IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **No S156 of 2013**

BETWEEN:

PLAINTIFF S156/2013

Plaintiff

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First Defendant

COMMONWEALTH OF AUSTRALIA

Second Defendant

DEFENDANTS' SUBMISSIONS

Filed on behalf of the Defendants by:

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I. PUBLISHABLE ON THE INTERNET

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

II. STATEMENT OF THE ISSUES

2. The issues that arise for determination in this matter are identified in the questions reserved by French CJ on 13 February 2014 for the consideration of a Full Court under s 18 of the *Judiciary Act 1903* (Cth) (the **Judiciary Act**).[1] Questions 3 and 4 are to be answered by reference to the grounds identified in the plaintiff's further amended statement of claim filed on 23 December 2013.[2]

III. SECTION 78B NOTICES

3. The plaintiff gave notices under s 78B of the Judiciary Act on 27 February 2014. No further notices are required.

IV. MATERIAL FACTS

4. The facts by reference to which the questions reserved are to be answered are set out in the case stated by French CJ on 13 February 2014 (the **Stated Case**).[3]

V. APPLICABLE LEGISLATION

5. As the plaintiff has not done so, the defendants set out the applicable constitutional provisions and statutes in Annexure A to these submissions.

VI. ARGUMENT

(A) INTRODUCTION

6. This matter concerns the validity of the legislative scheme embodied in Part 2 Division 8 Subdivision B (**Subdivision B**) of the *Migration Act 1958* (Cth) (**the Act**), and the validity of certain decisions made by the Minister pursuant to that scheme. Subdivision B was introduced by the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (the **Regional Processing Act**), with effect from 18 August 2012.[4]

7. Subdivision B has two critical components: it confers power on the Minister to designate, by legislative instrument,[5] a country to be a "regional processing country" (s 198AB); and it imposes a duty (subject to certain exceptions and limits) on officers to take unauthorised maritime arrivals (**UMAs**) to a country so designated (s 198AD).

8. Although Subdivision B is entitled "Regional processing", it makes no provision with respect to UMAs once they have been taken to a regional processing country. That is to say, Subdivision B creates no rights, powers, liabilities, duties or privileges with respect to UMAs once they enter a regional processing country. In particular, it neither authorises nor requires UMAs to be kept in any form of detention in a regional processing country. Nor does it prescribe any process for the assessment of any protection claim by a UMA in

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1 Stated Case and Questions Reserved Book (**SCB**) 41.

2 SCB 13-25.

3 SCB 28-385.

4 Subsequently, minor amendments were made by the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013*. The concept of "unauthorised maritime arrivals" was substituted for "offshore entry persons", and obligations were imposed on the Minister to furnish certain reports to Parliament: ss 198AI and 198AJ.

5 The declaration in s 198AB(1) that a designation is a "legislative instrument" is not definitive of its character: see s 15AE(2) of the *Acts Interpretation Act 1901* (Cth) However, the factors identified in *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 113 FCR 185 at 194-202 support the characterisation of a designation as legislative in character. The plaintiff appears to accept this: see plaintiff's submissions at [59]-[62].

a regional processing country.[6] That Subdivision B does not make provision with respect to these matters is unsurprising, given that a UMA who is within the territory of a regional processing country is subject to the sovereign control of that country.

9. Subdivision B is concerned only with the removal of a particular class of unlawful non-citizens from Australia. Structurally, Subdivision B fits within Part 2 of the Act (entitled "Control of arrival and presence of non-citizens"), and Division 8 (entitled "Removal of unlawful non-citizens etc"). Subdivision A creates a general scheme for the removal of unlawful non-citizens from Australia.[7] Subdivision B creates a special scheme for the removal of a specific class of unlawful non-citizens (unlawful non-citizens who are also UMAs and who arrived in Australia after the commencement of the Regional Processing Act). The Act operates such that, where a UMA is not exempted from the operation of the special scheme – including where the Minister has determined that s 198AD not apply to a UMA (s 198AE), where no country has been designated as a regional processing country (s 198AF), or where there is no regional processing country willing to admit the UMA (s 198AG) – then the special rather than the general removal scheme applies.[8]

10. Section 198AB expressly defines the scope of the Minister's power to designate a country to be a regional processing country, and does so in a way that is obviously inconsistent with the many implied limits for which the Plaintiff contends. Parliament has stated that the "only condition" for the exercise of the power in s 198AB(1) is that the Minister thinks that it is in the national interest to exercise that power (s 198AB(2)). Parliament has also stated that the Minister "must" have regard to only one matter when considering the national interest for this purpose (being whether a country has given Australia certain assurances), and "may" have regard to any other matter which, in his opinion, relates to the national interest (s 198AB(3)).

11. If the Minister designates that a country is a regional processing country, the designation takes effect only after both Houses of Parliament have either expressly approved it (s 198AB(1B)(a)), or have failed to disapprove it within a certain period of time after it has been laid before each House (s 198AB(1B)(b)). In that way, the section gives effect to Parliament's expressly stated intention that UMAs (including UMAs in respect of whom Australia has or may have protection obligations) "should be able to be taken to any country designated to be a regional processing country" (s 198AA(b)), and that it is "a matter for Minister and Parliament to decide which countries should be designated as regional processing countries" (s 198AA(c)).

12. The Minister's designation of Papua New Guinea (**PNG**) was expressly approved by both Houses of Parliament (SCB 33 [11] and [13]), in circumstances in which both Houses had knowledge of various matters (SCB 33 [10]), including: the Minister's reasons for thinking that it was in the national interest to make the designation (SCB 254-264); the Minister's consultations with the UNHCR and the fact that the UNHCR had not at that time responded to the Minister's formal request for advice (SCB 249), and the status of arrangements in PNG for the treatment of UMAs taken there (SCB 233-235).

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6 It should not be assumed that every UMA has, or will make, any such protection claim. A UMA is defined simply as a person who entered Australia by sea at a certain place and who became an "unlawful non-citizen" because of that entry: s 5AA. Contrary to the plaintiff's apparent assumption to the contrary, a UMA is not necessarily a "refugee", nor will a UMA necessarily have any "claims" to be assessed: see plaintiff's submissions at [37], [64].

7 The power and duty to "remove" necessarily incorporates the notion of moving a person from Australia to another country: *WAIS v Minister for Immigration and Multicultural Affairs* [2002] FCA 1625 at [58] (French J); *Al-Kateb v Godwin* (2004) 219 CLR 562 (***Al-Kateb***) at 574 [7] (Gleeson CJ) and 636 [218] (Hayne J); *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 88 ALJR 324 (***Plaintiff M76***) at 346 [119] (Hayne J) and 355 [187] (Kiefel and Keane JJ).

8 This appears from s 198(11), which provides that s 198 (the general removal power) "does not apply to an unauthorized maritime arrival to whom s 198AD applies".

(B) QUESTIONS 1 AND 2 – VALIDITY OF SECTIONS 198AB AND 198AD

13. The general principles to be applied in determining whether a law is a law "with respect to" a particular head of legislative power are well settled.[9] The character of the law must be determined by reference to its legal and practical operation. A law will have a sufficient connection with the subject matter of a head of power if the connection between the law and that subject matter is more than "tenuous, insubstantial or distant".[10] If a sufficient connection with the head of power does exist, then "the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice".[11]

14. Both ss 198AB and 198AD are plainly supported by s 51(xix) (the **aliens power**). Those provisions are also supported by ss 51(xxvii) (the **immigration power**) and 51(xxix) (the **external affairs power**). However, if the Court is satisfied that the aliens power is available, then it is unnecessary for the Court to consider those heads of powers.

Aliens power

15. The existence of the power to make laws that authorise the removal of aliens from Australia is a necessary incident of Australia's sovereignty.[12] This Court has long recognised that Commonwealth laws that authorise the removal of aliens from Australia have a sufficient connection with the aliens power.[13] To adopt what McHugh J said in *Al-Kateb v Godwin* in a related context: "Such laws are not incidental to the aliens power. They deal with the very subject of aliens. They are at the centre of the power, not at its circumference or outside the power but directly operating on the subject matter of the power".[14] As Brennan, Dawson and Deane JJ (with whom Mason CJ relevantly agreed) said in *Chu Kheng Lim*:[15]

> The legislative power conferred by s 51(xix) with respect to "aliens" is expressed in unqualified terms. It prima facie encompasses the enactment of a law with respect to non-citizens generally. It also prima facie encompasses the enactment of a law with respect to a particular category or class of non-citizens, such as ... non-citizens who are in Australia without having presented a visa .... Such a law may, without trespassing beyond the reach of the legislative power conferred by s 51(xix), either exclude the entry of non-citizens or ... provide for their expulsion or deportation.
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> As has been seen, the first element of the definition of "designated person" ... is "non-citizen". The provisions of Div. 4B are concerned solely with non-citizens who satisfy the other elements of that definition ... They constitute, in their entirety, a law or laws with respect to the detention in custody, pending departure or the grant of an entry permit, of

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9 See, e.g., *New South Wales v Commonwealth* (***Work Choices Case***) 229 CLR 1 at 103 [142], citing with approval *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 (***Dingjan***) at 369 (McHugh J); *Grain Pool (WA) v Commonwealth* (2000) 202 CLR 479 (***Grain Pool***) at 492 [16].

10 See, e.g., *Work Choices Case* at 143 [275]; *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 314-315 (Brennan J); *Commonwealth v Tasmania* (*Tasmanian Dam Case*) (1983) 158 CLR 1 at 152-153 (Mason J); *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79 (Dixon J).

11 *Leask v Commonwealth* (1996) 187 CLR 579 (***Leask***) at 602 (Dawson J); *Grain Pool* at 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Work Choices Case* at 103 [142].

12 *Robtelmes v Brenan* (1906) 4 CLR 395 (***Robtelmes***) at 402-406 (Griffith CJ), 413-415 (Barton J), 420-422 (O'Connor J); *Al-Kateb* at 632 [203] (Hayne J); *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 (***Plaintiff M47***) at 1397 [75] (Gummow J), 1446 [348] (Heydon J). See also *Ruddock v Vardarlis* (2001) 110 FCR 491 at 542-543 [192]-[193] (French J); *Plaintiff M76* at 357 [202] (Kiefel and Keane JJ).

13 *Robtelmes* at 400-406 (Griffith CJ), 415 (Barton J), 420-422 (O'Connor J); *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 (***Yates***) at 94 (Isaacs J), 117 (Higgins J), 132-133 (Starke J); *Koon Wing Lau v Calwell* (1949) 80 CLR 533 (***Koon Wing Lau***) at 551, 555-562 (Latham CJ); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (***Chu Kheng Lim***) at 10 (Mason CJ), 25-26, 32-33 (Brennan, Deane and Dawson JJ), 44-45 (Toohey J), 56-58 (Gaudron J), 64 (McHugh J); *Al-Kateb* at 573 [4] (Gleeson CJ), 582-584 [39]-[45] (McHugh J), 600 [91]-[94], 604 [110] (Gummow J), 632-633 [203], 644 [245], 648 [255] (Hayne J, Heydon J agreeing).

14 *Al-Kateb* (2004) 219 CLR 562 at 582-583 [39]. See also *Plaintiff M76* at 358 [206] (Kiefel and Keane JJ).

15 (1992) 176 CLR 1 at 25-26. See also at 10 (Mason CJ), 46 (Toohey J) and 64-65 (McHugh J).

> the class of "designated" aliens to which they refer. As a matter of bare characterization, they are, in our view, a law or laws with respect to that class of aliens. As such, they prima facie fall within the scope of the legislative power with respect to "aliens" conferred by s 51(xix).

16. The plaintiff relies heavily on observations made by Gaudron J in *Chu Kheng Lim*.[16] But the limitation on s 51(xix) that Gaudron J suggested, and on which the plaintiff bases his constitutional argument, was not reflected in the judgments of the other members of the Court. Further, even in their own terms, Gaudron J's remarks would not assist the plaintiff because Subdivision B does operate by reference to a matter "which distinguishes aliens from persons who are members of the community constituting the body politic".

17. A long line of authority in this Court establishes three particular aspects of the scope of the power conferred by s 51(xix) of present relevance.

