IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO S169 OF 2014

BETWEEN:

CPCF
Plaintiff

AND:

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Defendant

THE COMMONWEALTH OF AUSTRALIA
Second Defendant

SUBMISSIONS OF THE DEFENDANTS

Filed on behalf of the defendants by:

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PART I PUBLICATION

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

PART II ISSUES

2. The issues are identified in the questions stated for the opinion of the Full Court in the special case filed on 25 August 2014 (**SC**). Abbreviations adopted in the special case are adopted in these submissions.

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

3. Notices have been issued pursuant to s 78B of the *Judiciary Act 1903* (Cth) in respect of the issues raised in the special case. No notices have been issued with respect to the matters raised in the plaintiff's submissions (**PS**) at [75]-[78].

PART IV FACTS

4. The facts are set out in the special case.[1]

5. The plaintiff is a national of Sri Lanka, and claims to have a well-founded fear of persecution in Sri Lanka (SC [2], [6]). There is no allegation that the Commonwealth at any time intended to take him to Sri Lanka.

6. The plaintiff departed from India on a boat headed to Australia. Neither he, nor any other person on the Indian vessel, had a right to enter Australia. On 29 June 2014, the Indian vessel was intercepted by an Australian border protection vessel in Australia's contiguous zone outside its territorial waters. An authorising officer in command of the Commonwealth ship formed a reasonable suspicion that the Indian vessel was involved in a contravention of the *Migration Act 1958* (Cth) (**Migration Act**), and authorised the exercise of maritime powers in relation to the Indian vessel under the *Maritime Powers Act 2013* (Cth) (**Maritime Powers Act**). The Indian vessel was detained. The persons on board (including the plaintiff) were detained and transferred to the Commonwealth ship when the Indian vessel was rendered unseaworthy by a mechanical failure. On 1 July 2014, the National Security Committee of Cabinet (**NSC**) decided that the plaintiff and the other persons from the Indian vessel should be taken back to India (SC [16]). Maritime officers took steps to implement that decision, but ultimately were unable to do so and the plaintiff was taken to Australia (SC [20]-[23]).

7. The plaintiff has not claimed a risk of persecution or significant harm in India. Nor do the facts in the special case raise, or provide a foundation to substantiate, any fear that the plaintiff might be removed from India to Sri Lanka.

PART V LEGISLATIVE PROVISIONS

8. In addition to the relevant legislative provisions identified by the plaintiff, the defendants rely on the legislative provisions in Annexure A.[2]

PART VI ARGUMENT

SUMMARY

9. The plaintiff's detention before entering Australia was authorised by s 72 of the Maritime Powers Act:

   9.1. Section 72(4) is not limited by reference to whether the domestic law of the place to which the person is taken implements or confers the benefit of the "non-refoulement obligations" (see SC [7]).

   9.2. Section 72(4) does not contain an implied condition that, before the power can be exercised to take a person to a place outside Australia, there must be an existing agreement or arrangement between Australia and the relevant foreign state enabling the person to be discharged or received at that place. Rather, a decision to take a person to a place outside Australia can be implemented concurrently with the process of making any arrangements considered necessary or desirable for the person's discharge

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1 There is a typographical error in the special case: SC [22] should refer to "paragraph 21 above", not "paragraph 20 above".

2 The defendants note that the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) was introduced into Parliament on 25 September 2014. If enacted, the Bill would amend a number of the legislative provisions at issue in this proceeding. However, as it would not do so with retrospective effect, the Bill does not affect the resolution of the proceeding.

at the particular place, provided that the person is taken to the place within a reasonable time in all the circumstances.

9.3. Section 72(4) provides authority to maritime officers to engage in conduct in the course of their duties, as part of a chain of command. It is permissible for a maritime officer to exercise the powers conferred by s 72(4) in the implementation of a decision made at the highest levels of the Australian Government, without any requirement to second guess that decision.

10. Further or alternatively, s 61 of the Constitution conferred on the Commonwealth Executive non-statutory power to prevent the plaintiff (a non-citizen with no right to enter Australia) from entering Australia, and to make that exclusion effective by detaining the plaintiff and taking him to a place outside Australia. Such power is an expression of Australia's sovereignty as a nation state to determine who may enter and remain in its territory, and to refuse entry to those who seek to travel to Australia in breach of Australian law. This executive power conferred by s 61 is not qualified by reference to international law obligations, let alone limited by the domestic laws of a foreign state.

11. Neither the power under s 72(4) of the Maritime Powers Act, nor non-statutory executive power, was subject to an obligation to give the plaintiff a prior opportunity to be heard about the exercise of that power. If the requirements of procedural fairness applied, their content was reduced to nothing in the circumstances here.

12. The plaintiff was lawfully detained while on the Commonwealth ship. Even if unlawfully detained (which is denied), he would not be entitled to claim any more than nominal damages, because he would in any event have been detained if he had been taken to Australia (SC [25]) or while being taken elsewhere.

(a) MARITIME POWERS ACT

13. Apart from procedural fairness, dealt with separately below, the questions reserved for the consideration of the Full Court identify three possible limits on the power conferred by s 72(4) of the Maritime Powers Act: first, that it does not permit a maritime officer to take a person to a particular place where the law applicable in that place would not give the person the benefit of the "non-refoulement obligations" identified in SC [7]; secondly, that it does not permit a maritime officer to take a person to a particular place in implementation of a decision by the Australian Government, without "independent consideration" by that officer of whether that should be so; and thirdly, that it does not permit a maritime officer to take a person to a particular place unless, prior to the commencement of that taking, an agreement or arrangement exists between Australia and that place concerning the reception of the person in that place. None of those asserted limits should be accepted.

14. In addition, the plaintiff has advanced submissions directed to two issues not raised in the questions reserved for the consideration of the Full Court. First, he contends that the policy recorded in SC [19] was unlawful (PS [68]-[70]). Secondly, he asserts that the exercise of power under s 72(4) here was for an improper purpose, namely general deterrence of others (basing that argument in part on constitutional propositions not previously the subject of any s 78B notice) (PS [75]-[78]). If the plaintiff wished to advance those arguments, they should have been identified as questions in the special case. Parties negotiate the facts included in a special case in light of the questions identified. It is fundamentally unfair for a party to change the issues after the special case is agreed, depriving the other party of the opportunity to seek the inclusion of further facts. As the arguments just identified are not properly before the Court, the defendants have not responded to them.

15. Similarly, the attempts by the interveners to raise issues beyond those in the questions reserved for the consideration of the Full Court should be rejected. The questions do not ask whether the power under s 72(4) was available to take the plaintiff to India only if there was first an assessment of his protection claims. The interveners' arguments on that question go beyond the special case.[3] As a matter of general principle, an intervener should not be permitted to change the questions in a special case. Further, the special case does not contain facts necessary to crystallise the issue that the interveners seek to raise. It does not provide any basis for finding that: (a) the plaintiff claims an apprehension that, if returned to India, he would be at risk of being returned to Sri Lanka; (b) such an apprehension, if held, would have a firm basis; or (c) even in the absence of any claim, there was a foreseeable risk of harm if the plaintiff was removed to India.[4] While such

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3 See the proposed submissions of the Office of the United Nations High Commissioner for Refugees (**UNHCR**) [8(b) & (c)], [45], [48]-[52] and the proposed submissions of the Australian Human Rights Commission (**AHRC**) [10], [19]. This argument is touched on in the plaintiff's submissions (PS [65]), where the plaintiff likewise seeks to go beyond the special case.

4 These are matters of practical reality and fact: see *Minister for Immigration and Multicultural Affairs v Al-Sallal* (1999) 94 FCR 549 (***Al-Sallal***) at [46]-[47]. The UN Human Rights Committee repeatedly refers to the need for a "real risk (that is to say, a necessary and foreseeable consequence)" of serious harm to engage the implicit non-refoulement obligation under the International Covenant on Civil

facts are not required to answer question 1(a), they are necessary for the arguments the interveners seek to make, because without them there is no basis to find that taking the plaintiff back to India engaged Australia's non-refoulement obligations.[5] Accordingly, even if non-refoulement obligations are relevant to the power conferred by s 72(4) (which is denied), there is no more basis to find that such obligations required "assessment" before he could be taken to India than would have been required before he could be taken to, for example, New Zealand or Canada.

16. That is particularly true given that India has non-refoulement obligations under the ICCPR [SC 8(a)] with which it should be assumed it will comply. The absence of facts in the special case[6] to ground any assertion that there is a real risk of indirect refoulement provides a further reason that the Court should refuse to receive, or should decline to address, the submissions of the interveners that go beyond the questions reserved.

(i) Non-refoulement obligations (question 1(a))

17. Question (1)(a) asks whether s 72(4) of the Maritime Powers Act authorised a maritime officer to take the plaintiff to a place outside Australia if he was not entitled by the law applicable in that place to the benefit of the non-refoulement obligations at international law described in SC [7]. The defendants submit that it did.

