THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
BETWEEN:

No S156 of 2013
PLAINTIFF S156/2013
Plaintiff

THE MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Defendant

THE COMMONWEALTH OF AUSTRALIA
Second Defendant

THE PLAINTIFF'S SUBMISSIONS

PART I: Certification for Publication

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

PART II: Statement of Issues

2. The issues are set out in the questions referred at the Stated Case and Questions Reserved Book ("Stated Case Book - SCB") at 41.

PART III: Section 78B Notices

3. Notices were issued in compliance with s 78B of the *Judiciary Act 1903* (Cth).

PART IV: Citations

4. Not applicable.

PART V: The Facts

5. The facts are as stated by the Chief Justice at SCB 29-49 and the attached 29 documents.

PART VI: Argument

(A) THE CONSTITUTIONAL ARGUMENTS

6. Part 2 of the *Migration Act 1958* (Cth) ('the **Act**') concerns the 'control of arrival and presence of non-citizens'. Division 8 of this Part concerns the removal of non-citizens, and other related matters. Sections 198AB and 198AD form part of sub-div B of div 8, which deals with 'regional processing'.

Filed on behalf of the Plaintiff on 26 March 2014
Adrian Joel & Co. Solicitors
225 Crown Street,
Darlinghurst NSW 2010

Telephone: 02 9361 6213
Fax: 02 9361 3386
Email: adrianjoelco@bigpond.com
Contact: Adrian Joel

7. Section 198AB(1) empowers the Minister to, by legislative instrument, declare that a country is a 'regional processing country'. The 'only condition' for the exercise of this power is that the Minister 'thinks that it is in the national interest to designate the country to be a regional processing country': sub-s (2). The power under sub-s (1) may only be exercised by the Minister personally: sub-s (5). Subsection 6 provides that the Minister may, by legislative instrument, revoke any designations made under sub-s (1).
8. Section 198AB(3)(a) provides that, when considering whether a designation is in the national interest for the purposes of sub-s 2, the Minister must have regard to whether or not the country to be designated 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.

    Pursuant to sub-s (3)(b), the Minister may also have regard to any other matter which, in his or her opinion, relates to the national interest.
9. Subsection (4) provides that any assurances taken into account for the purposes of sub-s (3)(a) do not need to be legally binding. Subsection (7) provides that the rules of natural justice do not apply to ministerial designations under sub-s (1), or revocations of such designations under sub-s (6).
10. Where a designation has been made under s 198AB(1), s 198AC(2) requires the Minister to lay various documents pertinent to the designation before each house of Parliament. A failure to comply with this requirement has no effect on the validity of the designation: s 198AC(5).
11. Section 198AD(1) stipulates the class of people who may be taken to a regional processing country designated under s 198AB. The affected class are 'unauthorised maritime arrivals' ('**UMAs**') who are subject to detention under s 189. All UMAs must, as soon as reasonably practicable, be taken by an officer to a regional processing country: sub-s (2). Subsection (3) provides that, for the purposes of sub-s (2), an officer may do any 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 UMA is detained, or (ii) a vehicle or vessel; and
    (d) use such force as is necessary and reasonable.
12. Where there have been two or more regional processing countries designated under s 198AB, the Minister must issue written directives stipulating which country particular UMAs, or classes of UMAs are to be sent to: sub-s (5). The rules of natural justice do not apply to the performance of this duty: sub-s (9), and the only condition governing the duty is that the Minister thinks that the directives issued are in the public interest: sub-s (8).
13. Section 189(1) of the Act requires an officer to detain a person in the migration zone if the officer reasonably suspects that the person is an unlawful non-citizen. The scheme

in ss 198AB and 198AD only applies to persons detained in this manner who also qualify as UMAs. Section 5AA(1) of the Act states that a person is a UMA 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, as defined under s 5AA(3).

14. The Act is silent on the question of how UMAs will be processed at a regional processing country. The lack of any requirement that a regional processing countries have in place a domestic legal framework for the processing of arrivals means that persons subject to the legislative scheme are vulnerable to indefinite detention or to refoulement (including to the regional processing country itself if a UMA is fleeing persecution from that nation).

THE CONSTITUTIONAL ARGUMENTS

15. Sections 198AB and 198AD of the Act are invalid because they are not supported by any head of power in s 51 of the Constitution. The sections operate in tandem. Each is incapable of operating in the absence of the other. Accordingly, the validity of the provisions must be considered by reference to the scheme that they jointly establish.
16. The constitutional heads of power that may be able to support ss 198AB and 198AD are the naturalization and aliens power in s 51(xix), the immigration and emigration power in s 51(xxvii) and / or the external affairs power in s 51(xxix). The scheme established by ss 198AB and 198AD is not 'with respect to' any of these heads of power.

The naturalization and aliens power in s 51(xix)

17. The effect of s 198AD, read with ss 189 and 5AA of the Act, is that only persons who qualify as both 'unlawful non-citizens' and UMAs may be sent to a regional processing country designated under s 198AB of the Act. The plaintiff accepts that the class of persons who fit this description qualify as aliens for the purposes of the Constitution. The plaintiff also acknowledges that the aliens power extends to enable Parliament to legislate to exclude or deport aliens from Australia.[1]
18. Notwithstanding the wide ambit of s 51(xix), limits to the scope of the power have been recognised on numerous occasions by members of the High Court. These limits have been said to apply both to the determination of the class of persons who qualify as aliens for the purposes of s 51(xix)[2] as well as to the question of what laws can be

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[1] See eg *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (***'Lim'***) (1992) 176 CLR 1 at 26 (Brennan, Deane and Dawson JJ), 56-7 (Gaudron J).

[2] See eg *Pochi v Macphee* (1982) 151 CLR 101 at 109 (Gibbs CJ); *Singh v Commonwealth* (2004) 222 CLR 322 at 329 [5] (Gleeson CJ); *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 217-218 [200] (Kirby J); *Koroitamana v Commonwealth* (2006) 227 CLR 31 at 55 [82] (Kirby J).

passed with respect to aliens under the head of power. For the reasons outlined below, ss 198AB and 198AD are not supported by s 51(xix) as they infringe limits in the latter category.