18. *First*, the aliens power does not circumscribe the reasons for which Parliament may require or authorise the removal of aliens.[17] Parliament may enact a law requiring or authorising the removal of aliens for any reason that it may think fit,[18] and "it is not for the judicial branch of the Government to review their actions, or to consider whether the means that they have adopted are wise or unwise".[19]

19. *Secondly*, the aliens power supports a law that requires or authorises the removal of any particular class of aliens. That is to say, Parliament may enact a law that distinguishes a particular class of aliens by reference to any discrimen which it thinks fit, and that subjects that particular class of aliens to a liability to removal that is not shared by other aliens.[20]

20. *Thirdly*, the aliens power supports a law that requires or authorises the removal of aliens (or a particular class of aliens) to a particular country. The power with respect to the removal of aliens from Australia is not limited to a power simply to "eject ... person[s] physically from Australia".[21] Parliament may select, or authorise the Executive to select, the country to which an alien is to be removed.[22]

Validity of ss 198AB and 198AD

21. The impugned provisions render UMAs liable to be taken to any country that has been designated by the Minister to be a regional processing country on the basis that the Minister thinks such a designation is in the national interest. The persons to whom those provisions apply are necessarily unlawful non-citizens[23] and therefore, as the plaintiff accepts,[24] a particular class of aliens.[25]

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16 See Plaintiff's submissions at [24]-[26], [28], quoting *Chu Kheng Lim* at 57.

17 *Robtelmes* at 400-406 (Griffith CJ), 413-415 (Barton J), 420-422 (O'Connor J); *Pochi v Macphee* (1982) 151 CLR 101 (***Pochi***) at 106 (Gibbs CJ); *Chu Kheng Lim* at 64 (McHugh J); *Al-Kateb* at 593 [41]-[42] (McHugh J), 613 [139] (Gummow J), 632-633 [203] (Hayne J, Heydon J agreeing).

18 *Pochi* at 106 (Gibbs CJ), cited with approval in *Chu Kheng Lim* at 64 (McHugh J). Note also *Polities v Commonwealth* (1945) 70 CLR 60 at 69, where Latham CJ said, after referring to the aliens power, that "The Commonwealth Parliament can legislate on these matters in breach of international law, taking the risk of international complications".

19 *Robtelmes* (1906) 4 CLR 395 at 404 (Griffith CJ), cited with approval in *Al-Kateb* at 632-633 [203] (Hayne J).

20 *Koon Wing Lau* at 561-562 (Latham CJ); *Chu Kheng Lim* at 25-26 (Brennan, Deane and Dawson JJ), 46 (Toohey J) and 65 (McHugh J).

21 *Al-Kateb* at 574 [7] (Gleeson CJ) and 636 [218] (Hayne J); *Plaintiff M76* at 346 [119] (Hayne J) and 355 [187] (Kiefel and Keane JJ).

22 *Robtelmes* at 404-406 (Griffith CJ), 419-422 (O'Connor J); *Al-Kateb* at 632 [203] (Hayne J, Heydon J agreeing); *Plaintiff M47* at 1401-1403 [100], [111] (Gummow J). See also *Znaty v Minister for Immigration* (1972) 126 CLR 1 (***Znaty***) at 8-16 (Walsh J, McTiernan and Owen JJ agreeing).

23 See ss 5AA and 14, and the definition of "non-citizen" in s 5(1) of the Act. Note also s 198AD(1), which specifies that the duty to take a UMA to a regional processing country applies only to persons detained under s 189.

24 Plaintiff's submissions at [17].

22. The plaintiff contends that the aliens power does not support ss 198AB and 198AD because he asserts that those sections "go significantly further" than providing for the removal of UMAs from Australia.[26] That contention is founded on the assertions – for which the plaintiff identifies no link to the statutory text[27] – that "in effect" the impugned provisions "subject" UMAs to "potentially indefinite detention" and to "refoulement".[28] Those assertions are the only foundation for the plaintiff's submission that the impugned provisions are not supported by the aliens power, because it is said they have the consequence that the impugned provisions are not "appropriate and adapted to regulating the entry or facilitating the departure of aliens, if and when departure is required".[29] The plaintiff says further that the impugned provisions "impose a requirement of deportation to and subsequent control at a regional processing country for a purpose wholly unconnected with the determination of status or entry rights under Australian law", and that "the control that the scheme in ss 198AB and 198AD imposes on the persons it operates on *after* the process of removal from Australia has been completed cannot be said to be directed in any way towards executing their departure from Australia".[30]

23. This argument is fundamentally misconceived in four respects.

24. *First*, as noted at paragraph 8 above, Subdivision B is silent as to what occurs after UMAs are taken to any regional processing country (save only that the Minister must have regard to whether that country has given certain specific assurances in that regard when deciding whether he thinks it is in the national interest to designate a particular country as a regional processing country: s 198AB(3)(a)). Subdivision B neither authorises nor requires UMAs to be kept in any form of detention in a regional processing country, let alone "indefinite" or "inhuman" detention. If a particular regional processing country chooses to exercise its sovereign power to detain a UMA who has been taken to that country, that is a matter for that country. If, on the other hand, a regional processing country decides to allow UMAs complete freedom to live and work in that country, that is likewise a matter for it. The scheme neither mandates nor forecloses either possibility. The special removal scheme in Subdivision B no more "subjects" UMAs to any particular form of treatment following their removal from Australia than does the general removal scheme in Subdivision A.

25. *Secondly*, the way that any *particular* regional processing country chooses to exercise its sovereign power with respect to UMAs who are taken to that country, and the "conditions" in any such country, are incapable of affecting the constitutional validity of Subdivision B. That subdivision provides a framework within which the Minister may designate that any particular country (be it PNG, Nauru, New Zealand or any other country) is a regional processing country to which UMAs may be taken. Even if, for some reason, it was not open to the Minister to designate a particular country to be a regional processing country having regard to certain characteristics of that country, that would not be relevant to the validity of the legislative framework, as the framework could always be used to designate a different country as a regional processing country.

26. *Thirdly*, the plaintiff's argument assumes, incorrectly, that in order to be supported by the aliens power Subdivision B must be directed to some legitimate "purpose" relating to

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25 The terms "non-citizen" and "alien" are co-extensive, having regard to the definition of non-citizen in s 5(1) of the Act and the decision in *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178. See also *Shaw v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 218 CLR 28

26 Plaintiff's submissions at [26], [30].

27 It is asserted, for example, that the phrase "regional processing country" indicates that the designated country "will be used for the detention and processing of persons who are transferred there": Plaintiff's submission at [27]. Plainly the phrase indicates no such thing.

28 Plaintiff's submissions at [27].

29 Plaintiff's submissions at [28]-[29].

30 Plaintiff's submissions at [30] and [32].

aliens, and that the scheme must be capable of being considered to be "appropriate and adapted" to that "purpose". But as noted at paragraph 15 above, a law requiring or authorising the removal of aliens from Australia is a law that operates directly on the core area of the subject matter of the power, being aliens, and is therefore necessarily supported by the aliens power. It is unnecessary to seek to identify the purpose of the law in order to characterise it as a law with respect to aliens. This Court's decision in *Leask* establishes that it is both unnecessary and inappropriate in deciding whether Subdivision B is a law with respect to s 51(xix) to engage in any analysis of whether the means adopted by Parliament are proportionate to the achievement of some identified purpose.[31] The only relevant question is whether Subdivision B has a sufficient (i.e. not a tenuous or insubstantial) connection with the aliens power, which it clearly does.

27. *Fourthly*, even if it were necessary or appropriate to seek to identify the "purpose" of Subdivision B, that purpose is described in s 198AA(b) of the Act as being that UMAs should be able to be taken to any country designated to be a regional processing country. The plaintiff errs by assuming that the only purpose that Parliament may legitimately pursue in exercise of the aliens power is one that is "connected with the determination of status or entry rights under Australian law". The purpose of Subdivision B is simply to remove UMAs to a regional processing country. If it is necessary to consider the issue of purpose at all, there is no basis for the Court to conclude that ss 198AB and 198AD exceed what would be a proportionate means of pursuing the legitimate objective of removal of a specified group of non-citizens.

Immigration power

28. Just as s 51(xix) confers a power on Parliament to make laws requiring or authorising the removal of any particular class of aliens from Australia to any particular country for any particular reason, so too does s 51(xxvii) confer a power of equivalent width with respect to the subset of aliens who meet the constitutional description of "immigrants".[32]

29. "The ultimate fact to be reached as a test whether a given person is an immigrant or not is whether he is or is not at that time a constituent part of the community known as the Australian people."[33] A UMA to whom s 198AD applies must be detained under s 189, meaning that he or she must be an unlawful non-citizen. An unlawful non-citizen is, by definition, not a member of the Australian community. Moreover, an unlawful non-citizen who is also a UMA is precluded from even applying for a visa in order to become a member of the Australian community.[34] Accordingly, a UMA to whom s 198AD applies must be an immigrant. It follows that the immigration power provides the same support for Subdivision B that is provided by the aliens power.

External affairs power

30. The external affairs power extends to authorising the Parliament to make laws with respect to the movement of persons between Australia and places physical external to Australia, independently of the existence or absence of any treaty imposing an obligation

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31 *Leask* at 593 (Brennan CJ), 602-603 (Dawson J), 613-616 (Toohey J), 616-617 (McHugh J), 624 (Gummow J), referred to with approval in *Theophanus v Commonwealth* (2006) 225 CLR 101 at 128 [70] (Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Attorney-General (NT) v Emmerson* [2014] HCA 13 at [80]-[82]; *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 296-297 (Mason CJ), 317-326 (Brennan J), 350-357 (Dawson J).

32 *Znaty* at 10 (Walsh J, McTiernan and Owen JJ agreeing); *Robtelmes* at 404 (Griffith CJ), 415 (Barton J); *Yates* at 83, 94, 108 (Isaacs J), 117 (Higgins J), 132-133 (Starke J); *Pochi* at 106 (Gibbs CJ).

33 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 (***Patterson***) at 472-473 [246] (Gummow and Hayne JJ), quoting *Potter v Minahan* (1908) 7 CLR 277. See also *Yates* at 62-65, 137; *R v Director-General of Social Welfare (Vict); Ex parte Henry* (1975) 133 CLR 369 at 381-383.

34 Section 46A of the Act. See also *Plaintiff M76* at 345-346 [116]-[118] (Hayne J), 354-355 [181]-[189] (Kiefel and Keane JJ).

on Australia to do so.[35] A law with respect to this matter is a law that operates directly on the core area of the subject matter of the power, and therefore no question of proportionality arises.[36]

31. The narrow proposition identified above finds its place within a broader proposition that has been accepted by this Court, which is that the external affairs power authorises Parliament to make laws with respect to places, persons, matters or things physically external to Australia.[37] The Court has adopted the following expression of the broader proposition:[38]

> The power extends to places, persons, matters or things physically external to Australia. The word "affairs" is imprecise, but is wide enough to cover places, persons, matters or things. The word "external" is precise and is unqualified. If a place, person, matter or thing lies outside the geographical limits of the country, then it is external to it and falls within the meaning of the phrase "external affairs".

32. Sections 198AB and 198AD render UMAs liable to be taken from Australia to a place that is physically external to Australia. The impugned provisions are therefore plainly supported by the "geographically external" aspect of the external affairs power. The Federal Court has previously held that a challenge to the constitutional validity of a predecessor to the present scheme[39] would be bound to fail unless this Court was to re-open and overturned the (now considerable) line of authority that supports the general principle identified above.[40] There is no basis for the Court to do so.

The limitation identified in *Chu Kheng Lim*

33. The plaintiff submits[41] that ss 198AB and 198AD of the Act infringe an "inherent constitutional limitation" on the exercise of legislative power, being the limitation identified by this Court in *Chu Kheng Lim*.

34. The Defendants object to the plaintiff advancing this argument, on the basis that he was refused leave to amend his statement of claim to include a ground that would have raised it. The proposed ground[42] stated that "Contrary to section 71 of the Constitution, sections 198AB and/or 198AD of the Act purports to confer part of the judicial power of the Commonwealth on persons who have not been appointed pursuant to section 72 of the Constitution, and is invalid". The plaintiff argued in support of his application for leave to amend that the impugned sections authorised "the Executive to, in effect, imprison persons in third countries against their will for an indefinite period". French CJ refused leave to amend on the basis that the plaintiff's contention was "untenable".[43] The plaintiff did not appeal that judgment, and is bound by it.