The source of Australia's non-refoulement obligations at international law

18. It is necessary to define with precision the scope of the international obligations that are in issue here. The special case concerns only those non-refoulement obligations referred to in SC [7]. It does not cover any other obligations assumed by Australia under the *Convention relating to the Status of Refugees* as amended by the *Protocol relating to the Status of Refugees* (**Refugees Convention**), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (**CAT**) and the ICCPR.[7]

19. In the case of art 33(1) of the Refugees Convention, the non-refoulement obligation requires only that Australia not "expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". Other non-refoulement obligations are imposed implicitly by art 7 of the ICCPR[8] and expressly by art 3 of the CAT.[9] The content of those obligations differs from the content of the obligation in art 33 of the Refugees Convention, but in this case nothing appears to turn on those differences.

20. Australia's obligations under the Refugees Convention were not enlivened in respect of the plaintiff, because they arise only with respect to persons who enter Australia's territory.[10] That is disputed by the plaintiff and interveners (PS [52]-[53]; AHRC [23]-[26]; UNHCR [13]-[33]), who submit that the Court should find the decision of the US Supreme Court in *Sale*[11] on this point is wrong. The Court should not determine this issue. While the jurisdictional reach of the Refugees Convention may be important in other contexts, it is not here. The defendants accept that the non-refoulement obligations arising from the CAT and ICCPR are not subject to any

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and Political Rights (**ICCPR**): see, eg, *ARJ v Australia* (Com No 692/1996, 28/07/97) at [6.8], [6.14]; *Kindler v Canada* (Com No 470/1991, 30/07/93, UN Doc CCPR/C/48/D/470/1991) at [6.2].

5 SC [7(b)] refers to the alleged non-refoulement obligations only where there is a real risk of persecution or significant harm, by direct or indirect return to Sri Lanka, prior to protection claims being assessed. Whether there is such a risk here is not addressed in the special case, as it was not required to be given the way question 1(a) was framed. UNHCR [32], referring to taking a person "back to the place of persecution", has no factual foundation, as there is no agreed fact (or even allegation) that this was ever contemplated.

6 Including, for example, any fact that would support the last sentence of UNHCR [46(d)] or the second sentence of UNHCR [52].

7 See *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 (***Plaintiff M70***) at [117].

8 That is, it implicitly prevents Australia from returning a person to a place where he or she will be subjected to torture or to cruel, inhuman or degrading treatment or punishment. That is consistent with AHRC [14]-[16].

9 "No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

10 See *Minister for Immigration v Khawar* (2002) 210 CLR 1 at [42]; *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1 (***Roma Rights Centre Case***) at [15]-[18]; *Sale v Haitian Centers Council Inc*, 509 US 155 (1993) (***Sale***) at 183, 187. That argument is strongly supported by the *travaux preparatoires*, upon which the US Supreme Court extensively relied in *Sale*, and which were said by Lord Bingham in the *Roma Rights Centre Case* at [17] to "yield a clear and authoritative answer".

11 509 US 155 (1993). See also *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 (***NAGV***) at [21]-[22].

relevant territorial limitation.[12] As the plaintiff's arguments do not distinguish between the non-refoulement obligations, nothing turns on the territorial reach of art 33.

21. It is also unnecessary to decide whether: (a) any non-refoulement obligation forms part of customary international law;[13] or (b) if so, it has been incorporated into the common law of Australia (cf PS [54]-[57]). The first issue is irrelevant as, even if non-refoulement obligations form part of customary international law, no argument is advanced that those obligations are of greater scope than the treaty obligations. Further, even if the Court thought the first issue relevant, the Court has insufficient evidence of state practice and *opinio juris* to enable determination of the content of customary international law.[14] The special case does not contain facts going to State practice or *opinio juris*, and the material cited in PS [50] and UNHCR [37]-[39] is patently insufficient.[15] The second issue should not be determined because this case turns on the meaning of s 72(4) and the scope of non-statutory executive power, neither of which is subordinate to the common law. Further, the orthodox view is that customary international law obligations are not automatically incorporated into Australia's domestic law.[16] Reconsideration should occur only in a case where the issue could affect the outcome in the litigation.

The content of Australia's non-refoulement obligations

22. Australia's non-refoulement obligations do not require a person who has made a claim for protection against a form of harm to which the obligations are directed to be given protection by Australia.[17] Nor do they limit the places to which Australia may take the person to parties to the treaties which give rise to those obligations,[18] still less to countries whose domestic laws contain schemes for assessment of protection claims. Australia's non-refoulement obligations are satisfied if, as a matter of practical reality, the country to which the person is taken offers effective protection. Whether that is so does not depend on its being party to relevant treaties, still less on having enacted them into domestic law. French J encapsulated the scope of the non-refoulement obligation in the Refugees Convention as follows:[19] "Return of the person to a third country will not contravene Art 33 notwithstanding that the person has no right of residence in that country and that the country is not a party to the Convention, provided that it can be expected, nevertheless, to afford the person claiming asylum effective protection against threats to his life or freedom for a Convention reason." As Professor Hathaway put it: "Ideally ... the refugee [would be] sent to a state that is a party to the Refugee Convention or Protocol, and which would in fact assess his or her status and honour all relevant Convention and other rights. But not even a carefully contextualised reading of the Convention can honestly be said to require this much."[20]

23. The source for the limitation on s 72(4) asserted by the plaintiff which is the subject of question 1(a) is unclear. It may be inspired by the result in *Plaintiff M70*,[21] which concerned the power of the Minister under the then

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12 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 at [109]. This is consistent with AHRC [20]-[22]; UNHCR [21]-[25]. Cf UNHCR [38], which suggests there are no territorial restrictions at all, which is inconsistent with ICCPR art 2(1) and CAT art 2.

13 If the principle of non-refoulement has attained the status of customary international law, it would follow that India is subject to the same obligations in that regard as Australia.

14 Determination of the content of international law is a matter of law to be determined from the sources of law identified in art 38(1) of the *Statute of the International Court of Justice*: *ACCC v PT Garuda Indonesia (No 9)* (2013) 212 FCR 406 at [31]-[48]. As to the requirements for formation of customary international law, see *Polyukovich v Commonwealth* (1991) 172 CLR 501 at 559-560. There must be evidence of extensive and virtually uniform general practice by States, followed as a matter of legal obligation (*opinio juris*). There must be an "articulation of a practice as binding": Crawford, *Brownlie's Principles of Public International Law* (8th edn, 2012) p 26.

15 Eg there is no evidence of membership of the UNHCR Executive Committees on which reliance is placed in UNHCR [37], despite the fact that membership (which fluctuates) is a small subset of parties to the Refugees Convention. The views in the ExCom communications are generally not concerned with the territorial scope of non-refoulement obligations. So too the 2001 Declaration by Contracting States to the Refugees Convention: Un Doc HCR/MMSP/20010/09 (16/01/02). ExCom 89, upon which UNHCR particularly relies, concerns recommendations as to interception measures. It does not purport to express views about States' legal obligations.

16 See *Nulyarimma v Thompson* (1999) 96 FCR 153.

17 *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 (**Plaintiff M47**) at [260]-[261], [506]-[514]; *Applicant A v Minister for Immigration and Multicultural Affairs* (1997) 190 CLR 225 at 274; *SZ v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 342 at [14]. See generally *Patto v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 119 (**Patto**) at [30]-[37].

18 *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at [39]; *Al-Sallal* (1999) 94 FCR 549 at [47].

19 *Patto* (2000) 106 FCR 119 at [37] (emphasis added). See also *Al-Sallal* (1999) 94 FCR 549 at 558-559; *Al-Zafiry v Minister for Immigration and Multicultural Affairs* [1999] FCA 443 at [26]; *NAGV* (2005) 222 CLR 161 at [25].

20 Hathaway, *The Rights of Refugees under International Law* (2005) p 333.

21 (2011) 244 CLR 144.

s 198A(3) of the Migration Act to declare a country to which "offshore entry persons" could be taken for the assessment of their refugee claims. Section 198A(3) permitted the Minister to declare that a country:

(i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and

(ii) provides protection for persons seeking asylum, pending determination of their refugee status; and

(iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and

(iv) meets relevant human rights standards in providing that protection ...

24. In *Plaintiff M70*, the majority held that the first three paragraphs of s 198A(3) were the "reflex" of Australia's international obligations under the Refugees Convention.[22] The Court's holding that the Minister's power was contingent on the declared country being legally obliged to do the things specified was a consequence of the construction of the words of s 198A(3), read against the background of Australia's international obligations.[23] It would be an error to read the result in *Plaintiff M70* as if it defines Australia's obligations under the Refugees Convention, for the result was a product of the construction of a particular statute.