Proportionality is a relevant test

19. For a law to be validly made under s 51 of the Constitution, the law must be 'with respect to' one or more of the heads of power in this section. This is fulfilled where there is a 'sufficient connection' between the law in question and a head of power.[3] A proportionality test may inform the question of whether ss 198AB and 198AD possess a 'sufficient connection' to the aliens power.
20. In *Theophanous v Commonwealth* (2006) 225 CLR 101, Gummow, Kirby, Heydon and Crennan JJ suggested that, pursuant to *Leask v Commonwealth* (1996) 187 CLR 579 ('***Leask***'), the proportionality principle could only be applied to purposive heads of power. Their Honours stated (at 70):

    > *Leask v The Commonwealth* denies the application of a concept of 'proportionality' to non-purposive heads of legislative power. In *Leask*, McHugh J, together with Brennan CJ, Dawson J and Gummow J, expressed that conclusion.

21. While the power in s 51(xix) is not typically conceived of as purposive, neither *Leask* nor any other authority forecloses the application of the proportionality principle to determine whether a law is validly made under the aliens power.
22. Six of the seven judges in *Leask* made statements which suggest that proportionality may, in the correct circumstances, be a relevant test with respect to non-purposive powers. Brennan CJ stated (at 593) that while the concept of proportionality is less likely to be of assistance in this context, it may be relevant where it can be 'used to ascertain whether an Act achieves an effect or purpose within power'. Dawson J, while regarding sufficiency of connection as the appropriate test for validity under non-purposive powers, noted (at 605) that the 'disproportion of a law to an end asserted to be within power may suggest that the law is actually a means of achieving another end that is beyond power'. Toohey J suggested (at 614-5) that, when characterisation under any head of power is concerned, '[t]he well accepted language of reasonably adapted will ordinarily suffice … as will the expression "reasonably capable of being considered appropriate and adapted"'. Gaudron J stated (at 616) that proportionality was 'one of several considerations that could be taken into account in determining purpose, whenever that is in issue and for whatever reason', and that it could also be used 'in determining whether a law is relevantly connected with a particular subject or with a head of constitutional power'. McHugh J suggested (at 617) that proportionality could be used as a 'guide to sufficiency of connection' when determining validity under a subject matter power. Kirby J (at 635) described proportionality as 'a concept of growing influence on our law more generally', which 'may sometimes be helpful in the context of constitutional characterisation'.

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[3] *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 334 (Mason CJ), 349 (Dawson J), 353-4 (Toohey J); *Leask v Commonwealth* ('***Leask***') (1996) 187 CLR 579 at 591 (Brennan J), 603 (Dawson J), 614 (Toohey J), 616 (McHugh J), 623 (Gummow J), 633 (Kirby J); *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 492 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

23. Overwhelmingly, the *Leask* judgments suggest that there is no blanket restriction on the use of proportionality considerations to help determine validity under non-purposive heads of power. The limitation on the use of proportionality is more subtle. Where a sufficient connection between a law and a constitutional head of power has been established, the principle of proportionality can be of no further assistance: the support of the head of power is attracted, irrespective of the appropriateness, necessity or desirability of the law.[4] However, proportionality may inform the question of whether a sufficient connection with a head of power exists in the first place.

24. In *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 (***'Lim'***), Gaudron J expressly suggested that proportionality may be used as a tool to determine the limits of s 51(xix). Her Honour stated (at 57):

> Leaving aside special questions which may arise with respect to enemy aliens and in respect of whom the power conferred by s 51(vi) of the Constitution may authorise different laws, a law imposing special obligations or special disabilities on aliens, whether generally or otherwise, which are unconnected with their entitlement to remain in Australia and which are not appropriate and adapted to regulating entry or facilitating departure as and when required, is not, in my view, a valid law under s 51(xix) of the Constitution. A law of that kind does not operate by reference to any matter which distinguishes aliens from persons who are members of the community constituting the body politic, nor by reference to the consequences which flow from non-membership of the community and thus, in my view, is not a law with respect to aliens.

25. Hence, for a law to be a valid enactment under the aliens limb of s 51(xix), it must be 'directly connected' with the alien status of the persons it operates upon.[5] A law that regulates the entry to Australia of aliens, or that 'provid[es] for their departure from Australia (including deportation, if necessary)'[6] will be sufficiently connected with the status of aliens to fall within s 51(xix). Other laws may also fall within the ambit of the aliens power, but are subject to a proportionality test and are only supported by the head of power 'to the extent that they are capable of being seen as appropriate and adapted to regulating entry or facilitating departure [of aliens] if and when departure is required'.[7]

Proportionality is to be applied to determine the validity of ss 198AB and 198AD

26. Although div 8 of the Act is titled 'Removal of unlawful non-citizens etc.', the scheme established by ss 198AB and 198AD goes significantly further than merely regulating the entry of aliens to Australia, or providing for their removal from Australia. Accordingly, upon the test outlined by Gaudron J in *Lim*, they are only valid to the extent that they can be seen as appropriate and adapted to these ends.

27. Section 198AB(1) authorises the Minister to designate any country in the world as a 'regional processing country', provided he or she judges the designation to be 'in the

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[4] *Leask* (1996) 187 CLR 579 at 593 (Brennan CJ).

[5] *Lim* (1992) 176 CLR 1 at 57 (Gaudron J).

[6] *Lim* (1992) 176 CLR 1 at 57 (Gaudron J).

[7] *Lim* (1992) 176 CLR 1 at 57 (Gaudron J).

national interest'.[8] The phrase 'regional processing country' indicates that the designated country will be used for the detention and processing of persons who are transferred there from Australia. The stated case confirms that this is indeed how the scheme operates in practice:[9] transfers to Papua New Guinea, in its capacity as a 'regional processing country', are detained in a 'Regional Processing Centre' established by Australia and serviced by providers contracted by Australia (see, SC27, Administrative Arrangements between Australia and PNG for the Temporary Regional Processing Centre signed in April 2013, [3.1] (p 378). Stated case at [40]). Departures from the Regional Processing Centre are also coordinated by Australia (*ibid*), though the processing of claims made by detainees occurs pursuant to the law of Papua New Guinea. Thus, s 198AD, which applies this scheme to unauthorised maritime arrivals, does far more than simply regulate their entry to Australia or facilitate their departure: it in effect subjects them to detention *after* their removal from Australia. As the Act does not establish any framework for the processing of UMAs who are transferred to a regional processing country, or require that any such framework exist under the domestic law in the regional processing country, the detention that UMAs may be subjected to post-deportation is potentially indefinite, and need not be directed towards the determination of their status. Detainees may also be subject to refoulement.