35. For the above reasons, Questions 1 and 2 should both be answered "No".

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35 *De L v Director-General, NSW Community Services* (1996) 187 CLR 640 at 649-650 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ); *Plaintiff M47* at 1398 [83] (Gummow J).

36 *Vasiljkovic v Commonwealth* (2006) 227 CLR 614 at 632-633 [41].

37 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (***Polyukhovich***) at 528-531 (Mason CJ), 599-604 (Deane J), 632 (Dawson J), 696 (Gaudron J), 712-714 (McHugh J); *Victoria v Commonwealth* (***Industrial Relations Act Case***) (1996) 187 CLR 416 at 485 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *XYZ v Commonwealth* (2006) 227 CLR 532 (***XYZ***) at 539 [10] (Gleeson CJ), 546 [30] (Gummow, Hayne and Crennan JJ); *Thomas v Mowbray* (2007) 233 CLR 307 at 324 [6], 365 [153].

38 *Polyukhovich* at 632 (Dawson J), cited with approval in *Industrial Relations Act Case* at 485.

39 Former s 198A of the Act. That section was repealed by the Regional Processing Act.

40 *P1/2003 v Ruddock* (2007) 157 FCR 518 at 533 [51]-[52] (Nicholson J).

41 Plaintiff's submissions at [33]-[38], [58].

42 Exhibit "AM-3" to the affidavit of Andras Markus affirmed on 16 April 2014 (proposed ground 4 in Annexure B).

43 Exhibit "AM-4" to the affidavit of Andras Markus affirmed on 16 April 2014.

(C) QUESTION 3 – VALIDITY OF THE DESIGNATION

36. The plaintiff claims that the Minister's designation that PNG is a regional processing country, made on 9 October 2012 under s 198AB of the Act (the **designation**), is affected by a bewildering array of errors. Most of these claims are no more than bare assertions that the designation is invalid by reference to various grounds of judicial review that are associated with challenges to administrative decisions, the plaintiff paying no regard to the established limits on the availability of those grounds of review even in that context, let alone in the context of the judicial review of an exercise of *delegated* legislative power that occurs within a regime that subjects that exercise of power to examination by both Houses of Parliament in accordance with the scheme in Subdivision B.[44] Other submissions made by the plaintiff are advanced in vague and emotive terms, often on the basis of factual assertions that are unsupported by any evidence in the special case.[45] Counsel for the plaintiff should withdraw such submissions.

37. By way of summary, the defendants, doing the best that they can to identify the substance of the points in issue, submit as follows:

37.1. The Minister did not err by failing to consider any matter that he was required by the Act to consider before designating that PNG is a regional processing country.

37.2. The Minister did not err by making findings for which he had "no evidence" in deciding to designate that PNG is a regional processing country.

37.3. The Minister did not act outside of the boundaries of "legal reasonableness" in deciding to designate that PNG is a regional processing country.

37.4. The Minister did not make any of the other errors asserted by the plaintiff.

Mandatory relevant considerations

38. The plaintiff asserts that a discretionary power that is "unconfined" by the terms of the statute "will still have mandatory considerations" that are to be ascertained by reference to the "subject matter, scope and purpose of the Act". The plaintiff then asserts that the following seven matters are matters that the Minister was bound to consider in assessing the national interest: (a) "consultations with and advice of the officer of the United Nations High Commissioner for Refugees [UNHCR] as to the proposed designation"; (b) "the international obligations or domestic law of [PNG]"; (c) "whether there was any effective national legal or regulatory framework for the determination or refugee status under the Refugee[s] Convention"; (d) "PNG's capacity to implement its international obligations"; (e) "that the transferees would be arbitrarily and indefinitely detained in PNG in torturous, inhuman and degrading conditions, without access to legal advice, representation or judicial review"; (f) "that the designation decision would result in violation or breach of at least four international treaties to which Australia was a signatory"; and (g) "that the designation decision was in violation of Australia's obligations under international law and/or customary international law".

39. The defendants make five general responses to those submission, and then some specific responses to particular asserted "mandatory considerations".

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44 The grounds on which a court may review the validity of administrative decisions and legislative instruments may overlap to some extent. However, the grounds of review are not co-extensive, and the principles governing the judicial review of administrative and legislative powers are not identical. See, for example, Pearce and Argument, *Delegated Legislation in Australia* (4th ed, 2012), at [12.8]-[12.9].

45 See, e.g., Plaintiff's submissions at [97], asserting that the designation is invalid "because it exposed potentially thousands of genuine refugee applicants to indefinite detention, unknown suffering and unknown delay in the processing of their refugee claims. The intention was to punish up to thousands of men and women in order to make a point in a different country. The detention of these refugee applicants on a small tropical island in the heat and the rain and in tents without access to proper or established services or facilities was out of all proportion to the intended object". There are similar submissions at [94]-[96].

40. *First*, it is significant that a designation by the Minister that a particular country is a regional processing country is a legislative instrument that takes effect only once both Houses of Parliament have either approved it or declined to disapprove it within 5 sitting days (s 198AB(1B)). The Minister must lay certain documents before each House of Parliament – including a statement of his reasons for thinking that it is in the national interest to designate the country – such that each House of Parliament may make an informed choice of whether to approve or disapprove the instrument (s 198AC). If either House of Parliament does not accept that it is in the national interest that UMAs should be liable to be taken to the particular country designated by the Minister, or if either House of Parliament is not satisfied that the Minister has provided it with sufficient information in order for it to form this judgment, then it may disapprove the designation. The existence of this "particular manifestation of responsible government ... over and above the general accountability that the Minister has to the Parliament"[46] strongly suggests that Parliament recognised that there could be a divergence between the Minister's assessment of the national interest and the Parliament's assessment of the national interest, and determined that any such divergence would be resolved at the political level. By this mechanism, Parliament gave effect to its intention expressed in s 198AA(c) that "it is a matter for the Minister and Parliament to decide which countries should be designated as regional processing countries".

41. *Secondly*, the proposition that a discretionary power that is unconfined in its terms "will" have mandatory considerations is simply incorrect. In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,[47] Mason J explained that where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account by the decision-maker are "similarly unconfined, except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard". The Court's task is not to "read into the Act" the things that, in the plaintiff's view, the Minister should consider.[48] It is to construe the Act.

42. Section 198AB(2) expressly provides that the "only condition" for the exercise of the Minister's power to designate a country to be a regional processing country is that the Minister "thinks that it is in the national interest" to do so. It then expressly provides that "in considering the national interest", the Minister "must" have regard to one matter (whether a country has given Australia certain assurances), and "may" have regard to any other matter which, "in his opinion", relates to the national interest (s 198AB(3)). These provisions reveal that:

    42.1. There is no jurisdictional condition to the exercise of the power to designate a country other than that the Minister thinks it is in the national interest to do so. The plaintiff's contention that there are other matters that the Minister must consider cannot be reconciled with Parliament's express statement that the Minister's view of the national interest is the "only" condition for the exercise of the power.

    42.2. In forming his assessment of where the national interest lies, the Minister is not obliged to consider any matter other than the existence or absence of the specified assurances by the relevant country. The fact that Parliament has specified only one consideration to which the Minister "must" have regard, and has otherwise stated

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46 Cf *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 439 [102] (Gleeson CJ and Gummow J), 561 [176] (Hayne J), 584 [246] (Callinan J); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 648 [30] (French CJ and Kiefel J), 656 [55] (Gummow, Hayne, Crennan and Bell JJ); *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 87 ALJR 682 at 692 [40] (French CJ, Crennan and Bell JJ).

47 (1986) 162 CLR 24 at 40.

48 Cf Plaintiff's submissions at [67].

that the Minister "may" have regard to any matter which "in his opinion" relates to the national interest, plainly indicates that Parliament did not intend that the Minister "must" have regard to any other matter.[49] Parliament deliberately left it to the Minister to form his assessment of what factors bore on the national interest in a given case, and what weight should be given to them individually and collectively, knowing that in each case it would then be able to form its own determinative assessment of the question.

42.3. Parliament evidently intended to authorise the Minister, if thought appropriate, to designate a country to be a regional processing country even if that country had not given the assurances referred to in s 198AB(3)(a), or had only given those assurances in qualified terms, because the language of that paragraph will not bear any other construction. That starkly demonstrates that, by enacting Subdivision B, Parliament deliberately altered the law declared in the *Malaysia Declaration Case.* Provided that the Minister genuinely considers whether the specified assurances have or have not been given, the Minister can lawfully conclude that it is in the national interest to designate that country, even if the assurances have not been given, and even if the Minister therefore cannot be confident that the country will treat persons taken to that country consistently with the Refugees Convention. If that is so, there is no room for most of the mandatory considerations that the plaintiff seeks to imply.

43. Of course, in this case PNG gave the relevant assurances to Australia,[50] and the Minister expressly considered those assurances.[51] Accordingly, the Minister did not fail to have regard to the only consideration he was required to have regard to in assessing whether he thought it was in the national interest to designate PNG, nor is such suggested.

44. *Thirdly*, the nature of the sole condition to the exercise of the Minister's power in s 198AB – being the Minister's assessment as to the "national interest" – is inconsistent with the existence of the seven mandatory relevant considerations for which the plaintiff contends. Many authorities accept that where legislation confers a power on a Minister subject to the Minister being satisfied that it is in the "national interest" to exercise that power, it is for the Minister to decide whether that condition is met, so long as he or she does so reasonably. Thus, it has been said that the question of what is or is not in the national interest is an evaluative one that is entrusted by the legislature to the Minister to determine according to his satisfaction, which must be obtained reasonably.[52] In *Patterson*, Kirby J, in observations that are particularly apt to the power conferred by s 198AB(1), said:[53]

> [T]he designation of the Minister as the repository of the power, and the specification that the Minister personally must exercise the power ... obviously reflect the importance, potential controversy and need for political accountability in such a decision and the high responsibility that Ministers bear in protecting the national interest in this and other fields. What is the "national interest" does not readily lend itself to the compartmentalisation of the considerations involved.
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> The wide range of subject matters that may be taken into account in making decisions "in the *public* interest" has been acknowledged by this Court. The present *Migration Act* deals

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49 Cf *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 333 (Gibbs CJ).

50 SCB 259-260 [15]-[19].

51 Cf SCB 231 (cl 18).

52 See, for example, *Madafferi v Minister for Immigration* (2002) 118 FCR 326 (***Maddaferi***) at 353 [89] (French, O'Loughlin and Whitlam JJ); *Wong v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 440 (***Wong***) at [52] (Black CJ, Hill and Hely JJ); *Tewao v Minister for Immigration and Citizenship* (2012) 126 ALD 185 (***Tewao***) at [39] (Cowdroy, Reeves and Jagot JJ). See also *Patterson* at 447 [167] (Gummow and Hayne JJ, Gleeson CJ agreeing).

53 *Patterson* at 502 [330]-[331]. In the context of s 501(3) of the Act, Kirby J set the bar of national interest higher than the Full Federal Court has subsequently accepted: see *Madafferi* at 353 [89]; *Wong* at [52]; *Tewao* at [39]

> with many subjects of great importance to the composition and safety of the Australian community. It would be contrary to principle for the words "in the *national* interest" to be given a confined meaning. However broad may be the jurisdiction conferred by the constitutional writs, they do not permit a court to substitute for the satisfaction of the Minister, provided by the Act of Parliament, the satisfaction of judges who are not accountable to the Parliament or the people in the same way as the Minister.

45. Consistently with the above observations, the Federal Court has regularly accepted that "[t]he Court is not entitled to substitute its views for the Minister's. The decision is to be made by the Executive. It has the responsibility, including the political responsibility, for deciding what is in the national interest".[54]

46. *Fourthly*, for the most part, the plaintiff identifies no basis in the text of the Act for the various "implications" that he seeks to draw. It is plainly insufficient for the plaintiff simply to refer to this Court's observation in *Plaintiff M61/2010E v Commonwealth*,[55] repeated in the *Malaysia Declaration Case*,[56] that "read as a whole, the Migration Act contains an elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugees Convention". Subdivision B was enacted after those statements were made, and the obvious and express purpose of Subdivision B is to authorise the Commonwealth to take persons claiming protection to a regional processing country chosen by Minister and the Parliament on legal conditions different to those pertaining at the time of the earlier authority. To succeed, the plaintiff would need to identify the particular provisions in the Act that he says give rise to the requirements to identify the seven matters he says are mandatory relevant considerations when exercising the new power conferred by s 198AB, and to explain how that implication is to be reconciled with the express provisions identified above. He has not even attempted that task.

