the context of other constitutional constraints (particularly s 51(xxxi)) that form of arid analysis is not the correct approach: see *Airservices Australia v Canadian Airlines* (2000) 202 CLR 133 at 250 [339], [341] per McHugh J and *Theophanous v Commonwealth* (2006) 225 CLR 101 at 127 [68] per the Court. Questions of characterisation are separate from the issue of whether such constraints are engaged. The Commonwealth submissions at CS [70]-[72] should be rejected for that reason.

26. It is also wrong to suggest that there is any analogy between the purpose to which the plaintiff's detention is directed and the limited purposes identified in *Lim* and reiterated in *Plaintiff M76* (at [140]): 'to consider and grant permission to remain in Australia, and to deport or remove [from Australia] if permission is not granted" (emphasis added). Ironically, having set so much store upon the question of sovereignty, the Commonwealth fails to engage with that concept at the stage in the analysis that it actually matters. The point made in *Lim* was that the powers to admit or deport were fundamental incidents of "sovereignty over [Australian] territory" (at 29) and that an associated power to detain could be seen as a necessary incident of those powers (at 32). None of that bears any connection to detention in the exercise of the powers of a foreign sovereign over foreign territory (contra CS [76]). Nor, save for resort to the supposed dire 'consequences' (as to which see further below) does the Commonwealth explain why the Court should accept that proposition: it is bare assertion unsupported by reasoning. The same is true of the similar submissions made by Transfield: TS [56].[26]

27. The Court should not accept those assertions, particularly in circumstances where the point made by Professor Saunders and at PS [45]-[50] suggests a cautious or conservative approach is required. There being no other permissible purpose, *Lim* dictates that (to the extent they authorise the conduct the subject of questions 1 and 6), s 198AHA of the Act and the Financial Framework Legislation are invalid.

28. Western Australia (intervening) seemingly asserts that there is, in addition, some unspent permissible object of removal from Australia, or perhaps segregation from the Australian community: WA [26]-[33], [38]. To the extent the Court has regard to those submissions (that are not put by any of the defendants) the first suggested purpose is untenable for the reasons given at PS [81]: for that would necessarily involve a reinvigorated system of colonial transportation, that was distinguished from removal or deportation at a very early time in this Court's history: see again *Robtelmes v Brenan* (1906) 4 CLR 395 per Barton J.

29. The same point applies to the second suggested object (segregation from the Australian community). Moreover, it is doubtful that such an object is a permissible one. The contrary

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[25] *Financial Framework (Supplementary Powers) Act 1997* (Cth) and the *Financial Framework (Supplementary Powers) Regulations 1997* (Cth) (together, **the Financial Framework Legislation**).

[26] The criticisms made of the plaintiff's submissions by WA at [34]-[37] similarly overlook the fact that the premise for what was said in *Lim* related to territorial sovereignty.

view, expressed by some members of the Court, involved the notion that s 51 (xix) confers power upon the Commonwealth Parliament to make laws with respect to the "exclusion" of aliens.[27] That issue has not been the subject of an authoritative decision of this Court[28] and rests upon an erroneous understanding of the executive power to "exclude" – the power to exclude entry at the border being no more than the "complement" of the power to expel or deport an alien in territory. For that reason, and the powerful reasons of Gummow J in *Re Woolley* at 52-55 [135]-[151], it should not be accepted that that is a permissible purpose. Notably, in explaining the holding in *Lim* in *Plaintiff M76*, Crennan, Bell and Gageler JJ did not suggest that that was one of the "limited purposes" to which the detention of aliens could be validly directed.[29] Nor was reference made to that object in *Plaintiff S4*.

30. As to the asserted untoward (or, as Transfield would have it, "bizarre") consequences of the plaintiff's argument (see TS [58] and CS [76]), those observations merely reflect the fact that the necessary outcome of any constitutional constraint is that there will be things that one or more of the organs of government may wish to do, yet cannot validly do. It is, on one view, equally 'bizarre' that disobedience to the Parliament may support extra-judicial detention (as punishment for contempt); and yet essentially identical conduct directed to a different organ of the same government (the executive) would not: see *Lim* at 28 and note *R v Richards; Ex Parte Fitzpatrick and Browne* (1955) 92 CLR 157. That "bizarre" consequence has not led to the development of a novel species of contumelious conduct warranting detention; and nor does the similar assertion made in the current case require that one ignore the fact that, for reasons of history and of principle, the exceptions identified in *Lim* are necessarily territorially specific.