28. The factors outlined above indicate that the transfer of persons to 'regional processing countries' under ss 198AB and 198AD goes beyond merely regulating the entry to Australia of aliens, or providing for their departure. Accordingly, the provisions will not be supported by s 51(xix) of the Constitution unless they satisfy the proportionality test outlined by Gaudron J in *Lim*. To satisfy this test, ss 198AB and 198AD must be capable of being seen as appropriate and adapted to regulating the entry or facilitating the departure of aliens, if and when departure is required.

Sections 198AB and 198AD do not satisfy the proportionality test

29. The scheme established by ss 198AB and 198AD is incapable of being seen as appropriate and adapted to regulating either the entry of aliens to Australia, or their departure from Australia.
30. It is true that regulation of the entry of aliens is one of the outcomes of s 198AD, in conjunction with s 189. However, s 198AB imposes 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. This goes so far beyond what is necessary to control the entry to Australia of persons subjected to the scheme as to be impossible to describe as genuinely directed towards this end.
31. Further, it cannot be said that ss 198AB and 198AD are reasonably appropriate and adapted to the regulation of the entry of aliens more generally, on account of any

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[8] *Migration Act 1958* (Cth), s 198AB(2).

[9] When determining whether a law has a sufficient connection with a head of power, the practical as well as legal operation of the statute must be considered: *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 368-9 (McHugh J); *Leask* (1996) 187 CLR 579 at 601-2 (Dawson J), 633-4 (Kirby J); *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

deterrent effect that the provisions may have on persons hoping to seek asylum in Australia. The scheme established is so extreme in its operation that it is impossible to regard it as appropriate and adapted to this end. Elements of this extremity include the fact that, under s 198AB(4), the Minister need have no regard to the domestic or international law incumbent upon a country when electing to designate it as a regional processing country, and the fact that, under s 198AB(6), the rules of natural justice do not apply to designations made by the Minister. The combined effect of these elements is that ss 198AB and 198AD operate in a manner which may result in persons affected by the scheme being subject to refoulement or being detained indefinitely in legal limbo, with no requirement that a determination of their status ever be reached. This is in excess of any legislative scheme for the detention of aliens that has ever previously been held to be supported by s 51(xix).

32. For similar reasons, the scheme established by ss 198AB and 198AD is not capable of being seen as appropriate and adapted to the departure of aliens from Australia. It is acknowledged that a law for the departure of aliens that is validly made under s 51(xix) may encompass the deportation of aliens from Australian territory.[10] However, 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. It follows that the scheme cannot be described as appropriate and adapted to this end.

Ss 198AB and 198AD otherwise infringe limitations which restrict the aliens power

33. Additionally, there are inherent constitutional limitations to s 51(xix) which restrict the Commonwealth's capacity to pass laws that operate upon aliens under the ambit of s 51(xix).
34. In *Re State Public Services Federation; Ex parte Attorney-General (WA)* (1993) 178 CLR 249 at 271-2, Mason CJ, Deane and Gaudron JJ held that the scope of s 51(xxxv) of the Constitution 'must be ascertained by reference not only to its text but also to its subject matter and the entire context of the Constitution, including any implications to be derived from its general structure'. Brennan J suggested that this approach applies to the construction of any of the legislative powers under s 51 of the Constitution.
35. In *Lim*, the joint judgment of Brennan, Deane and Dawson JJ (with whom Mason CJ agreed) considered the capacity of legislation to validly confer powers to detain aliens upon the Executive. Their Honours stated that enactments to this effect would be valid only 'if the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered'.[11] In their Honours' view, a law which failed to meet this standard would purport to confer power upon the Executive which would be incapable of being properly seen as 'an incident of the executive powers to exclude, admit and deport an alien'.[12] Detention other than for the purposes of deportation or consideration of an entry permit application would be

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[10] See *Lim* (1992) 176 CLR 1 at 26 (Brennan, Deane and Dawson JJ), 56-7 (Gaudron J).

[11] *Lim* (1992) 176 CLR 1 at 33.

[12] *Lim* (1992) 176 CLR 1 at 33.

punitive in nature, and in contravention of limits that flow from Chapter III of the Constitution.[13]

36. The views expressed by Brennan, Deane and Dawson JJ in *Lim* were described in *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 (‘***Re Woolley***’) at [14] as ‘reflect[ing] the principles for which [*Lim*] stands as authority’. The position was again affirmed by Crennan, Bell and Gageler JJ in *Plaintiff M76/2013 v Minister for Immigration* (2013) 88 ALJR 324 at 349 [138] (‘***Plaintiff M76***’). Their Honours stated (at 349 [140]):

> The constitutional holding in *Lim* was … that conferring limited legal authority to detain a non-citizen in custody as an incident of the statutory conferral on the executive of powers to consider and grant permission to remain in Australia, and to deport or remove if permission is not granted is consistent with Ch III if, but only if, the detention in custody is limited to such period of time as is reasonably capable of being seen as necessary for the completion of administrative processes directed to those purposes.

37. The scheme established under ss 198AB and 198AD of the Act infringes the constitutional limit laid down in *Lim* and affirmed in *Plaintiff M76*. A person deported under s 198AD to a regional processing country designated under s 198AB is subjected to the practical consequence of detention administered by the Commonwealth Executive. This detention has no temporal limitation placed on it, and is not for the purposes of removal from Australia or for considering whether to grant a permit for entry into Australia, as persons subjected to the scheme are precluded absolutely from resettlement in Australia. Moreover, the detention cannot reasonably be seen as necessary for the completion of administrative processes directed to considering whether to grant permission to remain in the regional processing country, as the statutory scheme does not require countries designated as regional processing countries to have any legal or administrative framework in place for the processing of claims made by persons detained under the scheme. Sections 198AB and 198AD enable the detention of certain aliens in a state of legal limbo, where determination of their status is never required.