47. The plaintiff seeks to call in aid extrinsic material relating to the Regional Processing Act. That material cannot, of course, displace the clear meaning of the statutory text.[57] Having regard to s 15AB(3) of the *Acts Interpretation Act 1901* (Cth), it is doubtful that it is appropriate for the Court to give any weight to that extrinsic material (given the clear meaning of s 198AB).[58] But if the Court thinks it appropriate to consider the extrinsic material, then it should conclude that that material supports the plain reading of s 198AB for which the defendants contend. The Revised Explanatory Memorandum (the **EM**) for the Regional Processing Bill explains that Subdivision B was enacted in response to this Court's decision in the *Malaysia Declaration Case* so as to ensure that "the government of the day can determine the border protection policy that it believes is in the national interest". It goes on to state that "national security" has a broad meaning and that it may include "governmental concerns" relating to various matters, including public safety, border protection, national security, defence, Australia's economic interests, Australia's international obligations and its relations with other countries, and measures for effective border management and migration controls. The plaintiff's reliance on the EM is misplaced, as he mistakenly treats statements concerning matters that the Minister may permissibly decide to consider, or not consider, in determining the national interest as if they establish matters that must be considered in determining the national interest.[59]

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54 *Maurangi v Minister for Immigration* (2012) 200 FCR 191 at [70] (Lander J). See also *Gbojueh v Minister for Immigration* [2012] FCA 288; *Wong v Minister for Immigration* [2002] FCA 959 at [33]-[35]; *Wight v Pearce* (2007) 157 FCR 485 at [120]; *Tewao.*

55 (2010) 243 CLR 319 at 339 [27].

56 (2011) 244 CLR 144 at 189 [90] (Gummow, Hayne, Crennan and Bell JJ).

57 See, e.g., *Alcan (NT) v Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47].

58 Cf *Commissioner of Taxation v Roger Crook & Assoc. Pty Ltd* (2005) 142 FCR 273 at 277-278 [17] (French J).

59 Plaintiff's submissions at [65]-[66].

48. *Finally*, at least with respect to the plaintiff's suggested mandatory considerations (c), (e), (f) and (g), those considerations are merely statements of opinion or conclusion. Further, there is nothing in the Special Case that would allow the Court to decide that the opinions or conclusions expressed by the plaintiff are accurate. As the plaintiff has not established that the opinions or conclusions to which he refers are true, he cannot establish that the Minister was required to consider them.

UNHCR consultation

49. It is appropriate to make some additional points specifically in response to the Plaintiff's submissions about UNHCR advice in relation to the proposed designation. The Plaintiff contends that "reading s 198AB and 198AC together", UNHCR advice on the proposed designation was a mandatory consideration to the exercise of the Minister's power under s 198AB.[60] But, far from reading those sections together, the plaintiff in fact ignores the terms of both sections. While no doubt s 198AB(3)(b) permits the Minister to take into account UNHCR advice as to a proposed designation, the express distinction in s 198AB(3) between matters that "must" be considered and those that "may" be considered leaves no room to conclude that UNHCR advice, the existence and timing of which is not a matter within the control of the Minister or Australia, is a mandatory relevant consideration.

50. Section 198AC concerns the documents that must be tabled in Parliament following a designation under s 198AB. It is not permissible to use s 198AC as a foundation for implying mandatory relevant considerations back into s 198AB, for s 198AC(4) expressly provides that "The sole purpose of laying the documents referred to in subsection (2) before the Parliament is to inform the Parliament of the matters referred to in the documents and nothing in the documents affects the validity of the designation". It further goes on to state that "the fact that some or all of those documents do not exist does not affect the validity of a designation". Further, the requirement to table documents under s 198AC(2)(e) extends only to a summary of "any" advice received from the UNHCR. That further indicates that Parliament contemplated that the Minister may designate a country even if no such advice had been received. Moreover, as noted above, both Houses of Parliament expressly approved the designation in circumstances where they were aware that the Minister had not received the UNHCR's formal advice when he made the designation.

51. The plaintiff's reliance on *Lee v Napier*[61] is misplaced. That case concerned legislation that expressly provided that the Minister "must consult" the Australian Medical Association before making an appointment.[62] Plainly, there is no equivalent provision in Subdivision B.

PNG's domestic law, and its obligations under international law

52. There is no substance in the plaintiff's contention that the international obligations or domestic law of PNG are mandatory relevant considerations.[63] Not only is that submission inconsistent with the terms of s 198AB(2) and (3) (for the reasons addressed above), it is also contrary to the strong indication from s 198AA(d). The plaintiff attempts to support his submission by reference to s 198AB(3)(a), which he submits "provides for non-refoulement of refugees and provides for an assessment of refugee status to be made in the host country". But that subsection does no such thing. It provides only that the Minister must consider whether or not the proposed regional processing country has

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60 Plaintiff's submissions at [72].

61 (2013) 301 ALR 663, relied upon in the Plaintiff's submissions at [71].

62 (2013) 301 ALR 663 at [15] (quoting s 84(3) of the *Health Insurance Act 1973* (Cth)). Note also that the Court accepted that many authorities (cited at [45]-[46]) support the view that consultation may have occurred even if a response from the person consulted has not been received.

63 Plaintiff's submissions at [73]-[74].

given certain assurances on those topics. As noted above, it is open to the Minister to designate that a country is a regional processing country even if satisfied the regional processing country had *not* given any such assurances.

Australia's obligations under international law

53. The plaintiff contends that "another mandatory relevant consideration" was that the designation decision would result in "violation or breach of at least four international treaties to which Australia was a signatory" and that it was in violation of customary international law (although the respect in which that is alleged is not identified).[64] As with the other asserted mandatory relevant considerations, this contention can be rejected simply by reference to the terms of s 198AB(2) and (3). The following additional points can also be made.

54. *First*, even if the plaintiff could establish that taking persons with protection claims from Australia to certain other countries without first assessing those claims would breach an obligation that Australia has accepted under international law (which he asserts blithely but without seeking to develop a considered argument from international law), such removal is an inevitable feature of any decision to designate a country under s 198AB. Subdivision B expressly creates a scheme pursuant to which UMAs "in respect of whom Australia has or may have protection obligations" are required to be taken from Australia. Having created such a scheme, Parliament cannot have intended the Minister to consider the compatibility of the scheme with Australia's international obligations each time a designation is made, for that would require the Minister to second-guess Parliament.

55. *Secondly*, as noted above, the terms in which s 198AB(3) is expressed plainly contemplate that the Minister may designate that a country is a regional processing country even if that country has not given Australia any, or any sufficient, assurances that it will assess protection claims, or that it will not refoule refugees. Moreover, the Minister is expressly told that the assurances which must be considered need not be legally binding. Parliament has thereby plainly contemplated that the Minister might consider that it is in the national interest to designate that a country is a regional processing country even where that country might refoule UMAs, and therefore that the Minister's assessment of the national interest need not be determined by reference to Australia's obligations under international law.

56. *Thirdly*, the plaintiff is wrong to contend that it is "significant" that s 198AA does not indicate that the designation of a country need not be determined by reference to Australia's international obligations.[65] The role of s 198AA(d) is to make clear that, in selecting a country to be a regional processing country, the Minister need not take account of the legal obligations of the selected country. That is directed to the possibility that removing UMAs to a country that does not have domestic or international legal obligations to provide protection may be contrary to Australia's international obligations.[66] Section 198AA(d) avoids any doubt that the Minister may designate such a country to be a regional processing country.

No evidence

57. In order to establish that the designation is invalid by reason that the Minister made a factual finding for which he had "no evidence", the plaintiff must establish three matters.[67]

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64 Plaintiff's submissions at [79]-[83].

65 Plaintiff's submissions at [64].

66 Cf *Malaysia Declaration Case* at 182-183 [66] (French CJ), 195-196 [116]-[118] (Gummow, Hayne, Crennan and Bell JJ), 233 [244] (Kiefel J).

67 See generally the discussion of the "no evidence" ground in *D'Amore v Independent Commission Against Corruption* (2013) 303 ALR 242; [2013] NSWCA 187 at [224]-[235]); *SZOOR v Minister for Immigration and Citizenship* (2012) 202 FCR 1 at 25 [101] (McKerracher J, Reeves J agreeing).

First, he must show that that the Minister had no evidence (as opposed to evidence that the plaintiff contends is insufficient) to support a particular finding.[68] Secondly, the finding in question must be a finding of fact, rather than an expression of opinion or a value judgment.[69] Thirdly, he must establish that the making of that factual finding gave rise to a jurisdictional error affecting the designation.[70]

58. The plaintiff submits that the Minister made two "findings" for which he had "no evidence".[71] The first "finding" is the Minister's opinion that designating PNG to be a regional processing country would "promote the maintenance of a fair and orderly Refugee and Humanitarian Program that retains the confidence of the Australia people".[72] The second "finding" is the Minister's expectation that PNG would act in accordance with the assurances it had given.[73]

59. With respect to the first "finding", the Minister's view that the designation of PNG would "promote the maintenance of a fair and orderly Refugee and Humanitarian Program that retains the confidence of the Australian people" did not involve the making of a factual finding. Rather, it involved the expression of a value judgment (i.e., that the designation would promote a "fair" system). As noted as the second criterion above, the "no evidence" ground has no application to value judgments or statements of opinion of this kind. Further, to the extent that the "finding" involved the expression a political judgment (i.e., that the designation would promote a system that the "Australian people" would support), it was a judgment that the Minister was competent to make without evidence. Finally, even if it was necessary for the Minister to have some material upon which he could form these judgments, he had such material in the form of a submission from the Department.[74]

60. With respect to the second "finding", the Minister did not need any "evidence" to prove that he held a certain expectation as to how PNG would act. Further, if it was necessary for the Minister to have some material upon which he could base his expectation that PNG would act in a certain way, the very fact of PNG having given Australia an assurance that it would act in that way provided a basis upon which the Minister could form that expectation.

61. The plaintiff therefore fails to clear the first hurdle concerning his "no evidence" grounds.

62. In any case, the asserted errors are not jurisdictional errors. At common law, the making of an administrative decision involving a finding of a particular fact for which there is "no evidence" vitiates the decision only where that fact is a jurisdictional fact.[75] For that

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68 *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 119-120 (Dixon CJ, Williams, Webb and Fullagar JJ), quoted with approval in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at 1172 [36] (McHugh and Gummow JJ); *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at 587 [575] (Weinberg J). In *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356-357, Mason J pointed out that the wider approach favoured by Deane J in *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666 (on which the plaintiff relies) has not been followed in Australia.

69 *Telstra Corporation Ltd v Seven Cable Television Pty Ltd* (2000) 102 FCR 517 at 553 [139] (Full Federal Court), applied in *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at 588 [581] (Weinberg J); *Randwick City Council v Minister for the Environment* (1998) 54 ALD 682 at 717 (Finn J).

70 The Minister's statement of reasons is not part of the "record" of the designation. Accordingly, the designation cannot be impugned on the basis of a mere error of law in the statement of reasons: *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 577 [83]-[85] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

71 Plaintiff's submissions at [87]-[91].

72 SCB 258 [13(3)].

73 SCB 259 [19].

74 SCB 220.

75 *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at 998-999 [39] (Gummow and Hayne JJ, Gleeson CJ agreeing). See also *Television Capricornia Pty Ltd v Australian Broadcasting Tribunal* (1986) 13 FCR 511 at 514, 519-520 (Wilcox J), approved in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 (***SZMDS***) at 622 [31] (Gummow ACJ and Kiefel J).

additional reason, even assuming the correctness of the novel[76] proposition that "no evidence" is an available ground of review with respect to the making of legislative instruments, the plaintiff's no evidence grounds must fail because neither of the "facts" about which he complains are jurisdictional facts.[77]

Unreasonableness

63. The plaintiff submits[78] that the designation is "afflicted by legal unreasonableness in the sense described in *Minister for Immigration and Citizenship v Li*" (***Li***).[79] Once again, this is said to be the case for a litany of reasons: the Minister "failed to consult and to read and consider the report of the UNHCR"; the Minister relied on assurances from PNG that had "very little credibility in them"; arrangements with PNG were still being negotiated; the Minister did not consider the "health and safety" of UMAs; the Minister did not consider "whether or not or when the refugee applications would be determined and by whom and in what fashion and in what period"; the Minister did not have "proper regard to" Australia's international obligations or to customary law; the Minister gave "excessive weight" to the MOU with PNG and the statement of arrangements; "additional evidence" was required.[80]

64. Most of the bases upon which the plaintiff asserts that the designation is "afflicted by legal unreasonableness" relate to alleged failures of the Minister to consider various matters in considering the national interest. To that extent, this ground of review approximates the plaintiff's attack on the designation on the basis that the Minister failed to take certain "mandatory relevant considerations" into account, and is defective for the same reasons.