Section 198AHA is not supported by a positive head of power

31. Section 198AHA is not supported by the **aliens power**: cf CS [43]-[45]; TS [36].

32. ***First***, in assessing the validity of s 198AHA, it is not to the point that this Court held in *Plaintiff S156*[30] that ss 198AB and 198AD of the *Migration Act* are supported by the aliens power: cf CS [43]. The crux of the decision in *Plaintiff S156* was that the *removal* of aliens from Australia is within the core of the aliens power. Nothing in *Plaintiff S156* stands for the proposition that the aliens power—either in general or once the aliens power is read as being subject to Chapter III—authorises the continued procuring or effective control of aliens' detention once the alien has been removed to another country. Indeed, so far as the Court addressed the issue of continued Commonwealth involvement after removal in *Plaintiff S156*, it observed only that the subdivision said virtually "nothing … about what is to happen to such persons in regional processing countries": at 697 [32].

33. ***Secondly***, there is no principle that the Commonwealth Parliament can regulate a matter if the matter has been brought about by a valid exercise of power: cf CS [43]. That would be like saying that the Commonwealth can regulate intrastate trade which has been brought about

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[27] See *Al-Kateb* at 584 [45] and 586 [49] (McHugh J) and at 648 [255]-[256] (Hayne J) (with whom Heydon J agreed at 662-663 [303] and *Re Woolley* at 26 [61] and 46-47 [115] (McHugh J) and at 75-76 [222]-[223] (Hayne J) (with whom Heydon J agreed at 87[270]). Gleeson CJ's comments in *Re Woolley* at 14-15 [26]-[28] do not extend that far - while his Honour explained *Lim* on the basis that the "power of exclusion" supported detention, his Honour characterised that power as one to keep those persons separate from the community "while their visa applications were being investigated and considered" (at 15 [27]).

[28] While Callinan J in *Al-Kateb* said that it "may be the case" that detention for such purposes is constitutionally permissible (and identified a number of practical considerations that might favour that view) he expressly refrained from deciding that issue: at 658 [289]. Moreover, Hayne J's reasons in *Al-Kateb* may suggest that that purpose is not sufficient in itself and may require (in addition) an ongoing purpose of removal: see the words "in the meantime" at 648 [255] but cf the seemingly broader formulation at 650-651, [267].

[29] Although cf the passage from Hayne J's reasons in *Wooley* extracted by Kiefel and Keane JJ in *Plaintiff M76* at 385 [207].

[30] *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 88 ALJR 690 (***Plaintiff S156***)

because of the valid regulation of interstate trade.

34. ***Thirdly***, at no point do any of the defendants advance a construction of the critical, limiting text in s 198AHA, namely, the concept of "the role of the country as a regional processing country". The premise upon which the defendants' submission appears to proceed is that a country's "role … as a regional processing country" is confined to steps the country takes in inquiring into whether aliens removed to that country under s 198AD should be given a visa: see, eg, CS [44]. That premise is, at best, questionable in circumstances where, in *Plaintiff S156*, this Court was willing to say no more than that the scheme "may imply that [transferees'] refugee status is to be determined in [the] country" to which they are removed: at 697 [32] (emphasis added). This Court was appropriately reluctant to make any stronger statement in *Plaintiff S156*: it is tolerably clear from s 198AB that a country can be designated as a regional processing country even if it does not intend to make a refugee assessment;[31] and it is crystal clear from that provision that, even if the country has given an assurance that it will undertake a refugee assessment, that assurance need not be legally binding: s 198AB(4). Indeed, the only condition attending the exercise of the power to designate a country as a regional processing country is that the Minster "thinks that it is in the national interest" to do so: s 198AB(2). All that can be gleaned from s 198AB is that a country's role as a "regional processing country" is its role in pursuing whatever the Minister thinks to be the national interest. The aliens power does not extend to authorising the enactment of any laws in respect of steps taken by foreign countries in pursuit of what the first defendant thinks is the national interest.