38. The constitutional limits established in *Lim* and affirmed in *Re Woolley* and *Plaintiff M76* are derived from the general structure of the Constitution. Adopting the reasoning in *Re State Public Services Federation*, these limits operate to restrict the scope of the aliens head of power in s 51(xix) of the Constitution. Upon this approach ss 198AB and 198AD lie beyond the scope of s 51(xix).

The immigration and emigration power in s 51(xxvii)

39. Further, the scheme in ss 198AB and 198AD is not supported by the immigration and emigration power in s 51(xxvii) of the Constitution.

40. The immigration limb of s 51(xxvii) has been said to authorise laws which regulate persons who enter Australia seeking settlement in the country, as well as laws which preclude such persons from becoming immigrants, by preventing them from seeking settlement in Australia.[14]

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[13] *Lim* (1992) 176 CLR 1 at 33.

[14] *Ex parte De Braic* (1971) 124 CLR 162, 166-7 (Windeyer J).

41. The preventative aspect of the immigration power has been held to encompass the arbitrary exclusion of an alien who has entered Australia,[15] as well as the power to deport excluded aliens from the country.[16]
42. In *Ferrando v Pearce* (1918) 25 CLR 241, Barton J considered the nature of the deportation that falls within the scope of s 51(xxvii). His Honour held that the power to deport 'is exhausted when the alien is placed outside the territorial limits of the deporting country – in this instance, Australia'.[17] However, his Honour acknowledged that as 'a person cannot well be deported in a ship bound nowhere', the power to deport under s 51(xxvii) extends to cover the power to choose the country to which the alien in question will be deported.[18]
43. The power to choose the place to which an alien will be deported is, therefore, appropriately described as incidental to the power conferred on the Commonwealth under the immigration power. The incidental power sustains laws which, despite falling ostensibly beyond the scope of s 51 of the Constitution, are 'necessary to effectuate' laws which are within power.[19] As the designation of a destination is required for deportation to be effected, it falls within the implied incidental power attached to s 51(xxix).
44. In *Znaty v Minister for Immigration* (1972) 126 CLR 1 ('***Znaty***'), the High Court, by majority, held that it was within the scope of s 51(xxvii) to deport an alien to a particular country, notwithstanding his willingness to depart voluntarily for another country that had agreed to accept him. Walsh J (with whom McTiernan and Owen JJ agreed), held that the power to deport pursuant to s 51(xxvii) encompassed the power to 'determine the way in which a deportation order is to be carried out', and 'choose the vessel or aircraft in which the deportee is to leave the country', and that the power would not be exceeded even if the choice of the location that the deportee would be sent to was influenced by broader factors than the mere removal of the person from Australia.[20]
45. The present case is materially different from *Znaty*. Section 198AB does far more than merely specify the locations to which persons deported under s 198AD may be sent – it establishes these locations as 'regional processing countries'. The scheme facilitates the ongoing detention of the persons it operates upon, in circumstances where their removal from Australia is complete.
46. The question of whether a law comes within the incidental reach of s 51(xxvii) hinges on whether it has a sufficient connection with immigration or emigration.[21] In *Nationwide News v Wills* (1992) 177 CLR 1, Mason CJ held that in order to determine whether such a connection exists, a proportionality test applies. His Honour stated that

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[15] *Ex parte De Braic* (1971) 124 CLR 162, 164 (Barwick CJ), 167 (Windeyer J).

[16] See *Znaty v Minister for Immigration* ('***Znaty***') (1972) 126 CLR 1.

[17] *Ferrando v Pearce* (1918) 25 CLR 241, 249.

[18] *Ferrando v Pearce* (1918) 25 CLR 241, 249.

[19] *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77 (Dixon CJ, McTiernan, Webb and Kitto JJ).

[20] *Znaty* (1972) 126 CLR 1, 8.

[21] *Nationwide News v Wills* (1992) 177 CLR 1, 27 (Mason CJ).

'it is material to have regard to the purpose of the provision and to the reasonableness of the connexion between the law and the subject matter of the power'.[22]

47. Under the test outlined by Mason CJ, the scheme established via ss 198AB and 198AD would fail to fall within the power incidental to s 51(xxvii). The exclusion of natural justice for designations made under s 198AB(1) and the lack of a requirement that designations be made with regard to whether or not designated countries legally provide for the processing of persons subject to deportation under s 198AD mean that deportation under the legislative scheme created by these provisions entirely circumvents processing in Australia. Moreover, it leaves open the practical effect of indefinite detention for persons removed from Australia under the scheme, after removal is complete and in a regional processing country where determination of their status is not required. This is disproportionate to the object of removing aliens from Australian territory, and has no reasonable connection with immigration.

48. The conclusion that ss 198AB and 198AD are unsupported by the incidental power attached to s 51(xxvii) of the Constitution does not, however, hinge upon acceptance of a proportionality test. The designation of regional processing countries under s 198AB, and deportation of persons to these countries under s 198AD is fundamentally directed towards the continued control of aliens deported from Australia after the deportation process is complete. This cannot, upon any test, be seen as sufficiently connected with the removal of aliens from Australia.

The external affairs power in s 51(xxix)

49. Finally, the scheme established by ss 198AB and 198AD cannot be described as a law with respect to 'external affairs'.

50. There are various aspects to the external affairs power, with the relevant limb involving a power to legislate with respect to places, persons, matters or things outside the geographic limits of Australia.[23]

51. The 'geographic externality' limb of s 51(xxix) is wide, but not unlimited. In *Polyukhovich v Commonwealth* (1991) 172 CLR 501, Dawson J said (at 632):

> [T]he 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'.

This statement was affirmed by Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ in *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 485.

52. Upon this test, to attract the support of s 51(xxix) under the geographic externality limb, the law in question must be with respect to a place, person, matter or thing

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[22] *Nationwide News v Wills* (1992) 177 CLR 1 at 27.

[23] See *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 602 (Deane J), 632, 641 (Dawson J), 696 (Gaudron J), 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 at 539 [10] (Gleeson CJ), 552 [49] (Gummow, Hayne and Crennan JJ); *P1/2003 v Ruddock* (2007) 157 FCR 518 at 532 (Nicholson J).

situated outside Australia.[24] The power is therefore predicated upon the *pre-existence* of an affair external to Australia.