65. The concept of vitiating unreasonableness arises in different contexts, and may be characterised in more than one way that is susceptible of judicial review.[81] In the context of the making of administrative decisions, "unreasonableness" may describe the gamut of "specific" or "particular" errors to which the courts often refer,[82] as well as any exercise of a discretionary power that infringes a "framework of rationality imposed by the statute".[83] In the context of the making of legislative instruments, "unreasonableness" may describe the making of an instrument that has no rational relationship with the purpose for which the power was conferred.[84] In either context, where an exercise of power is predicated upon the formation of a particular opinion or state of mind, "unreasonableness" may describe an opinion or state of mind that could not be formed by a reasonable person who correctly understands the meaning of the law under which he or she acts.[85]

66. Regardless of the context in which vitiating "unreasonableness" is invoked, the concept speaks to the existence of a power rather than the expediency of its exercise, and therefore involves a question as to the true construction of the authorising legislation.[86]

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76 The correctness of the proposition may be doubted: see Pearce & Argument, *Delegated Legislation in Australia* (4th ed, 2012) at [12.8]-[12.9]; *Vanstone v Clark* (2005) 147 FCR 299 at 332 [106] (Weinberg J).

77 The authorities relevant to determining whether particular facts are jurisdictional facts are usefully collected in *Harbour Radio Pty Ltd v ACMA* (2012) 202 FCR 525 at 547 [84]-551 [91] (Griffith J).

78 Plaintiff's submissions at [92].

79 (2013) 87 ALJR 618.

80 Plaintiff's submissions at [95]-[96].

81 *Li* at 630 [26] (French CJ).

82 *Li* at 630 [27]-[28] (French CJ), 639 [72] (Hayne, Kiefel and Bell JJ).

83 *Li* at 630 [23]-[28] (French CJ), 637 [63]-[65], [67] (Hayne, Kiefel and Bell JJ), 641-642 [90] (Gageler J).

84 *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 87 ALJR 289 (***Corneloup***) at 309 [58] (French CJ), 319-321 [117]-[123] (Hayne J, Bell J agreeing), 334 [199] (Crennan and Kiefel JJ).

85 *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432; *Foley v Padley* (1984) 154 CLR 349 at 353 (Gibbs CJ, Wilson J agreeing), 370 (Brennan J), 375 (Dawson J, Wilson J agreeing); *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 150 [34] (Gleeson CJ, Gummow, Kirby and Hayne JJ); *Li* at 641-642 [90] (Gageler J).

86 *Corneloup* at 306-307 [48]-[51] (French CJ), 319-320 [117]-[118] (Hayne J, Bell J agreeing); *Li* at 631 [29]-[30] (French CJ), 638 [67] (Hayne, Kiefel and Bell JJ), 642 [92] (Gageler J).

"Unreasonableness" is "not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which a court disagrees".[87] Here, the plaintiff attaches the label of unreasonableness simply as "an emphatic way of expressing disagreement" with the Minister's decision, but used in that way unreasonableness is a label having "no particular legal consequence".[88] In effect, the plaintiff simply invites the Court to "second-guess"[89] the decision of the Minister and the Parliament.

67. The applicable "legal standard or reasonableness" is the standard indicated by the true construction of the statute.[90] The power to designate a country to be a regional processing country in the national interest is very different to, for example, a power to adjourn a hearing to allow a visa applicant to provide further information (as in *Li*). The considerations open to be taken into account in the former context are far wider than those in the latter context.[91] Having regard to the terms of Subdivision B, it is difficult to imagine how the Court could conclude that the Minister's designation of PNG had no rational relationship with the purpose for which the power in s 198AB was conferred, or that his assessment of where the national interest lay could not be formed reasonably on the information available to him. That is particularly so given that the Minister's reasons for making the designation would be then placed before each House of Parliament at the time they voted to approve the designation for their further consideration.

Other grounds

68. Finally, the plaintiff's submissions impugn the designation as being the product of "illogical or irrational reasoning", as representing a "disproportionate response by reference to the scope of the power", and as "lack[ing] evident and intelligible justification".[92] The arguments in support of these claims amount to little more than emotive rhetoric.

69. The descriptions "illogical" and "irrational" in this context are "analogues of 'arbitrary' or 'perverse' and are not used with a lesser colloquial meaning that may be applied where the words are introduced in debate to emphasise the degree of dissent from a disputed conclusion or point of view".[93] Yet the plaintiff does not engage in any attempt to explain by reference to principle, how any particular element of the Minister's reasoning was "illogical" or "irrational".

70. Instead, the plaintiff seeks to impugn the designation on the basis of assertions as to the conditions in PNG which are not referenced in evidence as to the fact at the time or material available to the Minister. The plaintiff errs, in particular, by asserting that the designation was made "for the purpose of the arbitrary and indefinite detention of the plaintiff under the 'No Advantage Principle'".[94] There is no evidence that the Minister had regard to that concept in making the designation. The plaintiff's assertion that the

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87 *Li* at 631 [30] (French CJ).

88 See *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 626 [40] (Gleeson CJ and McHugh J), quoted in *Li* at 631 [30] (French CJ) and in *SZMDS* at [124] (Crennan and Bell JJ).

89 Cf *Corneloup* at 306 [48], 311 [65] (French CJ).

90 *Li* at [67] (Hayne, Kiefel and Bell JJ).

91 See *Li* at [108], [111]-[112] (Gageler J), noting the significance of the fact that a discretion is wide in scope, and affected by policies of which the Court has no experience, in assessing whether a decision is reasonable.

92 Plaintiff's submissions at [96]-[98].

93 See, e.g., *Minister for Immigration and Citizenship v SZLSP* (2010) 187 FCR 362 at 375-376 [40]-[41] (Kenny J); *Tisdall v Webber* (2011) 193 FCR 260 at 296 [126] (Buchanan J, Tracey J agreeing), applying *SZMDS* at [135] (Crennan and Bell JJ).

94 Plaintiff's submissions at [99]-[100].

Minister did so is based on a document that did not even exist at the time the designation was made.[95] Counsel for the plaintiff should withdraw these submissions.

71. Question 3 should be answered "No".

(D) QUESTION 4 – VALIDITY OF THE TAKING DIRECTION

72. Subsections 198AD(5) to (11) establish a mechanism for the Minister to select the particular regional processing country to which a UMA, or class of UMAs, must be taken once there are two or more regional processing countries. The Minister is required by s 198AD(5) to give a direction to officers identifying the regional processing country to which UMAs should be taken. The "only condition" for the performance of that duty is that the Minister thinks that it is in the public interest to direct the officer to take a UMA, or class of UMAs, to the specified regional processing country (s 198AD(8)). An officer must comply with such a direction (s 198AD(6)). However, absent any direction by the Minister under s 198AD(5), officers remain subject to the general obligation under s 198AD(2) to take UMAs to "a" regional processing country. That fact renders this question moot.

73. On 12 September 2012, Nauru became a regional processing country.[96] On 10 October 2012, PNG became a regional processing country.[97] At the time that the plaintiff was taken to PNG, the direction that was relevant to the choice between Nauru and PNG was a direction made on 29 July 2013 (**the taking direction**).[98] In that direction, the Minister separated UMAs into four demographic classes (being family groups; single adult females; single adult males; unaccompanied minors). He then directed that members of those respective classes be taken to PNG if three conditions were satisfied, or to Nauru if three corresponding conditions were satisfied. The conditions related to: (a) the availability of facilities and services in the relevant country for that class of persons; (b) which country had the greater quantity of vacant accommodation for that class of persons; and (c) whether taking the UMA to the relevant country would result in a family group being split.[99]

74. The taking direction was made in the immediate context of two significant events concerning Australia's regional processing policy.

74.1. First, on 19 July 2013, Australia and PNG had entered into a Regional Resettlement Arrangement (**RRA**), pursuant to which "any" UMA entering Australian waters on or from that date would be liable to transfer to PNG.[100]

74.2. Secondly, the Minister had, during the public announcement of the RRA, indicated that the "facilities, as they are right now" in PNG were not appropriate for "family groups" and "women and children".[101] But for other UMAs, "anyone who arrives from now on will be subject to the new rules".[102]

75. The plaintiff challenges the taking direction on several grounds. First, he says that the taking direction is invalid if his challenge to the validity of the designation is successful.[103] So much may be accepted, but the premise of the point fails.

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95 Plaintiff's submissions at [99]-[100], SCB 366-381. Note also that the no advantage principle was never relevant to the plaintiff, because by the time he was transferred to PNG that principle had been overtaken by the Regional Resettlement Arrangement with PNG, whereby transferees were to be resettled within PNG: SCB 273 [3].

96 SCB 34 [18].

97 SCB 33 [13].

98 SCB 317.

99 SCB 37 [30], 317-318.

100 SCB 273 [3].

101 SCB 282.

102 SCB 282.

103 Plaintiff's submissions at [102]-[103].

76. The plaintiff also says that the taking direction is invalid because: (a) it does not specify the "regional processing centre [country]" to which the plaintiff should be taken;[104] (b) it is "uncertain";[105] (c) the Minister failed to take into account certain "mandatory relevant considerations" in making the taking direction;[106] (d) the taking is "the subject of legal unreasonableness".[107] Each of those arguments should be rejected.

77. It is convenient to dispose of the latter two grounds first. As noted above, the "only condition" for the performance of the Minister's duty under s 198AD(5) is that he thinks that it is in the "public interest" to specify one country rather than another. As this Court has stated on numerous occasions, the term "public interest" is of broad import, and "classically imports a discretionary value judgment to be made by reference to undefined factual matters confined only insofar as the subject matter and the scope and purpose of the statutory enactments may enable given reasons to be pronounced definitely extraneous to any objects the legislature could have had in view".[108] There is nothing in the Act to create any "mandatory relevant considerations" concerning the performance of the duty under s 198AD(5), particularly considering that that duty can be performed by reference to UMAs as a class (thereby negativing any implied obligation to consider the circumstances of specific UMAs, which seems to be one of the plaintiff's complaints). The assertion of "legal unreasonableness" receives no developed argument from the plaintiff.

78. The plaintiff's first two grounds assert that the taking direction fails to meet the description of a direction that "specifies" the particular regional processing country to which a UMA is to be taken, in reliance on the principles articulated in *King Gee Clothing Co Pty Ltd v Commonwealth*.[109]

79. In assessing whether the taking direction contains a sufficient "specification" of the relevant matter, it is important to have regard to the nature of the direction, and the purpose that it serves within the statutory scheme. In particular, the following points are significant:

    79.1. Section 198AD(5) is concerned with the giving of directions to officers, not to UMAs or members of the public. It is necessary to recognise that the officers to whom a direction under s 198AD(5) is issued have access to information that may not be available to the public at large. The question whether the taking direction sufficiently specifies the regional processing country to which UMAs must be taken depends on whether it contains "adequate information as to the duties of those who are to obey".[110] It must be "clear enough to serve the practical purpose which the provision is evidently intended to serve", but not more than this.[111]

    79.2. The officers who must comply with the taking direction are applying that direction to choose between countries that have been designated under s 198AB(1). The factual questions that may arise in applying the taking direction therefore necessarily arise within a very confined field.

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104 FASOC, Annexure B at 16(a); Plaintiff's submissions at [104]-[108].