35. ***Fourthly***, it can be accepted that a law may be with respect to aliens although it confers or imposes rights, powers, liabilities and privileges on persons other than aliens: see CS [43]. It remains necessary for the law, properly construed to have a sufficient connection with aliens. In *Cunliffe v Commonwealth* (1994) 182 CLR 272, the case on which the Commonwealth defendants rely, the regulation of (non-alien) migration agents was within the aliens power because the regulation was protective of aliens (see at 295 (Mason CJ), 334 (Deane J)) and regulated the provision of services to aliens and no one else (see at 295 (Mason CJ); see also at 315 (Brennan J)). On no view can s 198AHA be said to be a law of that kind.

36. One thing is clear: a law which "appl[ies] indifferently to [aliens] and others" is not supported by the aliens power: see *Williams v Commonwealth (No 1)* (2012) 248 CLR 156 (***Williams (No 1)***), 277 [272] fn 455 (Hayne J). Having regard to the open-ended nature of the concept of a country's "role … as a regional processing country", together with the breadth of the conduct purportedly authorised by s 198AHA(2), it cannot be said of s 198AHA that it operates in some discriminatory manner in respect of aliens.

37. ***Fifthly***, Transfield errs by focusing on the legal and practical effect of the Transfield Contract or other actions by the Executive: TS [36]. The relevant question is the legal and practical operation of s 198AHA.

38. ***Sixthly***, Transfield errs in contending that there is no need for a separate head of power to support an "arrangement" if the section as a whole is a law with respect to aliens: cf TS [36]. The "arrangement" referred to in s 198AHA(1) is a *valid* arrangement, not an arrangement which is a nullity. The *Williams* cases make it clear that, putting aside various confined categories, valid statutory authority is needed for the Commonwealth to enter into contractual arrangements. *That* is why a head of power (and the making of a valid statute in exercise of that power) is needed for the Transfield Contract to have been validly entered into

[31] The giving of an assurance to that effect is a consideration, not a jurisdictional constraint on the designation: s 198AB(3)(a)(ii) of the *Migration Act*.

and, accordingly, picked up by s 198AHA(1).

39. Nor is s 198AHA supported by any **external relations** element of the external affairs and Pacific Islands powers: cf CS [46]–[49], TS [37]. The plaintiff makes seven submissions in reply on this issue.

40. ***First***, it can be noted that none of the defendants rely on any treaty implementation aspect of the external affairs power. That, presumably, is because they (correctly) believe that, on no view, can s 198AHA be said to be proportionate to the implementation of some treaty: it does not hinge on the existence of a treaty; nor does it hinge on the existence of any international arrangement which prescribes, with sufficient specificity, the regime to be taken; nor do its provisions ensure that the action it authorises is proportionate to implementing any such arrangement.

41. ***Secondly***, it follows that the defendants' contention is therefore that the external affairs power authorises the enactment of a provision, which is triggered by entry into an "arrangement" with another State, but which otherwise does not meet any of the conditions which must attend a law said to be supported by the power to implement treaties. Prima facie, this result would dismantle the constraints on the treaty implementation limb articulated by this Court in the *Industrial Relations Act Case* .[32] To say that such a result should not lightly be admitted is not to read one aspect of the external affairs power as constraining another; it is simply to read the Constitution coherently and as a whole.

42. ***Thirdly***, the Commonwealth defendants' response to this appears to be that, by regulating conduct in relation to regional processing functions, s 198AHA regulates a matter which "necessarily ... concerns Australia's external relations, [or] at least its relations with the regional processing country": CS [47]. That statement is left at the level of unsupported assertion. It invites several immediate retorts: (i) under the statutory scheme, any interest which a foreign State has in being assisted with their processing of transferees is an interest which the Commonwealth itself creates by transferring the person under s 198AD; (ii) nothing in s 198AB—which concerns the designation of regional processing countries—has the result that the scheme is triggered only where a foreign State has an interest in regional processing; (iii) there is no reason to suppose that *all and any* conduct in relation to an arrangement or regional processing function concerns Australia's relations with a foreign State, but that is the hypothesis upon which the validity of s 198AHA depends. More fundamentally, the Commonwealth defendants' submission fails to articulate with any precision what criterion of constitutional validity s 198AHA is said to meet. The criterion which the Commonwealth defendants appear to advance is that a law is supported by the external relations aspect of the external affairs power if it is on a matter which concerns Australia's external relations. *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 does not state a proposition in those terms: cf CS [47] (fn 43). A criterion of that kind suffers from debilitating vagueness: what does it mean for a "matter" to "concern" Australia's external relations? Nothing in the Commonwealth defendants' submissions gives any guidance. If (as the Commonwealth defendants submit) it is sufficient for a law to be on a matter which concerns Australia's relations with *one* country, then virtually everything would be within Commonwealth power—for, in the contemporary interconnected world, almost any subject matter can affect Australia's relations with at least one other country. The Commonwealth's submission has the consequence that, once a subject matter meets the (vague) criterion of concerning Australia's external relations, it is as if that subject matter were inserted as a new subject matter power into s 51 of the Constitution. That outcome ought not be contemplated. The true principle is that, while the external affairs power does have an "external relations"