53. Neither s 198AB nor s 198AD satisfies this standard. While s 198AB enables the Minister to designate places outside Australia as regional processing countries, this provision is meaningless except in conjunction with s 198AD. Section 198AD provides for the transfer of UMAs from Australia to regional processing countries. This is not a law which deals with persons, places, matters or things outside Australia, but rather one which regulates persons within Australia with a view to removing them outside Australian borders.

54. In *Plaintiff M47-2012 v Director General of Security* (2012) 86 ALJR 1372, Gummow J stated in obiter that, pursuant to the decision in *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640 (‘***De L***’), ‘[a] law dealing with the movement of persons between Australia and places physically external to Australia may be supported by the external affairs power … independently of the implementation by that law of any treaty imposing obligations upon Australia respecting movement of non-citizens’.[25]

55. His Honour’s statement merely acknowledges that laws dealing with the movement of persons between Australia and external places may, in certain circumstances, attract the support of s 51(xxix). His Honour’s comments should not be taken to suggest that *any* law within this category will necessarily be supported by s 51(xxix). This much can be gauged from the context (at 1399 [84]).

56. Moreover, the legislative scheme under consideration in this case differs significantly from the scheme in question in *De L*. Accordingly, that case does not compel a finding that the removal of persons within Australia to regional processing countries under ss 198AB and 198AD is a law with respect to external affairs.

57. In *De L*, the law in question was a regulation made pursuant to the *Family Law Act 1975*, which operated with respect to children who had been removed to Australia from foreign countries. The regulation provided that where this initial removal to Australia had occurred in breach of a parent’s custody rights, the Family Court should order the return of the child to the foreign country.[26] What distinguishes the law in *De L* from the scheme established under ss 198AB and 198AD is the predication of the law upon a matter external to Australia – the pre-existing transfer of a child from a foreign country. The present scheme differs in that there is no pre-existing external affair upon which the law operates. The only element of externality is created by the legislation itself, which operates upon persons within Australia by providing for their removal. The absence of any pre-existing element of externality puts the scheme in ss 198AB and 198AD beyond the reach of s 51(xxix) of the Constitution.

58. Further and in the alternative, the ambit of s 51(xxix) is restricted by limits which flow from the text and structure of the Constitution. A restriction of this nature flows from the limitation articulated in *Lim* that laws that provide for the detention in custody of aliens will only be valid where the detention is limited to what is reasonably capable of

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[24] See *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 602 (Deane J), 641 (Dawson J), 696 (Gaudron J), 714 (McHugh J); *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 485 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

[25] *Plaintiff M47-2012 v Director General of Security* (‘***Plaintiff M47***’) (2012) 86 ALJR 1372, 1398-9 [83].

[26] See *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640 at 649-651.

being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered'.[27] As the scheme in ss 198AB and 198AD fails to meet this standard,[28] it falls beyond the reach of s 51(xxix).

(B) THE JUDICIAL REVIEW ARGUMENTS

59. The first question is whether the Minister's designation that PNG is a regional processing country made on 9 October 2012 under section 198AB of the *Migration Act 1958* (Cth) (at SCB 253) is invalid?

10 60. By section 198AB(1) of the Act, the Minister may, by legislative instrument, designate that a country is a regional processing country. A number of observations about the nature of the power can be made.

61. One cannot assume that a clear distinction may be drawn between instruments of a legislative and administrative character. *In Bread Manufacturers of NSW v Evans* (1981) 180 CLR 404 at 146.3, Gibbs CJ held that the question whether judicial review applies to a legislative or executive decision introduces a "*distracting complication*" into the process of decision. Judicial minds have differed on the question, but the classification of the power does not matter for judicial review purposes (*ibid*).

62. There is no reason why the validity of a legislative instrument cannot be tested in the
20 High Court under section 75(v) of the Constitution or in the Federal Court under section 39B of the *Judiciary Act 1903* (Cth), or even under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) in proceedings to review the validity of an administrative decision that rests for legal support upon a legislative instrument.[29]

Mandatory Considerations

63. In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40.4 (per Mason J) the court held that a discretionary decision that is unconfined by the terms of the statute will still have mandatory considerations a person is bound to take
30 into account by reference to the subject-matter, scope and purpose of the Act. What that test means in its application is not yet settled. In *Plaintiff M61-2010E v The Commonwealth* (2010) 243 CLR 318 at [27] the unanimous court said 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 and the Refugees Protocol.*" It was also considered to go "*beyond what would be required to respond to those obligations*". It also said (*ibid*) "*... the text and structure of the Act proceed on the footing that the Act provides power to respond to Australia's international obligations by granting a protection visa in an appropriate case and by not returning that person,*
40 *directly or indirectly, to a country where he or she has a well-founded fear of persecution for a Convention reason.*" (See also at [29]-[36]). This was approved in *Plaintiff M70-2011 v Minister for Immigration and Citizenship (Malaysian Declaration Case)* (2011) 244 CLR 144 at [44] (per French CJ).

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[27] *Lim* (1992) 176 CLR 1 at 33 (Brennan, Deane and Dawson JJ).

[28] See paragraph [37].

[29] *Magno v Minister for Foreign Affairs and Trade* (1992) 35 FCR 235.

64. It is significant that the objects clause in s 198AA excludes 'the international obligations or domestic law *of that country*.' This pointedly does not exclude the relevance of Australia's international obligations in this process. Also relevant is that refugees are given a separate and special treatment in the Act. The obligations to them are different.
65. Though the "sole" consideration to be taken into account under section 198AB(1) of the Act is the "national interest", there is nothing which changes this reading of the *Migration Act* as a whole. In the Explanatory Memorandum for the amending act introducing the changes, Australia's international obligations were recognised as part of a large suite of factors relevant to determining the national interest:
66. In any event, as the revised explanatory memorandum provides (at [120]) "*The term 'national interest' has a broad meaning and refers to matters which relate to Australia's standing, security and interests. For example, these matters may include governmental concerns related to such matters as public safety, border protection, national security, defence, Australia's economic interests, Australia's international obligations and its relations with other countries. Measures for effective border management and migration controls are in the national interest.*"
67. The applicable and relevant mandatory considerations here that must be read into the Act were that the Minister was required, in informing himself as to the national interest, to take into account:

    a. Consultations with and advice of the office of the United Nations High Commissioner for Refugees as to the proposed designation;
    b. The international obligations or domestic law of Papua New Guinea;
    c. Whether there was any effective national legal or regulatory framework for the determination of refugee status under the Refugee 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.