105 FASOC, Annexure B at 16(d); Plaintiff's submissions at [110]-[114].

106 FASOC, Annexure B at 16(b); Plaintiff's submissions at [109].

107 FASOC, Annexure B at 16(c). The plaintiff does not address submissions to this claim.

108 See, e.g., *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 (Dixon J); *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 (Mason CJ, Brennan, Dawson and Gaudron JJ); *Pilbara Infrastructure v Australian Competition Tribunal* (2012) 246 CLR 379 at 400-401 [42] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Plaintiff M79/2012* at 692 [39] (French CJ, Crennan and Bell JJ).

109 (1945) 71 CLR 184 at 194, 196 (Dixon J). See also *Cann's Pty Ltd v Commonwealth* (1946) 71 CLR 210 at 227 (Dixon J); *Television Corporation Ltd v Commonwealth* (1963) 109 CLR 59 at 71 (Kitto J).

110 *Brunswick Corporation v Stewart* (1941) 65 CLR 88 at 99 (Williams J, emphasis added). See also *Director of Public Prosecutions v Priestley* [2013] NSWSC 407 at [26]-[30] (Adams J).

111 *Ex parte Zietsch; Re Craig* (1944) 44 SR (NSW) 360 at 365 (Jordan CJ). See also *R v Holmes; Ex parte Altona Petrochemical Co Ltd* (1972) 126 CLR 529 at 562 (Windeyer J).

79.3. Section 198AD(5) does not affect the liability of a UMA to be taken a regional processing country under s 198AD(2). Its purpose is to govern the internal administration of the Department, by instructing officers as to how they should discharge their duty under s 198AD(2).

80. Contrary to the plaintiff's submissions, the taking direction did not require officers to undertake an "evaluative process".[112] Instead, particularly having regard to the Minister's statement at the time of the announcement of the RRA, the meaning of the taking direction was tolerably clear. Relevantly to the plaintiff, officers were directed to take him, as a single adult male, to PNG, provided there was greater accommodation for that class of UMA in PNG than Nauru. The application of that criterion involved a simple inquiry readily made by the officers to whom the direction was given. The answer to the application of that criterion is not in dispute. The selection of that criteria did not render the taking direction invalid for uncertainty. Question 4 should be answered "No".

(E) QUESTION 5 – REMITTAL

81. The Full Court's answers to the questions reserved will determine most of the substantive issues that arises in this matter. However, two issues that will remain undetermined are whether the decision or act of an officer on 2 August 2013 to take the plaintiff to PNG under s 198AD(2) of the Act (the **taking decision**) was invalid, and what relief ought be granted if the taking decision was invalid.[113]

82. Section 44(1) of the Judiciary Act relevantly provides that this Court may remit any part of a matter that is pending in the Court to any federal court that has jurisdiction with respect to the subject matter and the parties. Section 476B(1) of the Act has the effect that, despite s 44 of the Judiciary Act, but subject to s 476B(3) of the Act, the Court must not remit any part of a matter that relates to a "migration decision" to any court other than the Federal Circuit Court. Section 476B(3) provides that this Court may remit part of a matter that relates to a migration decision to the Federal Court if that Court has jurisdiction in relation to such a decision under s 476A(1)(b) or (c).

83. The taking decision is a "migration decision".[114] It is not, however, a decision in relation to which the Federal Court has jurisdiction under s 476A(1)(b) or (c). Accordingly, the defendants agree with the plaintiff that it would not be open to the Court to remit the part of this matter which relates to the taking decision to the Federal Court.[115] However, the taking decision plainly can be remitted to the Federal Circuit Court (which has jurisdiction under s 476(1) of the Act), subject to the operation of s 494AA of the Act.

84. Section 494AA provides that certain proceedings may not be "instituted or continued" in any court, including proceedings relating to the performance or exercise of a function, duty or power under Subdivision B in relation to a UMA (s 494AA(1)(e)). However, s 494AA(3) provides that "Nothing in this section is intended to affect the jurisdiction of the High Court under section 75 of the Constitution."

85. Section 494AA(1)(e) does not preclude this Court from exercising its power under s 44(1) of the Judiciary Act to remit that part of the proceeding which relates to the taking decision to the Federal Circuit Court. Section 494AA(3) expressly provides that s 494AA does not affect the original jurisdiction of this Court, and the section should not be read as impliedly excluding the established power of this Court to remit matters commenced in its original jurisdiction to another court. Section 476B(4) demonstrates that, when Parliament wishes to exclude or limit remittal under s 44 of the Judiciary Act, it does so

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112 Cf Plaintiff's submissions at [106].

113 Cf SCB 15, 18.

114 See the definitions in ss s 5(1), 5E and 474 of the Act.

115 Plaintiff's submissions at [121].

expressly. There is a marked contrast between the specificity of s 476B(4) and the general language of s 494AA(2). Further, section 476 and 476B were enacted more recently than s 494AA,[116] and they therefore prevail in the event of inconsistency.

86. There is a strong presumption that "Parliament does not intend to cut down the jurisdiction of the courts save to the extent that the legislation in question expressly so states or necessarily implies".[117] Applying that approach, s 494AA is properly construed as precluding a person from "instituting" certain proceedings in any court other than this Court, and from "continuing" a proceeding that was already on foot in any court other than this Court.[118] So read, s 494AA(1) does not prevent the commencement of a proceeding to which the section applies in this Court, and its continuation in another court if this Court decides that remittal is appropriate.

87. The above construction of s 494AA is consistent with the Minister's second reading speech for the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001*, where the Minister explained that s 494AA would "preclude the institution of proceedings relating to [offshore entry persons] in any court – apart from the High Court of Australia" (emphasis added).

88. Consistently with the above, this Court has not treated s 494AA(1) as preventing remittal of cases to which it applies. On at least two occasions the Court has remitted such matters to lower courts, after s 494AA was drawn to the attention of the Court.[119]

89. Accordingly, for the reasons outlined above, the defendants agree with the plaintiff that the Court may remit that part of the matter which relates to the taking direction to the Federal Circuit Court.[120] If the Court remitted that part of the matter to the Federal Circuit Court, that court could transfer the proceeding to the Federal Court under s 39 of the *Federal Circuit Court of Australia Act 1999* (Cth) if it decided it was appropriate to do so.

(F) QUESTION 6 – COSTS

90. Question 6 should be answered "the Plaintiff". If the Court decides to answer any individual question favourably to the plaintiff, it should invite submissions on costs.

VIII. ESTIMATE OF TIME FOR ORAL ARGUMENT

91. The defendants estimate that presentation of their oral argument will take 3 hours.

Dated: 16 April 2014

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116 Section 476B was inserted by the *Migration Litigation Reform Act 2005*. Section 494AA was inserted by the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001*.

117 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [72].

118 See, by analogy, *Utting v Utting* (1976) 12 ALR 124; *Conroy v Conroy* (1976) 12 ACTR 23.

119 *P1/2003 v Ruddock* [2003] HCATrans 787 (McHugh J); *Plaintiff M169/10 v Minister for Immigration* [2011] HCATrans 108 (Crennan J).

120 Plaintiff's submissions at [120].

Annexure A

The Constitution

51 Legislative powers of the Parliament

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

(xix) naturalization and aliens;

...

(xxvii) immigration and emigration;

...

(xxix) external affairs;

...

***Acts Interpretation Act 1901* (Cth)**

Part 5—General interpretation rules

15AA Interpretation best achieving Act's purpose or object

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

15AB Use of extrinsic material in the interpretation of an Act

(1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or

(b) to determine the meaning of the provision when:

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

...

(3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to:

(a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and

(b) the need to avoid prolonging legal or other proceedings without compensating advantage.

15AE Legislative instruments etc.

Instruments that are described as legislative instruments

(1) If a provision of a law requires or permits an instrument that is described as a legislative instrument to be made, then an instrument made under that provision:
  (a) must be in writing; and
  (b) is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

(2) However, the fact that a provision of a law requires or permits an instrument that is described as a legislative instrument to be made does not imply that an instrument made under that provision is or must be of legislative character (within the ordinary meaning of that term).

...

Definition

(6) In this section:

law means an Act or regulations or any other instrument made under an Act.

***Federal Circuit Court of Australia Act 1999* (Cth)**

39 Discretionary transfer of proceedings to the Federal Court or the Family Court

(1) If a proceeding is pending in the Federal Circuit Court of Australia, the Federal Circuit Court of Australia may, by order, transfer the proceeding from the Federal Circuit Court of Australia to the Federal Court or the Family Court.

(2) The Federal Circuit Court of Australia may transfer a proceeding under this section:
  (a) on the application of a party to the proceeding; or
  (b) on its own initiative.

(3) In deciding whether to transfer a proceeding to the Federal Court under subsection (1), the Federal Circuit Court of Australia must have regard to:
  (a) any Rules of Court made for the purposes of subsection 40(2); and
  (b) whether proceedings in respect of an associated matter are pending in the Federal Court; and
  (c) whether the resources of the Federal Circuit Court of Australia are sufficient to hear and determine the proceeding; and
  (d) the interests of the administration of justice.

...

(5) If an order is made under subsection (1), the Federal Circuit Court of Australia may make such orders as it considers necessary pending the disposal of the proceeding by the Federal Court or the Family Court, as the case requires.

...

(7) A reference in subsection (1) to a proceeding pending in the Federal Circuit Court of Australia includes a reference to a proceeding that was instituted in contravention of subsection 19(1).

...

Judiciary Act 1903 (Cth)

30 Original jurisdiction conferred

In addition to the matters in which original jurisdiction is conferred on the High Court by the Constitution, the High Court shall have original jurisdiction:

(a) in all matters arising under the Constitution or involving its interpretation; and

(c) in trials of indictable offences against the laws of the Commonwealth.

44 Remittal of matters by High Court to other courts

(1) Any matter other than a matter to which subsection (2) applies that is at any time pending in the High Court, whether originally commenced in the High Court or not, or any part of such a matter, may, upon the application of a party or of the High Court's own motion, be remitted by the High Court to any federal court, court of a State or court of a Territory that has jurisdiction with respect to the subject-matter and the parties, and, subject to any directions of the High Court, further proceedings in the matter or in that part of the matter, as the case may be, shall be as directed by the court to which it is remitted.

(2) Where a matter referred to in paragraph 38(a), (b), (c) or (d) is at any time pending in the High Court, the High Court may, upon the application of a party or of the High Court's own motion, remit the matter, or any part of the matter, to the Federal Court of Australia or any court of a State or Territory.

(2A) Where a matter in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party is at any time pending in the High Court, the High Court may, upon the application of a party or of the High Court's own motion, remit the matter, or any part of the matter, to the Federal Court of Australia.

(3) Where the High Court remits a matter, or any part of a matter, under subsection (2) or (2A) to a court:

(a) that court has jurisdiction in the matter, or in that part of the matter, as the case may be; and

(b) subject to any directions of the High Court, further proceedings in the matter, or in that part of the matter, as the case may be, shall be as directed by that court.

(4) The High Court may remit a matter, or any part of a matter, under this section without an oral hearing.

Migration Act 1958 (Cth)

4 Object of Act

(1) The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.

(2) To advance its object, this Act provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain.

(3) To advance its object, this Act requires persons, whether citizens or non-citizens, entering Australia to identify themselves so that the Commonwealth government can know who are the non-citizens so entering.

(4) To advance its object, this Act provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by this Act.

(5) To advance its object, this Act provides for the taking of unauthorised maritime arrivals from Australia to a regional processing country.

5 Interpretation

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

detain means:

(a) take into immigration detention; or

(b) keep, or cause to be kept, in immigration detention;

and includes taking such action and using such force as are reasonably necessary to do so.

Note: This definition extends to persons covered by residence determinations (see section 197AC).

detainee means a person detained.