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[32] *Victoria v Commonwealth* (1996) 187 CLR 416 (***Industrial Relations Act Case***)

aspect, a law is not supported by that aspect unless the Court can ascertain that it is reasonably capable of being seen as reasonably appropriate and adapted to the pursuit of Australia's external relations. The Commonwealth defendants do not advance any submission that s 198AHA meets that criterion. It does not: nothing in s 198AHA ensures that it is tailored to any discernible pursuit of external relations.

43. ***Fourthly***, the Commonwealth parties' submission at CS [47] proceeds upon a misconstruction of s 198AHA:[33] s 198AHA does not purport to authorise action only in relation to the regional processing functions which are the subject of the s 198AHA(1) arrangement; it purports to authorise action in relation to *any* regional processing functions, irrespective of whether they are the subject of the arrangement or not. That is clear from the fact that s 198AHA(2) carefully distinguishes between actions in relation to the arrangement and actions more generally in relation to regional processing functions.

44. ***Fifthly***, it is an error to ask, as Transfield does, whether the Constitution could "support the actions at issue in these proceedings": TS [37]. The question is whether the Constitution supports s 198AHA; even if it were the case that the Commonwealth could have enacted a valid law authorising the relevant conduct, that would be beside the point.

45. ***Sixthly***, the same error infects Transfield's contention that s 198AHA is valid because it authorises the taking of action facilitating the implementation of the law of a foreign sovereign State: TS [37]. Nothing in s 198AHA suggests that power under it can only be exercised or will characteristically be exercised to facilitate the implementation of the law of foreign States. Indeed, the definition of "regional processing functions" in s 198AHA(5)—which include the implementation, not only of "law", but also of "policy" or "any action"—makes it unambiguously clear that s 198AHA is intended to have a far broader sweep than facilitating the implementation of law. Again, it is an error to ask whether the Constitution could support the conduct in which the Commonwealth has engaged purportedly in reliance on s 198AHA; the starting point must be the statute: see, eg, *Wotton v Queensland* (2012) 246 CLR 1 at 14 [22] (per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

46. ***Seventhly***, at TS [37], Transfield misquote the dicta in *Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 (***Ex parte Te***) at [111] and therefore miss the central point. The dicta in *Ex parte Te* concerned the *status* of *citizens* of one State while in another State, *not* the general "treatment" of persons "associated with" one country while in the territory of another: see *Ex parte Te* at 193 [111] (Gummow J).[34] Further, it is clear from the definitions of "action" and "regional processing functions" in s 198AHA(5) that the section is intended to travel well beyond the treatment of persons while in the territory of another.

47. Section 198AHA is also not supported by the **physical externality** aspect of the external affairs power: cf CS [50]–[52], TS [38]. ***First***, the core of the Commonwealth defendants' submission is that the physical externality aspect of the external affairs power extends to laws regulating conduct which is "directed to carrying out an object physically external to Australia": CS [50]. This submission invites the immediate response that nothing in the legal operation discloses an intention to regulate conduct directed to carrying out physically external objects: s 198AHA makes no mention of "object" or "purpose"; and, more fundamentally, nothing in the section indicates that "regional processing functions"

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[33] That is, the reference to "those regional processing functions" in the third sentence.