68. As to the consultation consideration, in September 2012, the Minister wrote to the UNHCR, his Excellency, Mr António Guterres seeking the UNHCR's views on the possible designation of PNG as a regional processing country and consideration of what role the UNHCR could play to ensure the independent oversight of processing activities in PNG and Nauru (SCB 213). On 2 October 2012, the Minister again wrote to the UNHC, in relation to the implementation of the recommendations of the Expert Panel on Asylum Seekers. The letter also sought the UNHCR's views on the designation of PNG as a regional processing country under section 198AB of the Act (ACB 249 L28).
69. The Minister made his designation decision on 9 October 2012 (at SCB 253). In doing so, he failed to take into account the advice of the UNHCR, which did not arrive until after the designation decision (SCB 266).

70. The advice of the UNHCR was a mandatory relevant consideration that the Minister called for and he failed to wait for or take into account. The decision should be vitiated on this ground alone.
71. In *Lee v Napier* (2013) 301 ALR 663; [2013] FCA 236 (Katzmann J) the Federal Court considered the Minister for Health's duty to consult the Australian Medical Association (AMA) prior to making valid appointments to Professional Services Review Panel for disciplining general practitioners in Australia. There, the Minister wrote to the AMA, but did not wait for any response before making the statutory appointments. The Court held that there was no consultation (at [43] to [64] and the appointments were invalid.
72. Equally, here, the Minister simply did not wait for the response of the UNHCR in circumstances where it was a mandatory consideration, reading 198AB and 198AC together.
73. As to the international obligations or domestic law of Papua New Guinea, the Minister pointedly refused to have regard to these mandatory considerations as well. While the section 198AA(d) statement of policy provides that designation of a country need not be "*determined*" by reference to these matters, that does not mean they are not relevant to or informative of the decision. Indeed, they must be centrally relevant to a proposed designation decision. So much so, that they must be mandatory considerations. That they are mandatory is partly reflected in the terms of section 198AB(3)(a) of the Act which provides for non-refoulement of refugees and provides for an assessment of refugee status to be made in the host country. The Minister, in his statement of reasons (at SCB 264 L28) expressly said that he chose not to have regard to the international obligations or domestic law of PNG in making the designation decision. In so doing he expressly ignored plainly relevant considerations and closed his eyes to the manner in which PNG would actually undertake its obligations or even whether it could undertake its obligations under the arrangements. This failure was a jurisdictional error.
74. As to whether there was any effective national legal or regulatory framework for the determination of refugee status under the Refugee Convention, this consideration was a mandatory consideration by reference to section 198AB(3)(a)(ii) of the Act. For a host country to make an assessment of refugee status or to permit an assessment of refugee status to be made, that country must plainly possess an effective national legal or regulatory framework for such determinations. As at the date of the Minister's determination, there was no such framework in PNG.
75. In his statement of reasons (SCB 255) the Minister repeatedly cites as justification for his decision the "statement of arrangements" (SCB 233) that "are and are to be" in place. This document is unsigned, undated and unattributed. It is more in the nature of a statement of what might happen sometime in the future and it does not state how or by when these things might happen. For example, even the site of the place for accommodation of the transferees had not been determined as at the date of the designation decision. Similarly, there is no discussion in the Minister's reasons or in the advice before him as to whether PNG could actually do what it said in relation to assessing and protecting refugees and refugee applicants. The UNHCR's assessment was blunt (SCB 268 L40) – that PNG:

"does not have the legal safeguards nor the competence or capacity to shoulder alone the responsibility of protecting and processing asylum-seekers transferred by Australia."

76. Importantly, the UNHCR also said that (SCB 267 L38) considering PNG's:

"... legal framework at the domestic level, there is, at present, no effective national legal or regulatory framework to address refugee issues. Importantly, there are currently no laws or procedures in place in the country for the determination of refugee status under the Refugee Convention."

77. Another mandatory consideration for the Minister was PNG's capacity to actually implement its international obligations. This is not addressed by the Minister in his reasons. It is not addressed in the issues paper before him. It is a major focus of the UNHCR letter dated 9 October 2012 (SBC 266) which concludes that PNG did not have such capacity.

78. Another mandatory consideration was that the transferees might be arbitrarily and indefinitely detained in PNG, in torturous, inhuman and degrading conditions, without access to legal advice, representation or judicial review. They might also be held indefinitely, or even subject to refoulement. That this might be so is manifestly plain from the UNHCR letter dated 9 October 2012 (SBC 266). The Commissioner warned of no infrastructure, a bad environment and little available support on the ground in PNG. He also warned that the "no-advantage" test as applied to transferees from Australia would have negative impact on the refugees (*ibid* at 269 L10-25). As aliens on foreign soil in PNG, the transferees would have no access to legal representation or judicial review. The Minister simply failed to take these matters into account. It might even possible that the designation might mean that people fleeing persecution from PNG itself might be subject to this regime, in what would thereby amount to the clearest possible breach of Australia's international obligations as otherwise implemented by the Migration Act. Surely this is a possibility that the Minister would need to have had regard to.

79. Another mandatory relevant consideration for the Minister under the Act was that the designation decision would result in violation or breach of at least four international treaties to which Australia was a signatory. These are not excluded as a consideration by the objects clause in section 198AA. The treaties concerned and the precise provisions breached or potentially breached are set out in the plaintiff's further amended statement of claim at [14] (SCB 22-23). The Minister made no mention of them in making his decision and they were not covered by the issues paper except in relation to non-refoulement.

80. One final mandatory relevant consideration that the Minister did not have regard to in making his designation decision was that the decision was in violation of Australia's obligations under international law and/or customary international law

81. As the UNHCR letter dated 9 October 2012 (SBC 266) made plain, Australia should not simply pass off its onerous international treaty obligations onto third countries in circumstances where that country is unable to take over the said responsibility. It should deal with them itself. The UNHCR said that PNG could not meet the expectations of it in the memorandum of understanding and the statement of arrangements (SCB 268 at L39) and that:

"At best, we would see the transfers as a shared and

joint legal responsibility under the Refugee Convention and other applicable human rights instruments."