25. When attention is focused on the content of Australia's non-refoulement obligations, the authorities cited above confirm that Australia can comply with those obligations whether or not the place to which a person is taken is bound by international law to comply with the non-refoulement obligations, and whether or not (as question 1(a) asks) the domestic law of that place ensures the benefit of the non-refoulement obligations.

26. Accordingly, the answer to question 1(a) is "yes". It is possible to answer question 1(a) in that way without deciding whether s 72(4) is subject to Australia's non-refoulement obligations because, even on the assumption that it is, the only relevant question would be whether the place to which a person is to be taken offers effective protection as a matter of fact. The domestic law of that place would not control the answer to that question.

Construction of s 72(4) of the Maritime Powers Act

27. Given the above, the Court should not determine whether the power in s 72(4) is subject to Australia's non-refoulement obligations. Question 1(a) does not ask that question and for the reasons above the issue is hypothetical, as there is no basis upon which the Court could find that it would have contravened Australia's non-refoulement obligations to take the plaintiff to India, and there was no threat to take him to any other place. But if, contrary to that submission, the issue is to be determined, there are several reasons why s 72(4) should not be construed as subject to Australia's non-refoulement obligations.

28. International obligations "[do] not apply directly and in an unqualified way in Australia ... the fundamental question [is] the proper construction of the Act".[24] Australian law is not subordinate to international law, and Australian courts must apply Australian law whether or not it contravenes international law.[25] In the absence of provisions by which international law is "drawn into municipal law",[26] it forms no part of Australian law.[27] An Act may draw in international obligations expressly, eg the definitions in s 8 of the Maritime Powers Act by reference to the *United Nations Convention on the Law of the Sea* (**UNCLOS**). An Act may also draw in international obligations by using expressions given content by those obligations, eg the criterion for the grant of a protection visa prescribed by s 36(2) of the Migration Act,[28] or the word "protection" in s 198A(3) as construed in *Plaintiff M70*. While a statute should be construed, so far as the language permits, so that it is in conformity with and not in conflict with Australia's obligations at international law,[29] the critical issue is the construction of the statutory text.

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22 *Plaintiff M70* (2011) 244 CLR 144 at [118].

23 *Plaintiff M70* (2011) 244 CLR 144 at [125]-[126].

24 *NBGM v Minister for Immigration and Multicultural Affairs* (2005) 231 CLR 52 at [55].

25 *Polites v Commonwealth* (1945) 70 CLR 60 (***Polites***) at 69, 80-81; *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168 at 204; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 (***Kartinyeri***) at [97].

26 *NAGV* (2005) 222 CLR 161 at [26].

27 *Dietrich v The Queen* (1992) 177 CLR 292 at 305, 360; *Victoria v Commonwealth (Industrial Relations Case)* (1996) 187 CLR 416 at 480; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (***Teoh***) at 286-287.

28 See *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 (***Plaintiff M61***) at [27].

29 See, eg, *Jumbunna Coal Mine NL v Victorian Coal Miners' Assn* (1908) 6 CLR 309 at 363; *Polites* (1945) 70 CLR 60 at 68-69, 77, 79, 81; *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1 (***Lim***) at 38; *Kartinyeri* (1998) 195 CLR 337 at [97].

29. Contrary to these established propositions, the plaintiff's submissions effectively assert that international obligations are directly enforceable in Australian law not because they have been drawn in by the Maritime Powers Act but because they have not been excluded with sufficient clarity. That attempt to limit s 72(4) by reference to international law should be rejected for the following reasons.

30. First, and critically, the text of s 72(4) tells against such a construction. Section 72(4) is expressed in unqualified terms. The places to which a person may be taken are not expressly limited by reference to Australia's non-refoulement obligations. Nor does the provision use language (such as "protection") drawn from international treaties. To the contrary, the language of the section is cast in the widest terms possible. The burden faced by the plaintiff is to persuade the Court to read s 72(4) as if it concluded with the radical, yet unexpressed, proviso: "provided the taking is in compliance with Australia's international non-refoulement obligations". To read s 72(4) in that way would be effectively to amend rather than interpret the existing text.

31. Contrary to PS [59], there is nothing in the text of the Maritime Powers Act as a whole which would justify the implication of such a radical limitation. The proposition that the Act "manifests an intention, evident from the Act as a whole, that its provisions facilitate Australia's compliance with its non-refoulement obligations" (PS [58]) is untenable. It is no more than an unsubtle invitation to the Court to adopt reasoning that has been applied in the context of the Migration Act to the very different provisions of the Maritime Powers Act.

32. That is not to deny the obvious interface between the Maritime Powers Act and some of Australia's international law obligations.[30] UNCLOS is of particular significance here. It is referred to expressly, and its text is reflected in some provisions and may influence their interpretation. By contrast, there is no reference to Australia's non-refoulement obligations. The fact that, in particular and limited respects, the Act draws in aspects of international law does not assist the plaintiff, as those express references tend against the suggestion that further unexpressed limitations derived from international law are to be read in. The implication of a particular limit upon a particular provision drawn from particular obligations at international law cannot be supported by a general submission that the Act "reflects a concern for consistency with principles of international law" (cf AHRC [39]).

33. The plaintiff's submission that s 95 of the Maritime Powers Act "imports the terminology of the ICCPR non-refoulement obligations" (PS [59]) is apt to mislead. The ICCPR non-refoulement obligations are themselves a product of implication. There is thus no non-refoulement "terminology" for direct import. Instead, the language used in s 95 picks up language from art 7, but for the narrower purpose of ensuring "that persons in Australia's custody are not subject to cruel, inhuman, or degrading treatment or punishment, as required under art 7". That section is directed to treatment of people held in detention under the Act. It has nothing to say as to the places to which a person may be taken and then released, because once released such persons plainly are not "held under this Act" (cf AHRC [40]). Further, the fact that an express, but limited, restriction is imposed by s 95 by reference to concepts drawn from the ICCPR tells against the implication of any different and wider limitation drawn from that source.

34. The reference in s 7 of the Maritime Powers Act to the fact that "[i]n accordance with international law, the exercise of powers is limited in places outside Australia" does not avail the plaintiff. That section is a "Guide to the Act". It contains a general description of the way the Act works. The relevant part of s 7 plainly refers to ss 40-44, by which the operation of the Act outside Australia is expressly limited conformably with the international law concerning the power of a nation to exercise enforcement jurisdiction outside its territory.[31] The section is concerned with limitations on jurisdiction at international law, and says nothing about whether the Act is impliedly subject to substantive rules of international law such as non-refoulement obligations.

35. The Maritime Powers Act confers powers operating on vessels flagged to a foreign sovereign and at sea in areas regulated by international maritime law (PS [61]). But that does not mean that s 72(4) is to be read as subject to limits found in other international instruments, unrelated to international maritime law. It draws too much from the fact that aspects of the Maritime Powers Act adopt the language of UNCLOS (which, in relation to the exclusive economic zone, requires States to "have due regard to ... other rules of international law" (art 58(3)) to conclude that s 72(4), which is not drawn from UNCLOS and the operation of which is not limited

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30 See ss 12-14, 19, 31(c), 32(c), 33, 40(b), 41(e), 43(a), 44(b), 55(6), 83(a)(ii), 83(b)(ii), 104(2)(a)(ii), 108, 109(b), 116(4)(e).

31 See Replacement Explanatory Memorandum for the Maritime Powers Bill 2012 (Cth) (**EM**) p 2: "The exercise of maritime powers under an authorisation is subject to certain geographical limits. For example, maritime powers cannot be exercised in another country except in limited circumstances, such as with the agreement of that country. These provisions are consistent with limits under international and Australian law in relation to the exercise of maritime enforcement powers." See also the commentary relevant to cll 13 and 14 on p 24 and cll 40-45 on pp 38-41.

to the exclusive economic zone, is limited by other rules of international law. Rather than leave the limits of the Act to implications derived from international law, Div 5 of Pt 2 expressly specifies the applicable limits. That was entirely unnecessary if the Act is to be read as the plaintiff suggests.

36. Similarly, the plaintiff and UNHCR draw too much from s 74. It imposes a limit on the power of a maritime officer to "place or keep a person in a place". Div 8 of Pt 3 uses the verb "place" in a particular manner: see ss 71 and 72(5)(a). The power in s 72(4) to "take the person ... to a place" is textually distinct from the power in s 71 to "place or keep" a person in a particular place (cf UNHCR [50], [52]). Section 74 uses the same "place or keep" language of s 71. It is intended to limit the exercise of the powers in s 71. Read in the context of Div 8, the language in s 74 clearly was not directed to the power to "take" in s 72(4). That is supported by the fact that s 74 has a temporal component. It assumes that the maritime officer retains control over the person, which is not the case once "taking" is complete. Further, s 74 is explicitly directed to whether it "is safe" for a person to be in a place. That language provides no foundation for a requirement to assess whether a place either will be or remain safe in future. It concerns an inquiry of a different kind than required to assess whether taking to a place complies with non-refoulement obligations. Further, the submission wrongly imports into the meaning of "safe" in s 74 concepts of non-refoulement that do not fit within the purpose of that section in the scheme of Div 8 of Pt 3. The word carries its ordinary meaning, which is concerned with practical circumstances on a vessel or other place as determined from time to time.