[34] "As to external affairs, it may be remarked that the status of the citizens of one state whilst in the territory of another is '[o]ne of the most important and delicate of all international relationships'". This point is also clear from the authority which Gummow J quoted, *Hines v Davidowitz* 312 US 52 at 64 (1941): "One of the most important and delicate of all international relationships … has to do with the protection of the just rights of a country's own nationals when those nationals are in another country".

necessarily, or even characteristically, occur outside Australia: see, in particular, the definition of "action" and "regional processing functions" in s 198AHA(5). At paragraph [68], the Commonwealth defendants cite *Mowbray* (in support of the proposition that the physical externality aspect of the external affairs power supports laws regulating intra-territorial conduct directed to carrying out a physically external object. However, *Mowbray* states no proposition of the kind now advanced by the Commonwealth defendants. The dicta in *Mowbray* at [153] can stand for no more than that the Commonwealth can enact prophylactic laws to prevent an apprehended foreign injury. s 198AHA does nothing of the sort. The true principle is that the Commonwealth *can* regulate some intra-territorial conduct under the physical externality element of the external affairs power, but it can do so only where the regulation of that intra-territorial conduct is properly incidental to the regulation of some matter within the core of the power, that is some physically external person, place, matter or thing. Nothing in s 198AHA tethers its scope to the constraints imposed by that principle.

48. ***Secondly***, in any event, none of the defendants explain why the physical externality aspect of the external affairs power extends to authorising the causing, procuring or effective control of extra-judicial detention: cf *Re Woolley* at [63] (McHugh J); *Al-Kateb* at [39], [42] (McHugh J).

49. ***Thirdly***, the Commonwealth defendants make no attempt to identify what they describe as the "narrowest, valid, construction" of s 198AHA at CS [51]. If that construction is to involve a carve-out of some unspecified categories of intra-territorial conduct, it is not obvious how that construction is a textually available one. Nor is it obvious that Parliament would have intended such a carve-out.

50. ***Fourthly***, the Commonwealth defendants also err in contending that s 198AHA(2) can be read down so that it refers only to actions and payments within a head of power: CS [51]. Questions as to how *Hughes* sits with *Pidoto v Victoria* (1943) 68 CLR 87 (***Pidoto***) can be put to one side. The approach in *Hughes* could be available if s 198AHA was a provision relevantly "expressed in general terms": *Hughes* at 556 [43]. Yet, Parliament has made its intention clear and in specific terms in s 198AHA: that the provisions is intended to authorise "any" action, that "action" is intended to include the exercise of restraint over liberty and (through the definition of "regional processing functions") that such action or the making of such payments may occur in any country.

51. ***Fifthly***, in defending the validity of s 198AHA under the physical externality element of the external affairs power, Transfield makes a similar basic error to that which it makes in respect of the external relations aspect of that power: at TS [38]. That is, Transfield fails to ask how s 198AHA could validly bear its legal meaning; Transfield instead asks whether the physical externality element of the external affairs power could support a law authorising the conduct in which the Commonwealth defendants have engaged. The error in that approach was exposed as long ago as *Pidoto*.

52. ***Sixthly***, the Commonwealth defendants miss the point in attempting at CS [52] to address the proposition that there should be constraints on Parliament's power to assume plenary control over a person by rendering them outside the jurisdiction such that the person becomes physically external to Australia. The critical point is that, while persons are in Australia, they have substantial constitutional protections; and the Commonwealth should not be able to avoid those protections by rendering the person overseas.

53. ***Seventhly***, at TS [38], Transfield does not furnish any coherent reason why the Commonwealth has not itself generated the physical externality. Transfield observes that transferees must first have come from overseas before they are subject to s 198AD. That fact says nothing itself about whether the transferees' subsequent physical presence in a regional

processing country is caused by the Commonwealth: plainly it is. (It can also be observed that the fact that a matter is caused by an external event does not bring it within the external affairs power: *Pape v Commissioner of Taxation* (2009) 238 CLR 1 (***Pape***) at 126 [368]-[369] (Hayne and Kiefel JJ), 159 [465], 160-161 [470] (Heydon J)). Transfield correctly points out at TS [38] that transferees are taken to Nauru purportedly in performance of the statutory duty imposed by s 198AD. That would seem to support, rather than contradict, the plaintiff's point that any physical externality is generated by the Commonwealth.