82. The Minister did not deal with any of this directly in his reasons for decision and the issues paper did not cover it as well. The issues paper styled the issue as being "contestable" (SCB 222 at [33]) and the proposed designation might well constitute a breach or breaches of international law but that it did not matter because the Minister could determine that it was within the national interest and the Minister can seek a further submission if he is troubled by the issue (*ibid* [34]-[36]).
83. The Minister failed to call for any further submission on Australia's international law obligations or in relation to customary international law. As to customary international law, see – Oliver Jones "*The Doctrine of Adoption of Customary International Law*" (2010) 89 *The Canadian Bar Review* 401.

Other Constitutional Writ-Judicial Review Grounds

84. Alternative to the grounds above that the Minister failed to take into account mandatory relevant considerations, the plaintiff also contends that the Minister failed to give the above matters proper, genuine or realistic consideration as he was required to do by law - *Minister for Immigration v SZJSS* (2010) 243 CLR 122 at [29]), *Khan v Minister for Immigration & Ethnic Affairs* (1987) 14 ALD 291 (Gummow J) and *Zentai v O'Connor (No 3)* (2010) 187 FCR 495 at [396] (McKerracher J). That is, the Minister must show an active intellectual engagement with the issue and a process of reasoning which connects it with the conclusion reached (*Lafu v Minister for Immigration* (2009) 112 ALD 1 at [49] and [54]). Such failures constitute jurisdictional errors.
85. As to the no evidence grounds for constitutional writ or judicial review of the designation decision, the Minister had before him no evidence that PNG would act or was capable of acting in accordance with its assurances that offshore entry persons, including the applicant, would not be at risk of being sent to another country where they had a well-founded fear of persecution or that their claims to be refugees would be assessed within Article 1A of the Refugees Convention and those facts did not exist.
86. Further, in making his decision, the Minister had before him no evidence that PNG would promote the maintenance of a fair and orderly Refugee and Humanitarian Program and that fact did not exist.
87. The no evidence rule is that decisions which are based upon findings of fact must be founded upon logically probative evidence and not mere suspicion. A finding of fact that was made in the absence of supporting evidence is an error of law - *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390. See also, *Minister for Immigration & Ethnic Affairs v Pochi* (1980) 44 FLR 41 at 62–68 per Deane J (with Evatt J agreeing). The position that findings of fact must be supported by logically probative evidence is again developed in Deane J's judgment in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 367 (compare the decision of Mason CJ at 356).
88. In his 5 reasons for decisions (at reason 3 – SCB 258 L42) the Minister determined that he was designating PNG because it will "*promote the maintenance of a fair*

and orderly Refugee and Humanitarian Program that retains the confidence of the Australian people".

89. That was a significant finding by the Minister. He had no evidence before him that this was the case. He had an issues paper that merely contended the proposition (at SCB 219 at [16(b)] and SCB 220 at [24]. He had no evidence before him, let alone logically probative evidence to lawfully found his finding.
90. As to the Minister's finding (in his reasons at SCB 259 at [19]) that he expected PNG was capable of acting, and would act, in accordance with its assurances that offshore entry persons would not be at risk of being sent to another country where they had a well-founded fear of persecution or that their claims to be refugees would be assessed within Article 1A of the Refugees Convention – there was no evidence or logically probative evidence before him that this was the case. Indeed, had he waited for the UNHCR report (SCB 266), he would have seen significant evidence to the contrary based on a total lack of legal or regulatory framework in PNG to deal with refugees.
91. By reason of these two legal errors, each of which constitutes jurisdictional error, the Minister's decision is invalid.
92. The designation decision is afflicted by legal unreasonableness (in the sense described in *Minister for Immigration and Citizenship v Li* (2013) 87 ALJR 618) in the following respects:
93. No sensible Minister acting with due appreciation of his responsibilities would have decided to do what the Minister did. This is because he failed to consult and to read and consider the report of the UNHCR. He took the assurances of PNG at face value in circumstances where there was very little credibility in them. He made the decision, and therefore caused transferees to automatically be sent immediately to PNG in circumstances where a site for the accommodation of the refugee applicants had not even been determined and where the facilities and infrastructure necessary for a refugee camp in PNG had not been established and where basic aspects of the arrangements with PNG were still being negotiated (eg: SCB 221 at [30]). He made the decision without real regard for the health and safety of the transferees and whether or not or when the refugee applications would be determined and by whom and in what fashion and in what time period. He made the decision without any proper regard to Australia's international obligations or to customary law. He made the decision in unseemly haste.
94. Further, the Minister failed to give adequate weight to relevant factors of great importance. The Minister failed to give weight to the essential fact that PNG was neither ready to receive transferees from Australia in terms of accommodation and health and safety, nor ready to process any refugee claims from the transferees at the time of the designation decision in that there was no necessary physical or legal framework or regulatory framework to address the refugees in PNG (eg: SCB 276 at L 38).
95. Further, the Minister gave excessive weight to irrelevant factors of no importance. The Minister gave excessive weight to the memorandum of understanding with PNG (SCB 206) and the statement of arrangements (SCB 233) in that those documents were uncertain, qualified and they could not be accepted on their terms, largely because they were so heavily qualified by statements as to what might happen as opposed to what has happened or will happen and by when. Further or

additional evidence was required and the Minister did not call for it and it was not presented to him.

96. The Minister reasoned illogically or irrationally. It was illogical or irrational for the Minister to determine to send possibly thousands of men and women to a remote island in a largely undeveloped country in circumstances where they would be indefinitely detained, where the necessary facilities and processes had not been established and where the health and safety and refugee status of those persons would be risky and uncertain for an unforeseeable period of time.
97. Further, the designation decision is a disproportionate response by reference to the scope of the power. The clear object of the designation decision was to stop the boats coming from Indonesia. The decision is disproportionate 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 and facilities was out of all proportion to the intended object.
98. The designation decision lacked evident and intelligible justification in that the Minister chose to trade human suffering on a massive scale and to sentence thousands of people, many of them genuine refugees, for an anticipated decrease in boats emanating from Indonesia.
99. In addition to the above, there is no statutory power within the Act authorising the Minister to make the designation decision pursuant to section 198AB(1) of the Act for the purpose of the arbitrary and indefinite detention of the plaintiff under the 'No Advantage Principle'. Nowhere in the Act, is the term the 'No Advantage Principle' defined nor referred. However, according to the definition of the 'No Advantage Principle' in the 'Statement of Arrangements' (at 368 L33):

    > "Transferees should not be given any preferential treatment in the processing of their claims and should receive no advantage (including in relation to and timeframes for, resettlement) as a result of having undertaken or been intercepted in the process of undertaking irregular migration to Australia, compared to those person who avail themselves of regular processing opportunities closer to their country of origin."