37. Secondly, the context and purpose of the Maritime Powers Act (and s 72(4) in particular) tell against the plaintiff's submissions. In contrast to s 36 of the Migration Act, s 72(4) is not directed towards facilitating compliance with non-refoulement obligations. On the contrary, the object of the Maritime Powers Act is to provide "a broad set of enforcement powers for use in, and in relation to, maritime areas" (s 7). Exercise of those powers is premised, relevantly, on suspected contraventions of Australian law (s 17). Nothing in that purpose suggests confinement of maritime powers so as to prevent their use to stop contraventions of Australia's domestic law. That one of the Acts to be enforced is the Migration Act tells strongly against the proposition that there is an implied limitation in the Maritime Powers Act such that it cannot be used to enforce the Migration Act if that would conflict with obligations at international law on which the plaintiff relies. Further, the EM expressly recognised (p 6) that action under s 72(4) may engage non-refoulement obligations, but stated that compliance was to be ensured, not by limitation of the power conferred by s 72(4), but by operational procedures adopted by those called upon to exercise the power.

38. It may be accepted that the Maritime Powers Act operates with the Migration Act in various limited respects (PS [60]). But it does not follow that limitations on specific provisions in the Migration Act can be read into the Maritime Powers Act, simply because one Act refers to the other. Nor is it accurate to describe the Maritime Powers Act and the Migration Act as a "legislative scheme" dealing with the same subject matter. The enforcement powers conferred by the Maritime Powers Act relate to enforcement action with respect not just to the Migration Act, but also the *Customs Act 1901* (Cth), the *Fisheries Management Act 1991* (Cth) and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).[32] The powers of maritime officers do not vary depending on the law being enforced. It would be a serious error to use the Migration Act as the foundation for an implied limit on the powers conferred on maritime officers by the Maritime Powers Act, which would then restrict enforcement action under customs, fisheries or environmental legislation. While s 245F(9) of the Migration Act was one predecessor to s 72(4), it was not the only one.[33] Section 72(4) is not a re-enactment of s 245F(9), thus subject to any implied limit on that provision (cf AHRC [48]). Accordingly, even if, when found within the Migration Act, s 245F(9) was in some way limited by Australia's non-refoulement obligations (which has not been, and need not be, decided), no such limitation applies in the new statutory context of the Maritime Powers Act.

39. Thirdly, contrary to AHRC [34], nothing in the history of s 245F(9) supports the limitation asserted by the plaintiff. The AHRC attributes significance to the fact that s 245F(9) was put into a form similar to s 72(4) by the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth), an Act that also contained provisions that validated the actions taken by the Commonwealth concerning the *MV Tampa*. The AHRC's submission

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32 See definition of "monitoring law" in s 8 of the Maritime Powers Act and reg 6 of the *Maritime Powers Regulations 2014* (Cth), which prescribes further laws as monitoring laws.

33 See also *Customs Act 1901* (Cth), s 185; *Fisheries Management Act 1991* (Cth), s 84; *Torres Strait Fisheries Act 1984* (Cth), s 42; *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 457 (which extended the application of s 403 beyond "Australian jurisdiction"). These provisions were all repealed or amended in relevant respects by the *Maritime Powers (Consequential Amendments) Act 2013* (Cth).

suggests that s 245F(9) should be read as applying only in a factual scenario akin to that one, seemingly because that factual scenario motivated its enactment. That submission is without merit, particularly as s 245F(9) never had any operation with respect to persons from the *MV Tampa*. The *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) dealt with both validation and enforcement powers. The new enforcement powers (including s 245F) were enacted by provisions unconnected to the validation provisions.

40. Fourthly, a construction such that s 72(4) authorises a maritime officer to take a person to another country only if that country has enacted the non-refoulement obligations in its domestic law is exceedingly unlikely. That construction would condition the availability of power under s 72(4) on a legal judgment concerning the domestic law of another country. That judgment would not be straightforward for an Australian lawyer to undertake, and practically impossible for a maritime officer on the high seas. The implication of such a limitation would confine the operation of an important statutory provision in a manner that could not possibly be complied with in practice. The same is true of the submission at AHRC [38] that the power cannot be used to take a person to a place where his or her entry would be contrary to local law.

41. Finally, the plaintiff's case is not advanced by recourse to the "principle of legality" (PS [66]). It has not before been suggested that the rights upon which the plaintiff relies are "fundamental common law rights". Even if they were, once it is concluded that s 72(4) is not limited by reference to the limits at international law asserted by the plaintiff, it follows that it is not limited by reference to common law rights said to be derived from them.

(ii) Implementation of Cabinet decision (question 1(b))

42. Question 1(b) asks whether a maritime officer may take the plaintiff to India in implementation of a decision by the Government that the plaintiff should be taken there without "independent consideration" by the maritime officer of whether that should be so. The defendants submit that the answer to this question is "yes".

43. It is not uncommon for a statute conferring power on a person to require the repository of the power to consider whether to exercise the power in a particular way. In such a case, to exercise the power at the dictation of another is a failure to perform the task required, and the exercise of power would be invalid. Equally, however, it is common for statutes that confer power not to require "independent" decision-making, as responsible government requires that control can be exercised by Ministers and senior public servants over those who exercise public power.[34] The identification of the extent to which direction is permissible depends upon the nature of the power, the context in which it is to be exercised and the character of its repository.[35]

44. For the following reasons, s 72(4) confers powers on maritime officers to facilitate the performance of duties under the Maritime Powers Act. The word "may" is used not to repose a discretion, but to confer a power that can be exercised according to the dictates of the existing structures within which maritime officers operate. Section 72(4), like the other provisions of Pt 3, confers power on maritime officers. But unlike, say, s 17, which by its reference to suspicion on reasonable grounds, requires the authorising officer to give consideration to whether the vessel is involved in a contravention of Australia law, s 72(4) does not require a maritime officer to give consideration to any particular matters before exercising power.[36] The reason is clear when one considers the context in which maritime powers fall to be exercised by maritime officers.

45. The expression "maritime officer" is defined in s 104(1) to include members of the Australian Defence Force (**ADF**), officers of Customs, members of the Australian Federal Police (**AFP**) and (in limited circumstances) a person appointed by the Minister. Especially for members of the ADF and AFP, maritime powers will generally be exercised within a chain of command. That is particularly obvious for members of the ADF, who are subject to s 27 of the *Defence Force Discipline Act 1982* (Cth). As observed in *Haskins v Commonwealth*:[37] "Obedience to lawful command is at the heart of a disciplined and effective defence force." A similar chain of command is established for members of the AFP.[38] Consistently with this, it is an agreed fact that maritime officers on navy vessels and Australian customs vessels perform their duties and exercise their powers, including their powers under the Maritime Powers Act, in the context of a chain of command in which they are governed by orders and instructions from superior or senior officers (SC [14]).

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34 See *R v Anderson; Ex parte IPEC-Air Pty Ltd* (1965) 13 CLR 177 at 204-206.

35 *Wetzel v District Court* (1998) 43 NSWLR 687 at 688, 692-693; *Bread Manufacturers (NSW) v Evans* (1981) 180 CLR 404 at 429-430.

36 cf *Commonwealth v Fernando* (2012) 200 FCR 1 at [83]-[84].

37 (2011) 244 CLR 22 at [67].

38 See s 40 of the *Australian Federal Police Act 1979* (Cth). Compare, in a different context, *A v New South Wales* (2007) 230 CLR 500 at [4] and [42]; *Glinski v McIver* [1962] AC 726 at 744.

46. Accordingly, a critical contextual factor in construing the Maritime Powers Act is that it confers powers on officers who exercise them in the context of established structures requiring them to follow orders. It cannot be supposed that Parliament intended it to be impermissible for a maritime officer to exercise power conferred by s 72(4) in implementation of an order given by a superior. Far from being impermissible, this is likely to be commonplace. Indeed, the chain of command is expressly recognised in the definition of "authorising officer" in s 16(1). Provided an "authorising officer" has given an authorisation in accordance with Pt 2, Div 2 (as occurred here: SC [13(a)]), the Act contemplates maritime officers exercising powers in accordance with that authorisation without being required to consider whether that is otherwise appropriate.

47. To construe Pt 3 of the Maritime Powers Act as requiring each maritime officer to consider whether to exercise a particular maritime power in a particular manner in respect of each individual on a vessel would require each maritime officer to second guess – and depart from, if he or she thought it appropriate – the chain of command. Maritime officers would be required to do this even though they may not have access to the full spectrum of information bearing on whether the power should be exercised in a particular manner. That could jeopardise the safety of the maritime officer and others, as it may cause a failure to take action at critical times or to different maritime officers acting inconsistently or unpredictably in a dangerous environment on the high seas.