54. ***Eighthly***, at TS [38], Transfield also overstates what this Court held in *Plaintiff S156*. It is clear from the second question reserved by the Special Case that this Court only answered the question of whether s 198AD was supported by a head of power. This Court did not conclusively determine whether s 198AD was consistent with Chapter III; a fortiori, it did not consider any argument of the kind put by the plaintiff in this case.

Non-statutory executive power

55. The Commonwealth does not seemingly assert that any exercise of non-statutory executive power involving expenditure of public money (or other associated actions) involved the ordinary administration of the functions of government.[35] It rather appears that it relies primarily on the prerogative power to enter treaties and the related power to deal administratively with the external affairs of the Commonwealth. It may be accepted that those powers exist (although the current matter involves nothing in the nature of a "treaty").[36] However, it does not follow that the Commonwealth had power to enter into the MOU or to undertake actions directed at putting into effect the "commitments" therein. There are four important reasons that is so.

56. ***First***, the coercive nature of the measures involved (a joint scheme resulting in the detention of the plaintiff and others) means that questions regarding the engagement of non-statutory executive power are to be answered "conservatively".[37] ***Secondly***, properly reflecting that conservative approach, three members of this Court in *CPCF* declined to recognise some form of novel[38] extra-territorial detention power vested in the executive, absent statutory authority.[39] The position is no different as regards executive action procuring and controlling such detention. ***Thirdly***, nor is any different result obtained by reliance on prerogative powers in respect of foreign relations. Indeed, that is clear in the example given by Maitland to which the Commonwealth refers at CS [84] (fn 94): "[s]uppose that under such a treaty a person was arrested and brought before one of the courts by habeas corpus; the treaty would have been treated as waste-paper – the king has no power to send men out of the country, and cannot give himself power by making a treaty".[40] That view is consistent with the doctrine of this Court.[41] ***Fourthly***, those considerations acquire even greater cogency by reason of the matters of principle identified by Professor Saunders and at PS [45]-[50]: for they highlight the important point this Court has made regarding representative and responsible government

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[35] To the extent it does so, the plaintiff respectfully adopts the submissions of Queensland (QS) at [33]-[47].
[36] See QS [19]-[24].
[37] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 (***Pape***), 24 [10] (French CJ).
[38] See, as to the difficulties posed by novelty for the Commonwealth's argument: Stellios, *Zines's The High Court and the Constitution* (6th ed, 2015) 401, citing *British Broadcasting Corporation v Johns* [1965] Ch 32, 79 (Diplock LJ) and *Ruddock v Vadarlis* (2001) 110 FCR 491, 501 [30] (Black CJ).
[39] *CPCF* at 239-240 [148]-[150] (Hayne and Bell JJ) (in dissent in the result), 255 [259]-[260] (Kiefel J) (in dissent in the result), cf 284 [478] (Keane J).
[40] Maitland, *The Constitutional History of England* (1963) 425, our emphasis. See also *Re Oriental Orders in Council Validation Act* (1965) 22 DLR 577 at 598 per Duff J –"It is no part of the prerogative of the Crown by treaty in time of peace to effect directory a change in the law governing the rights of,... individuals... All these require legislation" cited in Evatt, *The Royal Prerogative* (1987), at 146.
[41] *Vasiljkovic v Commonwealth* (2006) 277 CLR 614, 634-635 [49]-[50] (Gummow and Hayne JJ); *Pape* (2009) 238 CLR 1, 87 [227] (Gummow, Crennan and Bell JJ).

when considering the extent of executive power.[42] The concern is that absence of parliamentary control stands to cause a "deficit" in the constitutionally prescribed system of government: *Williams (No 1)* at 234 [143] (per Gummow and Bell JJ). For those reasons the submissions at CS [83]-[85] should be rejected.

57. The submission at CS [86] ("execution and maintenance of the … laws of the Commonwealth") fares no better. That same submission would seemingly have supported the existence of the power of detention asserted by the Commonwealth in *CPCF* (note Keane J at 285 [484]). The existence of such a power was implicitly rejected by the other members of the Court who considered that issue. And rightly so. As Brennan J observed in *Davis*, those words of extension in s 61 refer to a "function characteristically to be performed by execution of statutory powers".[43] At odds with existing authority,[44] the Commonwealth's submission envisages that the executive can, in addition, act to change or add to the law, being the detailed and prescriptive scheme in Division 8 of Part 2 of the *Migration Act*. That should not be accepted, particularly having regard to the coercive nature of what is sought to be done by the executive in the current matter.[45]

Can the Court address the validity of Nauruan law?