100. According to the Statement of Arrangements at [5.3] (SCB 375):
"For Transferees determined to be in need of international protection, the Government of PNG will allow the Transferee to remain in PNG consistent with the 'no advantage' principle unless a durable solution other than resettlement in Australia is found."
101. Put simply, the Minister had no statutory power or jurisdiction to make the designation decision to effect the purposes of the 'No Advantage Principle'.
102. As to the Ministerial direction dated 2 August 2013 (SCB 317), that direction is invalid for the following reasons.
103. It is invalid as a consequence of the designation decision being held invalid as its validity depends on the PNG declaration being valid.
104. Pursuant to section 198AD(5) of the Act, where there were 2 or more regional processing countries, the Minister was required to make a direction to his officers to take transferees to "*the regional processing country specified in the direction*".

105. In his direction, the Minister failed to specify which regional processing centre the plaintiff should be taken to, as was required.
106. Instead, the Minister set out an evaluative process that his officers could determine for themselves.
107. That was not envisaged by the section.
108. Accordingly, the direction is invalid by reason of simple ultra vires.
109. Further, the Minister failed to have regard to mandatory relevant considerations he was required to take into account and that he did not take into account, including:

    (i) the advice of the UNHCR dated 9 October 2012 (SCB 266);
    (ii) The plaintiff's current circumstances; and/or
    (iii) The actual situation in PNG regarding the then available accommodation, water and power, the health and safety of transferees, provision of medical care and tropical medical care, education opportunities and the capacity of the country to process or facilitate in a timely fashion the processing of the transferee's refugee claim.

110. When making the Ministerial direction pursuant to section 198AD of the Act, the Minister exercised the power in such a way that the result of the exercise of the power is uncertain. The judicial review or constitutional writ ground of uncertainty was discussed in *King Gee Clothing Co Pty Ltd v Commonwealth* (1945) 71 CLR 184, where Dixon J held (at 194, 196) there is no "doctrine" that certainty is a separate requirement that all forms of subordinate legislation must fulfil (a proposition endorsed by Kitto J in *Television Corporation Ltd* 109 CLR 59 at 71; see also *Cann's Pty Ltd* 71 CLR 210 at 227). Rather, uncertainty will invalidate where one can derive from the text, context and purpose of the statute an intention by Parliament that the power be confined in a way, which requires a high level of certainty (or precision).
111. Section 198AD(5) of the Act provides for that precision.
112. However, the terms of the direction provided that unauthorised maritime arrivals may be taken to either PNG or Nauru, if, (a) facilities and services are available; and conjunctively (b) if there is vacant accommodation and that vacant accommodation is greater than that available in Nauru.
113. As such, the Minister failed to specify to which regional processing centre the plaintiff should be taken, as was required by section 198AD(5), instead, he made a direction that the plaintiff may be taken to either the Manus or Nauru RPC's, if the facilities, services or accommodation were available.
114. This resulted in an exercise of power that was uncertain and therefore void.
115. Further, the Minister had no authority or power to make the Ministerial direction for the purpose of furthering the No Advantage Principle (arguments above are repeated here).
116. As to the remittal question, the "taking decision" (that is, the decision of the Minister's officer to take the plaintiff forcibly to PNG against his will on 2 August 2013) is capable of being remitted to the Federal Circuit Court for hearing.
117. The High Court's general power of remittal under section 44 of the *Judiciary Act 1903* (Cth) is subject to section 476B of the Act. Section 476B of the Act provides that the Court must not remit a matter, or part of a matter, that relates to a 'migration decision' to any court other than the Federal Circuit Court.

118. The term 'migration decision is defined in section 5(1) of the Act to include a 'privative clause decision'. That phrase is in turn defined in section 464(2) to mean a 'decision of an administrative character made… under this Act, other than a decision referred to in subsection (4) or (5).' Section 474(3) provides an extended definition of the term 'decision'.
119. Having regard to the definition and associated sections, the "taking decision" is plainly a migration decision.
120. The Court may therefore remit the 'taking decision' to the Federal Circuit Court, as that part of the matter relates to a 'migration decision', see ss 5, 474, 476 and 476B(1) of the Act.
121. However, the 'taking decision' cannot be remitted to the Federal Court because that Court does not have any jurisdiction, by reason of section 476A, which is in turn prohibited by section 476B(1).
122. In turn, the Federal Circuit court might transfer the taking decision to the Federal Court, pursuant to section 39 of the *Federal Circuit Court Act 1999* (Cth), having regard to section 39(3)(a)-(d).
123. The Federal Circuit Court is the most appropriate court to hear the challenge to the taking decision.

PART VII: Applicable Provisions

1. Section 51 of the Constitution;
2. Sections 5AA, 189 and 198AA to 199 of the *Migration Act 1958* (Cth).

as still in force

PART VIII: Orders Sought

3. The orders sought are set out in the pleading SCB 18 and in the questions reserved at SCB 41. Questions 1 to 5 should be answered "Yes". Question 6 should be answered "the defendants".

PART IX: TIME OF ORAL ARGUMENT

4. It is estimated that the appellant's oral argument will take approximately 3 hours.

Dated: 26 March 2014

Counsel for the Plaintiff

Mark A Robinson SC
Tel: 02 9221 5701
Fax: 02 8028 6017
Email:mark@robinson.com.au

Professor George Williams AO
Tel: 02 9385-5459
Fax: 02 9385-1175
Email:george.williams@unsw.edu.au

Jay Williams
Tel: 0418 991 596
Fax: 02 9221 6944
Email:j.williams@fjc.net.au