48. Further, the plaintiff's construction of s 72(4) would require maritime officers to focus, not on the enforcement action required to prevent contravention of Australian law (that being the focus of the Maritime Powers Act), but on an individualised consideration of the interests of each passenger on a vessel involved in a contravention of Australian law. While maritime officers are well placed to engage in the former activity, they are poorly placed to engage in the latter. That provides strong reason to doubt the plaintiff's construction.

49. Sometimes, the structures in which maritime officers operate repose decision-making authority in a particular maritime officer.[39] Then, that officer must decide how to proceed having regard to the suite of powers and options available. On other occasions, a decision will have been made higher up the command structure. Then, the task of maritime officers is to implement the decision using whatever powers are available, including that conferred by s 72(4). Once it is recognised that it is permissible for a maritime officer to exercise maritime powers in accordance with the orders of superiors, there is no objection to an officer doing so in accordance with a decision taken by the NSC. That is suggested by two features of the statutory scheme.

50. First, as the plaintiff accepts (PS [20], [71]), any decision to take a person to a place outside Australia is likely to involve considerations of Australia's relations with other nations. This necessarily involves Australia's foreign policy interests, and political judgements about those interests. It may involve negotiation with another country to secure its agreement to receive a person, but whether and how such negotiations are carried out plainly is not a matter for the maritime officer exercising power under s 72(4). It is unreal to imagine that a maritime officer on a Commonwealth ship at sea could, or would, independently make a decision as to the choice of foreign country to which to take a person. A maritime officer, having received orders as to the place to which a person is to be taken, cannot be required to second guess those orders and give "independent consideration" to whether the person should be taken there (cf PS [73]). The corollary of that suggestion would be that maritime officers are required to disobey their orders if they – exercising their "independent" discretion – think a person should be taken to a different place. Parliament is very unlikely to have intended to require a maritime officer to disobey orders in that way.

51. Secondly, at least so far as the ADF is concerned, the chain of command can readily be traced to the highest levels of the Executive. Section 68 of the Constitution provides that the "command in chief" of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative. That confers on the Governor-General a "titular command",[40] exercisable in accordance with the principle of responsible government on ministerial advice,[41] to determine where, how and when defence forces are to be

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39 As, for example, in dealing with an illegal fishing vessel, where there is frequently no call for any decision-making at a higher level than at the level of the commander of the relevant Australian vessel.

40 Sir Ninian Stephen, "The Governor-General as Commander in Chief" (1983-1984) 14 *MULR* 563 (**Stephen**) at 569, cited in *Coutts v Commonwealth* (1985) 157 CLR 91 at 109. See also *Attorney-General (Vic) v Commonwealth* (1935) 52 CLR 533 at 567.

41 See *Lane v Morrison* (2009) 239 CLR 230. See also *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 10 March 1898 pp 2249-2264; Quick & Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) (**Quick & Garran**) p 713; Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) pp 176-177; Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (1983) p 15; Stephen at 569; *Final Report of the Constitutional Commission* (1988), vol 1 (**Constitutional Commission Report**) at [5.188]; Zines, *The High Court and the Constitution* (5th ed, 2008) pp 344-345.

deployed.[42] An important purpose of this provision is to ensure the Commonwealth's naval and military forces are under civilian control. It places the Governor-General in a position analogous to that held by colonial governors[43] and the Crown.[44] In practice, s 9 of the *Defence Act 1903* (Cth) vests command of the ADF in the Chief of the ADF, and the command of each arm of the ADF in the Service Chiefs. Section 8 then gives the Minister for Defence power to give directions to the Chief of the ADF or the Service Chiefs in relation to the general control and administration of the ADF, who can then implement those directions through orders flowing down the ordinary chain of command. The Court should require the clearest of language before it adopts a construction that confers powers on members of the ADF requiring them to exercise a discretion as to the way they exercise those powers independently of the structure summarised above. Yet that is the plaintiff's construction of s 72(4) of the Maritime Powers Act. If that construction is rejected for maritime officers who are ADF officers, equally it should be rejected for other maritime officers. That is especially so given the obvious prospect of joint operations, involving ADF and non-ADF maritime officers, perhaps even on the same vessel.

52. Here, as is not surprising given the matters above, the decision as to the place to which the plaintiff should be taken was made by the NSC (SC [16]). That body was properly placed to weigh and assess the competing considerations bearing on the choice as to where the plaintiff should be taken. The decision having been made at the highest levels of Government, maritime officers properly implemented that decision by exercising powers at their disposal, including that conferred by s 72(4). That was both lawful and appropriate.

(iii) Arrangement or agreement with the place to which a person is to be taken (question 1(c))

53. Nothing in the text of s 72(4) limits the place to which a person may be taken to one with which arrangements have been made, before the taking, for the discharge of the person. No such limit should be implied. Indeed, to read in any such limit would be inconsistent with the express role given to "request or agreement" in ss 40(a) and 41(1)(j); namely, as one, but only one, of a range of circumstances that trigger various powers under the Maritime Powers Act.

54. Neither any constitutional limit, nor any concern that this Court be in a position at all times to assess the lawfulness of a person's detention under s 72(4), requires any such limit (cf PS [36]-[38]). At all times, the lawfulness of the detention will depend upon whether the detention is for a permissible purpose – to take a person to a particular place – and whether that is being done within a reasonable time.

55. Section 72(4) authorises detention and taking for the purposes identified in ss 31 and 32. Relevantly, such purposes include preventing a breach of, and ensuring compliance with, Australian law. Where the power under s 72(4) is used to take a person seeking to enter Australia without permission to a place other than Australia, that purpose is engaged and s 72(4) authorises a maritime officer to take the person, or cause the person to be taken, to that place within a reasonable time. That is consistent with the ordinary principle that applies in cases where no period is specified in a statute for doing a particular act.[45] No invocation of constitutional principle is required to reach that conclusion (cf PS [31]). Plainly enough, when power is exercised under s 72(4) to take a person to a place other than Australia, provided the power is exercised within a reasonable time any detention accompanying the taking facilitates the purposes of effective prevention from entry. It is well settled that executive detention for like purposes is compatible with Ch III of the Constitution.[46]

56. The defendants do not submit that the place to which a person may be taken can be altered at the unconstrained discretion of the Executive (cf PS [35(b)]). But where a person is detained for the purpose of taking them to another place under s 72(4), detention may continue while that purpose is fulfilled. If it is necessary to change the place to which the person is to be taken, the purpose of detention is unchanged. That is not to say the circumstances in which such a change can occur are at large. It is not necessary to determine the limits in this case, beyond holding that the place may change if, having arrived, it would not be practicable to complete taking the person to that place within a reasonable time.

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42 *Chandler v Director of Public Prosecutions* [1964] AC 763 at 800, 807; *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 at 100; *Lane v Morrison* (2009) 239 CLR 230 at [53]-[58].

43 Constitutional Commission Report at [5.178].

44 Quick & Garran p 713; Constitutional Commission Report at [5.178].

45 See, eg, *Folkard v Metropolitan Railway Co* (1873) LR 8 CP 470; *Lau v Calwell* (1949) 80 CLR 533 at 573-574, 590; *Hospital Benefit Fund of WA Inc v Minister for Health, Housing & Community Services* (1992) 39 FCR 225 at 229.

46 See, eg, *Plaintiff S4/2014 v Minister for Immigration and Border Protection* [2014] HCA 34 at [26].

57. As with an express prescription that something must be done "within a reasonable time", what is within that period depends on context and the facts of the case.[47] What is a reasonable time will be informed by matters such as the distance of the place selected from the person's present location, weather conditions, the speed of the vessel on which the person is to be taken to the place and whether it is necessary to make detours to rotate crew or re-supply the vessel. The time to travel to the place selected (which takes account of each of the above matters) will not exceed the reasonable time for which a person may be detained under s 72(4).

58. The reasonable time within which taking must be completed under s 72(4) must include such further time as is reasonably required to determine whether the person may be discharged at that place and take the steps reasonably required to effect that discharge. If it were otherwise, a person to whom s 72 applies would normally have to be taken to Australia. That follows because, in any case involving non-citizens who are seeking to enter Australia, there will be doubt (at least for some period of time, while persons on the vessel are identified) as to what places, other than Australia, will receive such persons. It cannot be supposed that in all such cases persons must be taken to Australia, for s 72(4) plainly contemplates that a person may be taken to a place other than Australia. It would radically alter the statutory scheme if, in the absence of certainty that persons will be received in the place to which they are taken, all persons must be taken to Australia.