58. The "act of state" doctrine is not a "universally applicable rule".[46] It should not preclude this Court from determining whether the detention in which the Commonwealth was involved, said by the Commonwealth to be valid because of Nauruan law, is so valid. The Court should consider whether the detention regime relied upon by the Commonwealth is valid under the Nauruan *Constitution*. The plurality in *Moti* held "… there will be occasions when to decide the issues that must be determined in a matter an Australian court must state its conclusions about the legality of the conduct of a foreign government or persons through whom such a government has acted."[47] Moreover, the act of state doctrine "has no application where it is alleged that Commonwealth officials have acted beyond the bounds of their authority under Commonwealth law".[48]

59. In elaborating the statement that the principle in *Underhill v Hernandez*[49] is not absolute, the authors of *Dicey, Morris and Collins* set out that "… there may be circumstances in which foreign legislation may be held by the English court to be unconstitutional under the foreign law. But the court will not entertain an action the object of which is to obtain a determination of the constitutionality of the foreign legislation."[50] In *Buck v Attorney-General* [1965] Ch 745, relied on by Transfield at TS [66]-[67], Diplock LJ pointed out that, "[t]he validity of the foreign law is what this appeal is about; it is about nothing else."[51] *Buck* is not

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[42] See *Pape* (2009) 238 CLR 1, 37-38 [58]-[60] (French CJ), 79-80 [201] (Gummow, Crennan and Bell JJ), 105 [294] (Hayne and Kiefel JJ) and 210 [601] (Heydon J) and *Williams (No 1)* (2012) 248 CLR 156, 205 [60] (French CJ), 232-233 [136], 235 [145] (Gummow and Bell JJ), 259-260 [219] (Hayne J), 349-350 [508]-[509], 351-352 [515]-[516] (Crennan J) and 369-370 [578]-[581] (Kiefel J).

[43] See *Davis v Commonwealth* (1988) 166 CLR 79 (***Davis***), 109-110 (extracted with apparent approval by French CJ in *Williams (No 1)* (2012) 248 CLR 156, 190 [31] and see also Hayne J in *Williams (No 1)* at 249 [193]. They reflect the fact that, though the making of laws is entirely the work of the legislative branch, the manner, time and circumstances of putting those laws into execution must frequently be left to the discretion of the executive: *Williams (No 1)* (2012) 248 CLR 156, 201 [52] (French CJ).

[44] *R v Kidman* (1915) 20 CLR 425 at 440-441 (Isaacs J).

[45] See above and note, in addition, *Commonwealth v Tasmania* (1983) 158 CLR 1, 107-109 (Gibbs CJ), 203 (Wilson J), 252 (Deane J), and 321-323 (Dawson J) and *Davis* at 112-113.

[46] *Moti v The Queen* (2011) 245 CLR 456 (***Moti***), 475 [50] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[47] *Moti* at 475 [51] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[48] *Habib v Commonwealth* (2010) 183 FCR 62, 72 [24] (Perram J); see also *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 369 (Gummow J); *Hicks v Ruddock* (2007) 156 FCR 574, 586-587 [32]-[34] (Tamberlin J).

[49] *Underhill v Hernandez*, 168 US 250 (1897).

[50] Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (15th ed, 2012), 123-124 [5-048].

[51] *Buck v Attorney-General* [1965] Ch 745, 769-770 (Diplock LJ), Russell LJ expressing agreement at 773-774.

authority for a broader proposition that foreign constitutional law may never be addressed: indeed, its ratio is limited to the proposition that a court should refrain from adjudication where the validity of the foreign law is the sole object of the litigation. Transfield and the Commonwealth have put Nauruan law in issue in this case: SC Question 11 would not arise but for the defendants' reliance on Nauruan law to justify its involvement in the plaintiff's detention. This Court should hesitate to accept the Commonwealth's submission that such involvement is so justified, while refraining from interpreting the law that is claimed as the justification.[52] The approach for which the plaintiff contends is also supported by comparative jurisprudence of Courts of high authority.[53] As in those authorities, the ruling sought by the plaintiff has no effect at all on the courts of the foreign state.