Note: This definition extends to persons covered by residence determinations (see section 197AC).

diplomatic or consular representative, in relation to a country other than Australia, means a person who has been appointed to, or is the holder of, a post or position in a diplomatic or consular mission of that country in Australia, not being a person who was ordinarily resident in Australia when he or she was appointed to be a member of the mission.

enter includes re-enter.

enter Australia, in relation to a person, means enter the migration zone.

entered includes re-entered.

entry includes re-entry.

excised offshore place means any of the following:

(a) the Territory of Christmas Island;

(b) the Territory of Ashmore and Cartier Islands;

(c) the Territory of Cocos (Keeling) Islands;

(d) any other external Territory that is prescribed by the regulations for the purposes of this paragraph;

(e) any island that forms part of a State or Territory and is prescribed for the purposes of this paragraph;

(f) an Australian sea installation;

(g) an Australian resources installation.

excision time, for an excised offshore place, means:

(a) for the Territory of Christmas Island—2 pm on 8 September 2001 by legal time in the Australian Capital Territory; or

(b) for the Territory of Ashmore and Cartier Islands—2 pm on 8 September 2001 by legal time in the Australian Capital Territory; or

(c) for the Territory of Cocos (Keeling) Islands—12 noon on 17 September 2001 by legal time in the Australian Capital Territory; or

(d) for any other external Territory that is prescribed by the regulations for the purposes of the definition of ***excised offshore place***—the time when the regulations commence; or

(e) for any island that forms part of a State or Territory and is prescribed by the regulations for the purposes of the definition of ***excised offshore place***—the time when the regulations commence; or

(f) for an Australian sea installation—the commencement of the *Migration Amendment (Excision from Migration Zone) Act 2001*; or

(g) for an Australian resources installation—the commencement of the *Migration Amendment (Excision from Migration Zone) Act 2001*.

Federal Circuit Court means the Federal Circuit Court of Australia.

Federal Court means the Federal Court of Australia.

(b) deals with:

(i) a prescribed disease; or

(ii) a prescribed kind of disease; or

(iii) a prescribed physical or mental condition; or

(iv) a prescribed kind of physical or mental condition; or

(v) a prescribed kind of examination; or

(vi) a prescribed kind of treatment.

lawful non-citizen has the meaning given by section 13.

migration decision means:

(a) a privative clause decision; or

(b) a purported privative clause decision; or

(c) a non-privative clause decision.

migration zone means the area consisting of the States, the Territories, Australian resource installations and Australian sea installations and, to avoid doubt, includes:

(a) land that is part of a State or Territory at mean low water; and

(b) sea within the limits of both a State or a Territory and a port; and

(c) piers, or similar structures, any part of which is connected to such land or to ground under such sea;

but does not include sea within the limits of a State or Territory but not in a port.

non-citizen means a person who is not an Australian citizen.

officer means:

(a) an officer of the Department, other than an officer specified by the Minister in writing for the purposes of this paragraph; or

(b) a person who is an officer for the purposes of the *Customs Act 1901*, other than such an officer specified by the Minister in writing for the purposes of this paragraph; or

(c) a person who is a protective service officer for the purposes of the *Australian Federal Police Act 1979*, other than such a person specified by the Minister in writing for the purposes of this paragraph; or

(d) a member of the Australian Federal Police or of the police force of a State or an internal Territory; or

(e) a member of the police force of an external Territory; or

(f) a person who is authorised in writing by the Minister to be an officer for the purposes of this Act; or

(g) any person who is included in a class of persons authorised in writing by the Minister to be officers for the purposes of this Act, including a person who becomes a member of the class after the authorisation is given.

privative clause decision has the meaning given by subsection 474(2).

purported privative clause decision has the meaning given by section 5E.

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

remove means remove from Australia.

removee means an unlawful non-citizen removed, or to be removed, under Division 8 of Part 2.

transitory person means:

(a) a person who was taken to another country under repealed section 198A; or

(aa) a person who was taken to a regional processing country under section 198AD; or

(b) a person who was taken to a place outside Australia under paragraph 245F(9)(b) of this Act, or paragraph 72(4)(b) of the *Maritime Powers Act 2013*; or

(c) a person who, while a non-citizen and during the period from 27 August 2001 to 6 October 2001:

(i) was transferred to the ship *HMAS Manoora* from the ship *Aceng* or the ship *MV Tampa*; and

(ii) was then taken by *HMAS Manoora* to another country; and

(iii) disembarked in that other country.

unauthorised maritime arrival has the meaning given by section 5AA.

unlawful non-citizen has the meaning given by section 14.

5AA Meaning of *unauthorised maritime arrival*

(1) For the purposes of this Act, a person is an ***unauthorised maritime arrival*** if:

(a) the person entered Australia by sea:

(i) at an excised offshore place at any time after the excision time for that place; or

(ii) at any other place at any time on or after the commencement of this section; and

(b) the person became an unlawful non-citizen because of that entry; and

(c) the person is not an excluded maritime arrival.

Entered Australia by sea

(2) A person ***entered Australia by sea*** if:

(a) the person entered the migration zone except on an aircraft that landed in the migration zone; or

(b) the person entered the migration zone as a result of being found on a ship detained under section 245F (as in force before the commencement of section 69 of the *Maritime Powers Act 2013*) and being dealt with under paragraph 245F(9)(a) (as in force before that commencement); or

(ba) the person entered the migration zone as a result of being on a vessel detained under section 69 of the *Maritime Powers Act 2013* and being dealt with under paragraph 72(4)(a) of that Act; or

(c) the person entered the migration zone after being rescued at sea.

Excluded maritime arrival

(3) A person is an ***excluded maritime arrival*** if the person:

(a) is a New Zealand citizen who holds and produces a New Zealand passport that is in force; or

(b) is a non-citizen who holds and produces a passport that is in force and is endorsed with an authority to reside indefinitely on Norfolk Island; or

(c) is included in a prescribed class of persons.

Definitions

(4) In this section:

aircraft has the same meaning as in section 245A.

ship has the meaning given by section 245A (as in force before the commencement of section 69 of the *Maritime Powers Act 2013*).

vessel has the same meaning as in the *Maritime Powers Act 2013*.

5E Meaning of *purported privative clause decision*

(1) In this Act, a ***purported privative clause decision*** means a decision purportedly made, proposed to be made, or required to be made, under this Act or under a regulation or other instrument made under this Act (whether in purported exercise of a discretion or not), that would be a privative clause decision if there were not:

(a) a failure to exercise jurisdiction; or

(b) an excess of jurisdiction;

in the making of the decision.

(2) In this section, ***decision*** includes anything listed in subsection 474(3).

13 Lawful non-citizens

(1) A non-citizen in the migration zone who holds a visa that is in effect is a lawful non-citizen.

...

14 Unlawful non-citizens

(1) A non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen.

...

46A Unlawful non-citizens

(1) An application for a visa is not a valid application if it is made by an unauthorised maritime arrival who:

(a) is in Australia; and

(b) is an unlawful non-citizen.

...

189 Detention of unlawful non-citizens

(1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.

(2) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter the migration zone (other than an excised offshore place); and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer may detain the person.

(3) If an officers knows or reasonably suspects that a person (other than a person referred to in subsection (3A)) in an excised offshore place is an unlawful non-citizen, the officer must detain the person.

(3A) If an officer knows or reasonably suspects that a person in a protected area:

(a) is a citizen of Papua New Guinea; and

(b) is an unlawful non-citizen;

the officer may detain the person.

(4) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter an excised offshore place; and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer may detain the person.

(5) In subsections (3), (3A) and (4) and any other provisions of this Act that relate to those subsections, ***officer*** means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

Note: See Subdivision B for the Minister's power to determine that people who are required or permitted by this section to be detained may reside an places not covered by the definition of ***immigration detention*** in subsection 5(1).

Division 8—Removal of unlawful non-citizens etc.

Subdivision A—Removal

198 Removal from Australia of unlawful non-citizens

(1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.

(1A) In the case of an unlawful non-citizen who has been brought to Australia under section 198B for a temporary purpose, an officer must remove the person as soon as reasonably practicable after the person no longer needs to be in Australia for that purpose (whether or not the purpose has been achieved).

(2) An officer must remove as soon as reasonably practicable an unlawful non-citizen:

(a) who is covered by subparagraph 193(1)(a)(i), (ii) or (iii) or paragraph 193(1)(b), (c) or (d); and

(b) who has not subsequently been immigration cleared; and

(c) who either:

(i) has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; or

(ii) has made a valid application for a substantive visa, that can be granted when the applicant is in the migration zone, that has been finally determined.

(2A) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is covered by subparagraph 193(1)(a)(iv); and

(b) since the Minister's decision (the ***original decision***) referred to in subparagraph 193(1)(a)(iv), the non-citizen has not made a valid application for a substantive visa that can be granted when the non-citizen is in the migration zone; and

(c) in a case where the non-citizen has been invited, in accordance with section 501C, to make representations to the Minister about revocation of the original decision—either:

(i) the non-citizen has not made representations in accordance with the invitation and the period for making representations has ended; or

(ii) the non-citizen has made representations in accordance with the invitation and the Minister has decided not to revoke the original decision.

Note: The only visa that the non-citizen could apply for is a protection visa or a visa specified in regulations under section 501E.

(3) The fact that an unlawful non-citizen is eligible to apply for a substantive visa that can be granted when the applicant is in the migration zone but has not done so does not prevent the application of subsection (2) or (2A) to him or her.

(5) An officer must remove as soon as reasonably practicable an unlawful non-citizen if the non-citizen:

(a) is a detainee; and

(b) was entitled to apply for a visa in accordance with section 195, to apply under section 137K for revocation of the cancellation of a visa, or both, but did neither.

(6) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(c) one of the following applies:

(i) the grant of the visa has been refused and the application has been finally determined;

(iii) the visa cannot be granted; and

(d) the non-citizen has not made another valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(7) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AI of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the non-citizen has not been immigration cleared; or

(ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(d) either:

(i) the Minister has not given a notice under paragraph 91F(1)(a) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that paragraph has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(8) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AJ of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the Minister has not given a notice under subsection 91L(1) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(9) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AK of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the non-citizen has not been immigration cleared; or

(ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(d) either:

(i) the Minister has not given a notice under subsection 91Q(1) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(10) For the purposes of subsections (6) to (9), a valid application under section 137K for revocation of the cancellation of a visa is treated as though it were a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(11) This section does not apply to an unauthorised maritime arrival to whom section 198AD applies.

Subdivision B—Regional processing

198AA Reason for Subdivision

This Subdivision is enacted because the Parliament considers that:

(a) people smuggling, and its undesirable consequences including the resulting loss of life at sea, are major regional problems that need to be addressed; and

(b) unauthorised maritime arrivals, including unauthorised maritime arrivals in respect of whom Australia has or may have protection obligations under the Refugees Convention as amended by the Refugees Protocol, should be able to be taken to any country designated to be a regional processing country; and

(c) it is a matter for the Minister and Parliament to decide which countries should be designated as regional processing countries; and

(d) the designation of a country to be a regional processing country need not be determined by reference to the international obligations or domestic law of that country.

198AB *Regional processing country*

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

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

(a) may designate only one country; and

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

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

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

(b) immediately after both of the following apply:

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

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

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

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

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

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

(ii) the country will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country under that section is covered by

the definition of ***refugee*** in Article 1A of the Refugees Convention as amended by the Refugees Protocol; and

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

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

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

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

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

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

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

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

198AC Documents to be laid before Parliament

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

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

(a) a copy of the designation; and

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

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

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

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

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

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

(4) The sole purpose of laying the documents referred to in subsection (2) before the Parliament is to inform the Parliament of the matters referred to in the documents and nothing in the documents affects the validity of the designation. Similarly, the fact that some or all of those documents do not exist does not affect the validity of the designation.

(5) A failure to comply with this section does not affect the validity of the designation.

(6) In this section, ***agreement*** includes an agreement, arrangement or understanding:

(a) whether or not it is legally binding; and

(b) whether it is made before, on or after the commencement of this section.

198AD Taking unauthorised maritime arrivals to a regional processing country

(1) Subject to sections 198AE, 198AF and 198AG, this section applies to an unauthorised maritime arrival who is detained under section 189.

Note: For when this section applies to a transitory person, see section 198AH.

(2) An officer must, as soon as reasonably practicable, take an unauthorised maritime arrival to whom this section applies from Australia to a regional processing country.

Powers of an officer

(3) For the purposes of subsection (2) and without limiting that subsection, an officer may do any or all of the following things within or outside Australia:
  (a) place the unauthorised maritime arrival on a vehicle or vessel;
  (b) restrain the unauthorised maritime arrival on a vehicle or vessel;
  (c) remove the unauthorised maritime arrival from:
    (i) the place at which the unauthorised maritime arrival is detained; or
    (ii) a vehicle or vessel;
  (d) use such force as is necessary and reasonable.

(4) If, in the course of taking an unauthorised maritime arrival to a regional processing country, an officer considers that it is necessary to return the unauthorised maritime arrival to Australia:
  (a) subsection (3) applies until the unauthorised maritime arrival is returned to Australia; and
  (b) section 42 does not apply in relation to the unauthorised maritime arrival's return to Australia.