59. No doubt for that reason, the plaintiff accepts that the permissible period under s 72(4) includes time to take reasonable steps to determine whether the person can be discharged at the place to which the person may be taken (PS [32]).[48] But the plaintiff seeks to limit those steps to those occurring before the making of a taking decision (although after detention has commenced). The limitation should be rejected.

60. Whether persons will be able to be discharged from detention at the place to which they are taken is subject to variables outside the control of the maritime officer. To construe s 72(4) so that the process of taking a person to a place cannot commence until there is an acceptance by the relevant country that the person will be received there would prolong the detention of persons detained under s 72(4), by preventing travel to that place occurring simultaneously with any negotiations. Further, any agreement to receive a person is likely to be subject to checks as to a person's identity or health. Until the result of those checks is known, it would be impossible to determine whether a person can be discharged from detention at a particular place. It would not be a workable construction of s 72(4) that, in a case of that kind, no taking can commence until all checks are completed, for that would only increase the period of detention on board the relevant ship.

61. Indeed, there is a fundamental tension in the plaintiff's case. While he concedes s 72(4) authorises what he terms a "short period" (PS [32]) of detention anterior to the taking decision, his submissions, if accepted, have the inevitable result that any such period could not be "short". Thus, the plaintiff accepts that s 72(4) authorises detention while reasonable steps are taken to determine whether the person can be discharged at the chosen place, which steps presumably include both negotiations and the completion of any reasonable checks that are required. While those steps are taken, persons would remain waiting on the vessel in its original location. If the plaintiff's submissions about procedural fairness were accepted, it would also be necessary for all persons on the vessel to be afforded a hearing about where they are to be taken before any taking could commence (that being a potentially lengthy process, particularly given the likely need for interpreters). And, most critically, if the plaintiff's and interveners' submission that non-refoulement obligations are relevant to s 72(4) were accepted, it would also be necessary to complete an assessment of any protection claims made by each person (being an assessment that maritime officers obviously would not be well placed to undertake). All of these steps would have to be taken before any taking decision could validly be made. On the plaintiff's construction of s 72(4), any period reasonably required to complete those steps would necessarily involve detention for a reasonable period, validly authorised by s 72(4), before any taking even starts. His construction reads s 72(4) as requiring persons to be kept in a stationary position on a vessel, potentially for weeks or even months, before the section authorises taking to a place other than Australia. To construe s 72(4) in that way would render it incapable of practical application, defeating its purpose.

62. Even if the steps the plaintiff postulates were completed before any taking commenced, and if there were then no reason to doubt a person may be discharged at a place (because, for example, there is an acceptance by the relevant country to receive the person), circumstances may change. Prior acceptance by the receiving country may be withdrawn. Weather conditions may make it unsafe to discharge persons within a reasonable

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47 *BTR Plc v Westinghouse Brake and Signal Company (Australia) Ltd* (1992) 34 FCR 246 at 272; *Macquarie Health Corp Ltd v Commissioner of Taxation* (1999) 96 FCR 238 at [100]; *NATB v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 133 FCR 506 at [51]. See also *Litster v Forth Dry Dock & Engineering Co Ltd (in rec)* [1990] 1 AC 546 at 569.

48 The plaintiff's subsequent submission at PS [38] appears to contradict that concession.

period. Section 72(4) would miscarry if the power it confers did not accommodate the possibility that, if it proved impossible to discharge a person at a particular place, the person may be taken to a different place (including to Australia, as here). The plaintiff accepts that this is so. He seeks to deal with this by submitting that if agreement is withdrawn, the decision to take is exhausted and can be remade (PS [39]). But it is artificial to draw a distinction between a case where, at the commencement of the taking, there is an agreement for the discharge of the person but that agreement subsequently fails, and a case where an agreement may be negotiated but is never concluded. From the perspective of the person being taken, the circumstances are identical, save that the latter has the potential to result in a shorter period of detention at sea.

63. None of this suggests that the period of detention can be indefinite or subject to the whim of the Executive. If, within a reasonable time, arrangements to effect the discharge of a person at a place are not able to be made, the person's continued detention would not be authorised by s 72(4). If so, power under s 72(4) must be re-exercised to select a different place. The circumstance is no different to that, accepted by the plaintiff (PS [39]), where it was previously thought practicable to discharge a person at a place but that ceases to be so.

64. Contrary to PS [42], there is no basis in the special case to conclude that, at the time of the decision to take the plaintiff to India, it was impracticable for him to be discharged there. The special case records only that, at the time of that decision, "no agreement or arrangement was in place" for the return of the passengers from the Indian vessel (SC [17]). The power may be exercised to take a person to a place at the same time arrangements are made to render practicable the person's discharge at that place. There is no basis to conclude that the detention of the plaintiff while seeking to effect his discharge in India continued any longer than reasonably necessary. The only basis for that conclusion relied upon by the plaintiff is, apparently, that it took longer than it would have taken to bring him to Australia (PS [41]). But the outer bounds of the permissible time to take a person to a place other than Australia are not marked by the time reasonably required to take the person to Australia. If they were, that would ordinarily mean that there was no power to take to a place other than Australia (the power conferred by s 72(4) often falling to be exercised with respect to vessels in Australia's contiguous zone: see s 41(1)(c)).

(iv) Section 72(4) empowered the steps taken (question 2)

65. For the reasons advanced above, the steps taken between 1 July and 10 July 2014, when the Commonwealth ship was travelling to India (SC 20(a)), and the steps taken between 10 July and 22 July 2014, were lawful.

(b) NON-STATUTORY EXECUTIVE POWER OF THE COMMONWEALTH (question 3)

(i) The scope of the non-statutory executive power to exclude aliens

66. The limits of the executive power of the Commonwealth under s 61 of the Constitution have not been, and probably cannot be, exhaustively defined.[49] In addition to powers conferred by statute or otherwise involving the execution and maintenance of the laws of the Commonwealth, and powers and functions conferred by specific provisions of the Constitution,[50] "[t]here are undoubtedly significant fields of executive action which do not require express statutory authority."[51]

67. While the source of the executive power of the Commonwealth is s 61,[52] the scope of executive power is informed by the prerogative powers of the Crown. While *Williams v Commonwealth (No 2)* emphasised that "the ambit of the executive power of the Commonwealth cannot begin from a premise that the ambit of that executive power must be the same as the ambit of British executive power", it accepted that "consideration of the executive power of the Commonwealth will be assisted by reference to British constitutional history".[53]

68. It has never been denied that executive power under s 61 includes aspects of common law prerogative powers.[54] Section 61 "enables the Crown to undertake all executive action which is appropriate to the position

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49 *Williams v Commonwealth* (2012) 248 CLR 156 (***Williams (No 1)***) at [22], [121], [483], [560]; *Pape v Commissioner of Taxation* (2009) 238 CLR 1 (***Pape***) at [227], [324]; *Davis v Commonwealth* (1988) 166 CLR 79 (***Davis***) at 92-93.

50 See, eg, ss 2, 57, 64, 67, 68, 69, 70.

51 *Williams (No 1)* (2012) 248 CLR 156 at [34]; *Davis* (1988) 166 CLR 79 at 108.

52 *Re Ditfort; Ex p Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 369; see also *Ruddock v Vadarlis* (2001) 110 FCR 491 at [179]; *Re Residential Tenancies Tribunal (NSW); Ex p Defence Housing Authority* (1997) 190 CLR 410 (***Re Residential Tenancies Tribunal***) at 424.

53 (2014) 88 ALJR 701 at [81] (***Williams (No 2)***).

54 *Barton v Commonwealth* (1974) 131 CLR 477 (***Barton***) at 498; *Davis* (1988) 166 CLR 79 at 92-94, 107-108; *Re Residential Tenancies Tribunal* (1997) 190 CLR 410 at 424, 438, 455, 459, 463-464; *Pape* (2009) 238 CLR 1 at [126]-[128], [214]-[215]; *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195 (***Cadia Holdings***) at [86]; *Ruddock v Vadarlis* (2001) 110 FCR 491 at [9], [178].

of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution" and "includes the prerogative powers of the Crown, that is, the powers accorded to the Crown by the common law."[55] In *Williams (No 1)*,[56] French CJ stated that s 61 includes "powers defined by reference to such of the prerogatives of the Crown as are properly attributable to the Commonwealth", and suggested that "[t]he mechanism for the incorporation of the prerogative into the executive power is found in the opening words of s 61 which vests the executive power of the Commonwealth in 'the Queen'."