Is the plaintiff's detention unlawful under the law of Nauru?

60. The matters raised by the plaintiff have not previously been determined by a Nauruan court. While the constitutionality of detention under the pre-settlement visa regime (i.e. Regional Processing Visas only) has been addressed by the Nauruan courts, those decisions were made prior to the introduction of Temporary Settlement Visas, which have now been introduced as a possible avenue for release from detention for Transferees on Nauru.[54] As such, there are no domestic Nauruan decisions are determinative of the lawfulness of the detention to which the plaintiff would be returning (cf TS [69]), and the question remains live as to whether the plaintiff's detention would have the purpose required by Art 5(1) of the Nauruan Constitution. For the reasons given in chief, the detention is not validly authorised.

Standing

61. The Commonwealth essentially seeks to advance the same arguments on standing as those rejected by Nettle J on 26 June 2015.[55] And for those same reasons, they should be rejected by the Full Court.

Dated: 25 September 2015

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[52] This might also be said to be a reason why the Court should be cautious to authorise the Australia executive's involvement with foreign detention based on a purpose of the foreign sovereign or authorisation of foreign law.
[53] See particularly *Nuova Safim SPA v Sakura Bank Ltd* [1998] CLC 306, 328 and *Al Jedda v Secretary of State for Defence* [2010] EWCACiv 756 [2011] 2 WRL 758, Arden LJ (at [74]-[75]) and Elias LJ (at [189]-[191]).
[54] Temporary settlement visas were introduced under the *Immigration (Amendment) Regulations 2014* (Nr) (SC p 484).
[55] *Plaintiff M68/2015 v Minister for Immigration and Border Protection; Plaintiff M80/2015 v Minister for Immigration and Border Protection* [2015] HCATrans 162.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M68 of 2015

BETWEEN

PLAINTIFF M68 / 2015

Plaintiff

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First Defendant

COMMONWEALTH OF AUSTRALIA

Second Defendant

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

Third Defendant

ANNEXURE A TO PLAINTIFF'S REPLY

Date of document: 25 September 2015

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AUSTRALIA

Applicable provisions of the *Migration Act 1958* (Cth)

The applicable provision, below, is still in force at the date of making the plaintiff's reply.

5 Interpretation

(1) In this Act, unless the contrary intention appears:

...

regional processing country means a country designated by the Minister under subsection 198AB(1) as a regional processing country.

...

NAURU

Applicable provisions of the *Immigration Act 2014 (Nr)*

The applicable provision, below, is still in force at the date of making the plaintiff's reply, having commenced 28 January 2014.

6 Powers of authorised officers

(1) For the purposes of the administration of this Act, an authorised officer may:

(a) without a search warrant, enter and search a vessel, aircraft, vehicle, premises or place;

(b) question a person:
(i) who desires to enter or leave Nauru; or
(ii) whom the officer suspects may be unlawfully in Nauru; or
(iii) whom the officer believes can give material information regarding a person referred to in subparagraph (i) or (ii);

(c) require a person referred to in paragraph (b) to produce such documents in his or her possession as may be necessary or desirable to enable the officer to carry out official duties;

(d) require a person who desires to enter or leave Nauru to make and sign a declaration in the form required by the Regulations;

(e) prevent a person whom the officer believes is not authorised to enter Nauru from entering Nauru;

(f) prevent a person in respect of whom a removal order is in force from leaving the vessel or aircraft on which the person has been placed for removal; and

(g) require a person who desires to enter Nauru to submit to be examined by a medical officer and to undergo and assist in the carrying out of a test or investigation as the medical officer requires.

...

(6) Any person who:

(a) hinders or obstructs an authorised officer, or a person assisting an authorised officer, in the exercise of powers conferred by this Act;

(b) refuses or fails to comply with a requirement of an authorised officer under this section;

(c) when required by an authorised officer under this section to answer a question, refuses or fails to answer the question to the best of the person's knowledge, information and belief; or

(d) falsely represents, by words or conduct, that he or she is an authorised officer or other person with powers under this Act.

commits an offence and is liable to a maximum penalty of $10,000.