Ministerial direction

(5) If there are 2 or more regional processing countries, the Minister must, in writing, direct an officer to take an unauthorised maritime arrival, or a class of unauthorised maritime arrivals, under subsection (2) to the regional processing country specified by the Minister in the direction.

(6) If the Minister gives an officer a direction under subsection (5), the officer must comply with the direction.

(7) The duty under subsection (5) may only be performed by the Minister personally.

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

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

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

Not in immigration detention

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

Meaning of officer

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

198AE Ministerial determination that section 198AD does not apply

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

198AF No regional processing country

Section 198AD does not apply to an unauthorised maritime arrival if there is no regional processing country.

198AG Non-acceptance by regional processing country

Section 198AD does not apply to an unauthorised maritime arrival if the regional processing country, or each regional processing country (if there is more than one such country), has advised an officer, in writing, that the country will not accept the unauthorised maritime arrival.

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

198AH Application of section 198AD to certain transitory persons

(1) Section 198AD applies, subject to sections 198AE, 198AF and 198AG, to a transitory person if, and only if:

(a) the person is an unauthorised maritime arrival who is brought to Australia from a regional processing country under section 198B for a temporary purpose; and

(b) the person is detained under section 189; and

(c) the person no longer needs to be in Australia for the temporary purpose (whether or not the purpose has been achieved).

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

198AI Ministerial report

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

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

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

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

198AJ Reports about unauthorised maritime arrivals

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

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

(i) assessing those claims in those countries; and

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

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

(c) the number of unauthorised maritime arrivals determined in those countries in the financial year to be covered by the definition of ***refugee*** in Article 1A of the Refugees Convention as amended by the Refugees Protocol.

(2) However, a report under this section need deal with a particular regional processing country in accordance with subsection (1) only so far as information provided by the country makes it reasonably practicable for the report to do so.

(3) A report under this section must not include:

(a) the name of a person who is or was an unauthorised maritime arrival; or

(b) any information that may identify such a person; or

(c) the name of any other person connected in any way with any person covered by paragraph (a); or

(d) any information that may identify that other person.

Subdivision C—Transitory persons etc.

198B Power to bring transitory persons to Australia

(1) An officer may, for a temporary purpose, bring a transitory person to Australia from a country or place outside Australia.

(2) The power under subsection (1) includes the power to do any of the following things within or outside Australia:

(a) place the person on a vehicle or vessel;

(b) restrain the person on a vehicle or vessel;

(c) remove the person from a vehicle or vessel;

(d) use such force as is necessary and reasonable.

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

199 Dependants of removed non-citizens

(1) If:

(a) an officer removes, or is about to remove, an unlawful non-citizen; and

(b) the spouse or de facto partner of that non-citizen requests an officer to also be removed from Australia;

an officer may remove the spouse or de facto partner as soon as reasonably practicable.

(2) If:

(a) an officer removes, or is about to remove an unlawful non-citizen; and

(b) the spouse or de facto partner of that non-citizen requests an officer to also be removed from Australia with a dependent child or children of that non-citizen;

an officer may remove the spouse or de facto partner and dependent child or children as soon as reasonably practicable.

(3) If:

(a) an officer removes, or is about to remove, an unlawful non-citizen; and

(b) that non-citizen requests an officer to remove a dependent child or children of the non-citizen from Australia;

an officer may remove the dependent child or children as soon as reasonably practicable.

(4) In paragraphs (1)(a), (2)(a) and (3)(a), a reference to remove includes a reference to take to a regional processing country.

474 Decisions under Act are final

(1) A privative clause decision:

(a) is final and conclusive; and

(b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and

(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

(2) In this section:

privative clause decision means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5).

(3) A reference in this section to a decision includes a reference to the following:

(a) granting, making, varying, suspending, cancelling, revoking or refusing to make an order or determination;

(b) granting, giving, suspending, cancelling, revoking or refusing to give a certificate, direction, approval, consent or permission (including a visa);

(c) granting, issuing, suspending, cancelling, revoking or refusing to issue an authority or other instrument;

(d) imposing, or refusing to remove, a condition or restriction;

(e) making or revoking, or refusing to make or revoke, a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article;

(g) doing or refusing to do any other act or thing;

(h) conduct preparatory to the making of a decision, including the taking of evidence or the holding of an inquiry or investigation;

(i) a decision on review of a decision, irrespective of whether the decision on review is taken under this Act or a regulation or other instrument under this Act, or under another Act;

(j) a failure or refusal to make a decision.

(4) For the purposes of subsection (2), a decision under a provision, or under a regulation or other instrument made under a provision, set out in the following table is not a privative clause decision:

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Decisions that are not privative clause decisions

Item	Provision	Subject matter of provision
1	section 213	Liability for the costs of removal or deportation
2	section 217	Conveyance of removees
3	section 218	Conveyance of deportees etc.
4	section 222	Orders restraining non-citizens from disposing of property
5	section 223	Valuables of detained non-citizens
6	section 224	Dealing with seized valuables
7	section 252	Searches of persons
8	section 259	Detention of vessels for search
9	section 260	Detention of vessels/dealing with detained vessels
10	section 261	Disposal of certain vessels
11	Division 14 of Part 2	Recovery of costs
12	section 269	Taking of securities
13	section 272	Migrant centres
14	section 273	Detention centres
15	Part 3	Migration agents registration scheme
16	Part 4	Court orders about reparation
17	section 353A	Directions by Principal Member
18	section 354	Constitution of Migration Review Tribunal
19	section 355	Reconstitution of Migration Review Tribunal
20	section 355A	Reconstitution of Migration Review Tribunal for efficient conduct of review
21	section 356	Exercise of powers of Migration Review Tribunal
22	section 357	Presiding member
23	Division 7 of Part 5	Offences
24	Part 6	Establishment and membership of Migration Review Tribunal
25	section 421	Constitution of Refugee Review Tribunal
26	section 422	Reconstitution of Refugee Review Tribunal
27	section 422A	Reconstitution of Refugee Review Tribunal for efficient conduct of review

Decisions that are not privative clause decisions		
Item	**Provision**	**Subject matter of provision**
28	Division 6 of Part 7	Offences
29	Division 9 of Part 7	Establishment and membership of Refugee Review Tribunal
30	Division 10 of Part 7	Registry and officers
31	regulation 5.35	Medical treatment of persons in detention

(5) The regulations may specify that a decision, or a decision included in a class of decisions, under this Act, or under regulations or another instrument under this Act, is not a privative clause decision.

(6) A decision mentioned in subsection 474(4), or specified (whether by reference to a particular decision or a class of decisions) in regulations made under subsection 474(5), is a ***non-privative clause decision***.

(7) To avoid doubt, the following decisions are ***privative clause decisions*** within the meaning of subsection 474(2):

(a) a decision of the Minister not to exercise, or not to consider the exercise, of the Minister's power under subsection 37A(2) or (3), section 48B, paragraph 72(1)(c), section 91F, 91L, 91Q, 195A, 197AB, 197AD, 198AE, 351, 391, 417 or 454 or subsection 503A(3);

(b) a decision of the Principal Member of the Migration Review Tribunal or of the Principal Member of the Refugee Review Tribunal to refer a matter to the Administrative Appeals Tribunal;

(c) a decision of the President of the Administrative Appeals Tribunal to accept, or not to accept, the referral of a decision under section 382 or 444;

(d) a decision of the Minister under Division 13A of Part 2 to order that a thing is not to be condemned as forfeited.

476 Jurisdiction of the Federal Circuit Court

(1) Subject to this section, the Federal Circuit Court has the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the Constitution.

(2) The Federal Circuit Court has no jurisdiction in relation to the following decisions:

(a) a primary decision;

(b) a privative clause decision, or purported privative clause decision, of the Administrative Appeals Tribunal on review under section 500;

(c) a privative clause decision, or purported privative clause decision, made personally by the Minister under section 501, 501A, 501B or 501C;

(d) a privative clause decision or purported privative clause decision mentioned in subsection 474(7).

(3) Nothing in this section affects any jurisdiction the Federal Circuit Court may have in relation to non-privative clause decisions under section 8 of the *Administrative Decisions (Judicial Review) Act 1977* or section 44AA of the *Administrative Appeals Tribunal Act 1975*.

(4) In this section:

primary decision means a privative clause decision or purported privative clause decision:

(a) that is reviewable under Part 5 or 7 or section 500 (whether or not it has been reviewed); or

(b) that would have been so reviewable if an application for such review had been made within a specified period.

476A Limited jurisdiction of the Federal Court

(1) Despite any other law, including section 39B of the *Judiciary Act 1903* and section 8 of the *Administrative Decisions (Judicial Review) Act 1977*, the Federal Court has original jurisdiction in relation to a migration decision if, and only if:

(a) the Federal Circuit Court transfers a proceeding pending in that court in relation to the decision to the Federal Court under section 39 of the *Federal Circuit Court of Australia Act 1999*; or

(b) the decision is a privative clause decision, or a purported privative clause decision, of the Administrative Appeals Tribunal on review under section 500; or

(c) the decision is a privative clause decision, or purported privative clause decision, made personally by the Minister under section 501, 501A, 501B or 501C; or

(d) the Federal Court has jurisdiction in relation to the decision under subsection 44(3) or 45(2) of the *Administrative Appeals Tribunal Act 1975*.

Note: Only non-privative clause decisions can be taken to the Federal Court under subsection 44(3) of the *Administrative Appeals Tribunal Act 1975* (see section 483).

(2) Where the Federal Court has jurisdiction in relation to a migration decision under paragraph (1)(a), (b) or (c), that jurisdiction is the same as the jurisdiction of the High Court under paragraph 75(v) of the Constitution.

(3) Despite section 24 of the *Federal Court of Australia Act 1976*, an appeal may not be brought to the Federal Court from:

(a) a judgment of the Federal Circuit Court that makes an order or refuses to make an order under subsection 477(2); or

(b) a judgment of the Federal Court that makes an order or refuses to make an order under subsection 477A(2).

(4) Despite section 33 of the *Federal Court of Australia Act 1976*, an appeal may not be brought to the High Court from a judgment of the Federal Court that makes an order or refuses to make an order under subsection 477A(2).

(5) In this section:

judgment has the same meaning as in the *Federal Court of Australia Act 1976*.

476B Remittal by the High Court

(1) Subject to subsection (3), the High Court must not remit a matter, or any part of a matter, that relates to a migration decision to any court other than the Federal Circuit Court.

(2) The High Court must not remit a matter, or any part of a matter, that relates to a migration decision to the Federal Circuit Court unless that court has jurisdiction in relation to the matter, or that part of the matter, under section 476.

(3) The High Court may remit a matter, or part of a matter, that relates to a migration decision in relation to which the Federal Court has jurisdiction under paragraph 476A(1)(b) or (c) to that court.

(4) Subsection (1) has effect despite section 44 of the *Judiciary Act 1903*.

494AA Bar on certain legal proceedings relating to unauthorised maritime arrivals

(1) The following proceedings against the Commonwealth may not be instituted or continued in any court:

(a) proceedings relating to an unauthorised entry by an unauthorised maritime arrival;

(b) proceedings relating to the status of an unauthorised maritime arrival as an unlawful non-citizen during any part of the ineligibility period;

(c) proceedings relating to the lawfulness of the detention of an unauthorised maritime arrival during the ineligibility period, being a detention based on the status of the unauthorised maritime arrival as an unlawful non-citizen;

(d) proceedings relating to the exercise of powers under repealed section 198A;

(e) proceedings relating to the performance or exercise of a function, duty or power under Subdivision B of Division 8 of Part 2 in relation to an unauthorised maritime arrival.

(2) This section has effect despite anything else in this Act or any other law.

(3) Nothing in this section is intended to affect the jurisdiction of the High Court under section 75 of the Constitution.

(4) In this section:

Commonwealth includes:

(a) an officer of the Commonwealth; and

(b) any other person acting on behalf of the Commonwealth.

ineligibility period means the period from the time of the unauthorised entry until the time when the person next ceases to be an unlawful non-citizen.

unauthorised entry means an entry into Australia that occurs:

(a) at an excised offshore place after the excision time for that place; or

(b) at any other place on or after the commencement of section 5AA.