69. The Commonwealth Executive also possesses implied powers derived from the character and status of the Commonwealth as the national government.[57] Such powers should be interpreted widely and "according to no narrow conception of the functions of the central government of a country in the world of today".[58] Commonwealth executive power is "to be measured by reference to Australia's status as a sovereign nation",[59] and encompasses powers necessary for "the protection of the body politic or nation of Australia".[60] As well as enabling the Commonwealth to engage in activities "peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation",[61] such powers enable the Commonwealth to respond to national emergencies or crises,[62] and deal with internal or external threats.[63] This aspect of executive power is not unlimited, and in particular must be consistent with the "basal consideration" arising from the federal distribution of powers between the Commonwealth and the States.[64] Accordingly, the existence of powers deduced from the establishment and nature of the Commonwealth as a polity is clearest – in a case like the present – where Commonwealth executive action involves no real competition with the States.[65]

70. The executive power to exclude non-citizens is supported by reference to both the prerogatives of the Crown at common law, and the inherent powers of the Commonwealth as the national polity. These alternative sources or expressions of executive power may be viewed as interrelated, each informing the other.[66]

71. At common law, an alien has no right to enter the territory of a sovereign State, and the State has power to exclude or expel an alien from its territory.[67] As the Privy Council said in *Attorney-General for Canada v Cain*,[68] in a passage frequently applied in this Court:[69] "One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests." The Privy Council accepted that the Crown "undoubtedly possessed" power to expel an alien from its territory, and return the alien to the country from which the alien entered.[70] Further, the power to

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55 *Barton* (1974) 131 CLR 477 at 498. For present purposes, it is unnecessary to distinguish between the approach of Blackstone (prerogative power refers to those rights and capacities enjoyed only by the Crown and not by its subjects) and that of Dicey (prerogative power refers to the "residue of discretionary or arbitrary authority ... legally left in the hands of the Crown").

56 (2012) 248 CLR 156 at [22], [24], [30]; see also [123], [484].

57 *Williams (No 1)* (2012) 248 CLR 156 at [22] and cases cited.

58 *A-G (Vic) (Ex rel Dale) v Commonwealth (Pharmaceutical Benefits Case)* (1945) 71 CLR 237 at 269, cited in *Pape* (2009) 238 CLR 1 at [87].

59 *Ruddock v Vadarlis* (2001) 110 FCR 491 at [191].

60 *Pape* (2009) 238 CLR 1 at [215]; see also *Davis* (1988) 166 CLR 79 at 109-110.

61 *Victoria v Commonwealth (AAP Case)* (1975) 134 CLR 338 at 397-398, see also 362, 375, 406; *Pape* (2009) 238 CLR 1 at [228], [327]-[329].

62 *Pape* (2009) 238 CLR 1 at [233], [241]-[242].

63 See *Burns v Ransley* (1949) 79 CLR 101 at 116; *R v Sharkey* (1949) 79 CLR 121 at 148-149; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 187-188; *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 94.

64 *Pharmaceutical Benefits Case* (1945) 71 CLR 237 at 271-272; *Williams (No 2)* (2014) 88 ALJR 701 at [83]; *Pape* (2009) 238 CLR 1 at [127].

65 *Davis* (1988) 166 CLR 79 at 93.

66 *Williams (No 1)* (2012) 248 CLR 156 at [30].

67 *Koon Wing Lau v Calwell* (1949) 80 CLR 535 at 555-556; *Lim* (1992) 176 CLR 1 at 29-31, 57; *Minister for Immigration v Haji Ibrahim* (2000) 214 CLR 1 (***Haji Ibrahim***) at [137]; *Ruddock v Vadarlis* (2001) 110 FCR 491 at [4], [97], [110], [125], [186]; compare *United States ex rel Knauff v Shaughnessy* 338 US 537 (1950) at 542.

68 [1906] AC 542 (***Cain***) at 546; see also *Robtelmes v Brenan* (1906) 4 CLR 395 at 400, 409; *Ah Yin v Christie* (1907) 4 CLR 1428 at 1431.

69 See, eg, *Robtelmes v Brenan* (1906) 4 CLR 395 at 400; *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 163 at [21]; *Plaintiff M47* (2012) 86 ALJR 1372 at [402].

70 *Cain* [1906] AC 542 at 547.

expel an alien carried with it power to do all things necessary to make the exercise of the power effective, including restraint of the person outside the territory of the State.[71]

72. *Toy v Musgrove*[72] turned on whether the prerogative to exclude aliens could be exercised by the government of the colony of Victoria. Each judge accepted or assumed that the Crown had historically possessed a prerogative to exclude aliens.[73] Higginbotham CJ considered that the "great preponderance of authorities" favoured the existence of a prerogative "to prevent aliens from landing on British soil, and to remove them after they have landed", that the "non-user" of that prerogative in modern times in England was "no evidence that the right itself has become extinct", and that the prerogative had not been affected by the enactment of legislation "for the purpose of improving and enlarging the means of carrying out more effectually the purpose of the prerogative".[74] The continuing existence of the prerogative has recently been recognised in the UK.[75]

73. In *Ruddock v Vadarlis*,[76] a majority of a Full Court of the Federal Court correctly held that Commonwealth executive power includes power "to prevent the entry of non-citizens and to do such things as are necessary to effect such exclusion".[77] French J stated: "The power to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the Government of the nation would lack under the power conferred upon it directly by the Constitution, the ability to prevent people not part of the Australia community, from entering."[78] While French J did not attempt to define the outer limits of this power, his Honour considered that it was "sufficient to authorise the barring of entry by preventing a vessel from docking at an Australian port and adopting the means necessary to achieve that result" and that it "would extend to a power to restrain a person or boat from proceeding into Australia or compelling it to leave".[79] Accordingly, on the facts of that case: "The steps taken in relation to the *MV Tampa* which had the purpose and effect of preventing the rescuees from entering the migration zone and arranging for their departure from Australian territorial waters were within the scope of executive power."[80]

74. The actions taken by officers of the Commonwealth in this case were supported as an exercise of non-statutory executive power. The Indian vessel was intercepted in the contiguous zone of Australia (SC [12]), and its intended destination was Christmas Island (SC [5]). None of the persons on the vessel, including the plaintiff, had a right to enter Australia (SC [5]). The Commonwealth Executive had power to prevent the Indian vessel and the persons on board from entering Australian territorial waters, including by boarding and detaining the vessel. Once detained, in circumstances where the vessel was no longer seaworthy, it was necessary, to make the exclusion effective, to take the persons from the vessel to a place outside Australia. That was done by attempting to take the persons to the place from which that vessel had departed. Contrary to PS [93], given their vessel was deemed unseaworthy, it is not sensible to suppose that the executive power extended only to taking the plaintiff and others from the Indian vessel to the edges of Australian territory.

(ii) No limitation on the non-statutory executive power by international law

75. The plaintiff submits (PS [94]) that the non-statutory executive power under s 61 of the Constitution can rise no higher than the common law prerogative, and that the prerogative is "cut down" by Australia's international law obligations, including the non-refoulement obligations. That submission should not be accepted.

76. While the prerogative powers of the Crown at common law can inform the scope of the executive power under s 61, such prerogative powers do not fix the limits or boundaries of the executive power of the Commonwealth. In any event, there is no authority that the historical prerogatives of the Crown are limited by obligations arising under international law not incorporated into municipal law.[81] In the case of the non-refoulement obligations, the

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71 *Cain* [1906] AC 542 at 546.

72 (1888) 14 VLR 349.

73 *Toy v Musgrave* (1888) 14 VLR 349 at 378-379, 397, 411, 415-416, 437, cf at 425-427. An appeal to the Privy Council was allowed on a separate point concerning the right of an alien to maintain an action against the Crown: *Musgrove v Toy* [1891] AC 272.

74 *Toy v Musgrave* (1888) 14 VLR 349 at 378.

75 *G1 v Secretary of State for the Home Department* [2012] EWCA Civ 867 at [12]. See also *Roma Rights Centre Case* [2005] 2 AC 1 at [11].

76 (2001) 110 FCR 491.

77 *Ruddock v Vadarlis* (2001) 110 FCR 491 at [193].

78 *Ruddock v Vadarlis* (2001) 110 FCR 491 at [193].

79 *Ruddock v Vadarlis* (2001) 110 FCR 491 at [197].

80 *Ruddock v Vadarlis* (2001) 110 FCR 491 at [204].

81 Such authority as there is suggests the contrary: see *R (On the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2009] 1 AC 453 at [66], [116], cf [145]; *New South Wales v Commonwealth (Seas and Submerged Lands Case)*

relevant instruments giving rise to those obligations did not exist when the prerogative power to exclude aliens was recognised and developed, nor at the time when the Constitution was adopted. As McHugh J observed in *Al-Kateb v Godwin*:[82] "courts cannot read the Constitution by reference to the provisions of international law that have become accepted since the Constitution was enacted in 1900". Just as the legislative power of the Commonwealth supports laws inconsistent with international law, Commonwealth non-statutory executive power is not subject to limits imposed by international law.

(iii) No limitation on the non-statutory executive power by statute

77. Commonwealth executive power is subject to regulation and control by valid legislation enacted by the Parliament. However, the orthodox approach to statutory construction is that a prerogative of the Crown will not be displaced by legislation except by express words or necessary implication.[83] In *Barton*,[84] Barwick CJ stated that "the rule that the prerogative of the Crown is not displaced except by a clear and unambiguous provision is extremely strong".[85] Mason J held that the prerogative power to seek and accept the surrender of a fugitive from a foreign state was "an important power essential to a proper vindication and an effective enforcement of Australian municipal law" and that it was "not to be supposed that Parliament intended to abrogate the power in the absence of a clearly expressed intention to that effect".[86] Similarly, Jacobs J concluded that "an intention to withdraw or curtail a prerogative power must be clearly shown" and noted that "the right to communicate freely with a foreign state is an important prerogative power".[87]

78. The principle is that "when a prerogative power of the Executive Government is directly regulated by statute, the Executive can no longer rely on the prerogative power but must act in accordance with the statutory regime laid down by the Parliament".[88] If a statute is intended to regulate comprehensively the whole ground formerly covered by a prerogative power, an intention to displace the prerogative may arise by necessary implication.[89] But the fact that a statute confers powers dealing with the same subject as the prerogative does not mean Parliament must have intended the statutory powers to displace the prerogative, particularly where they have a distinct operation or scope. The statutory powers may "provide an additional mode of attaining the same object",[90] leaving the prerogative intact. *Barton* is an example.

79. Further, "[t]he greater the significance of a particular executive power to national sovereignty, the less likely it is that, absent clear words or inescapable implication, the parliament would have intended to extinguish the power."[91] The power to determine who may enter Australia and who is to be refused admission is an inherent and central incident of Australia's sovereignty,[92] and is not readily excluded by implication.

80. In *Ruddock v Vadarlis*,[93] French J observed that, if Parliament were concerned about the existence of an executive power in this area derived from s 61, it could have legislated to exclude it by clear words. Following that decision, the Parliament specifically legislated to confirm the continued existence of the executive power "to protect Australia's borders, including, where necessary, by ejecting persons who have crossed those borders".[94] When Parliament enacted the Maritime Powers Act, it again expressly provided in s 5 that the Act

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(1975) 135 CLR 337 at 493, referred to in *Commonwealth v Yarmirr* (2001) 208 CLR 1 at [58]. See also, more generally, *Teoh* (1995) 183 CLR 273 at 291, 302.

82 (2004) 219 CLR 562 (***Al-Kateb***) at [62]; *Western Australia v Ward* (2002) 213 CLR 1 at [958], [961].

83 *Cadia Holdings* (2010) 242 CLR 195 at [94], see also [14].

84 (1974) 131 CLR 477.

85 *Barton* (1974) 131 CLR 477 at 488.

86 *Barton* (1974) 131 CLR 477 at 501.

87 *Barton* (1974) 131 CLR 477 at 508.

88 *Re Residential Tenancies Tribunal* (1997) 190 CLR 410 at 459 (emphasis added); *Oates v Attorney-General* (Cth) (2003) 214 CLR 496 at [37]; *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 (***Jarratt***) at [85]; *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24 (***Arnhem Land Aboriginal Land Trust***) at [27]; see generally *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508 (***De Keyser***) at 526, 537-540, 549-550, 561-562, 575-576.

89 See eg *Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24 at [27].

90 *De Keyser* [1920] AC 508 at 561; see also *Ruddock v Vadarlis* (2001) 110 FCR 491 at [182].

91 *Ruddock v Vadarlis* (2001) 110 FCR 491 at [185], [202].

92 *Ruddock v Vadarlis* (2001) 110 FCR 291 at [192]-[193]. See also *Robtelmes v Brenan* (1906) 4 CLR 395 at 406; *Al-Kateb* (2004) 219 CLR 562 at [203]; *Pochi v Macphee* (1982) 151 CLR 101 at 106.

93 (2001) 110 FCR 491 at [204].

94 Migration Act s 7A. See *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth), commencing 27 September 2001.

"does not limit the executive power of the Commonwealth", precluding any implication of a legislative intention to abrogate or displace the prerogative power to prevent the entry into Australia of those who have no right to enter.[95] Given the well-known decision in *Ruddock v Vadarlis*, any steps taken by the Parliament to reverse the outcome in that decision "would have taken a much more explicit, direct and blunt form".[96]

81. Contrary to PS [88], s 5 of the Maritime Powers Act is critical to resolving the present question. It removes the foundation for the recognition of any "implicit negative" that the Act excludes Commonwealth executive power.[97] The plaintiff's analogy with *Momcilovic*[98] is unavailing. Here, s 5, the central nature of the relevant power to Australia's sovereignty and the obvious rational explanation for supplementing non-statutory executive power combine to preclude a finding that the non-statutory power is excluded by necessary implication.

10 ***(c) PROCEDURAL FAIRNESS***

82. Questions 4 and 5 concern whether the exercise of the power under s 72(4) of the Maritime Powers Act, or the non-statutory executive power of the Commonwealth, was subject to an obligation to give the plaintiff an opportunity to be heard about the exercise of the power and, if so, whether the obligation was breached. For the following reasons, it should be concluded that neither power was subject to such an obligation or, alternatively, that the content of such obligation in this case reduced to nothing.[99]

(i) Procedural fairness and the Maritime Powers Act (question 4)

No obligation to afford procedural fairness

83. It is often possible to imply a condition that a power conferred by statute be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power.[100] Such an implication
20 ordinarily will be drawn unless the exclusion of procedural fairness is required as a matter of express words or necessary implication.[101] But such implication is not inevitable, and the test is as stated above, not a requirement for "irresistible clearness" (cf PS [9]). The nature of a particular statutory power may be such that, properly construed, it excludes any such implication.[102] In deciding whether the exercise of a statutory power is conditioned by obligations of procedural fairness,[103] "one must have regard to the text of a statute creating the power, the subject matter of the statute, the interests which exercise of the power is apt to affect and the administrative framework created by the statute within which the power is to be exercised." For the following reasons, there is no obligation to afford an opportunity to be heard as to the exercise of the power in s 72(4) of the Maritime Powers Act.

84. First, as explained above, s 72(4) is not properly construed as reposing a discretion whether to detain and take
30 a person to a place. Rather, it is a power conferred upon maritime officers, to be exercised within the context of the chain of command. For the same reasons that these considerations permit a maritime officer to exercise the power in implementation of a decision of the NSC, it is unreal to suppose that a maritime officer is required to afford an opportunity to be heard to the subject of an exercise of the power. There would be no point to such a hearing, for the maritime officer would be required to take the person to the place nominated by the officer's superiors. The maritime officer retains a discretion as to how to implement any such orders, and remains required to do so in a lawful manner (including, consistently with s 74, by placing or keeping the person during the taking in a way that is safe). The maritime officer would be free to seek a variation of his or her orders if

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95 The EM stated in relation to cl 5: "This means that the Bill does not override the ability of the executive government to exercise any of those powers traditionally known as Crown prerogatives, which enable the executive to make certain decisions without the need for parliamentary or legislative approval."

96 *Plaintiff M47* at [334]; compare *Platz v Osborne* (1943) 68 CLR 133 at 141, 146-147.

97 *Momcilovic v The Queen* (2011) 245 CLR 1 (***Momcilovic***) at [111]-[112], [272], [482]-[484], [654]. Cf *Alvi v Secretary of State for the Home Department* [2012] 1 WLR 2208, cited at PS [88], which considered legislation dealing with the grant of permission to enter and remain in the UK, which is more akin to the Migration Act than the powers to exclude aliens under the Maritime Powers Act. The UK Supreme Court has held that the *Immigration Act 1971* (UK), in terms, seeks only to preserve a limited category of prerogative powers (cf Migration Act s 7A and Maritime Powers Act s 5): *Munir v Secretary of State for the Home Department* [2012] 1 WLR 2192 at [23]-[33].

98 (2011) 245 CLR 1.

99 The submissions below proceed on the assumption that the power in s 72(4) and the non-statutory executive power are not limited in accordance with Australia's non-refoulement obligations, such that the point at PS [18] does not arise.

100 *S10/2011 v Minister for Immigration* (2012) 246 CLR 636 (***S10***) at [97].

101 *Annetts v McCann* (1990) 170 CLR 596 at 598.

102 *S10* (2012) 246 CLR 636 at [99]-[100].

103 *Kioa v West* (1985) 159 CLR 550 at 616.

appropriate given the circumstances at any given time. But this case is concerned only with whether procedural fairness required a hearing with respect to the decision to take itself. A hearing on that topic would have been pointless, the decision as to location having been made by the NSC by reference to factors not personal to the plaintiff.

85. Secondly, to be required to afford an opportunity to be heard before the exercise of power under s 72(4) would be contrary to the purposes of the Maritime Powers Act. A principal object is to prevent contraventions of Australian law by authorising expeditious preventative action where contraventions are suspected. The long title of the Act describes it as an Act to "provide for the administration and enforcement of Australian laws in maritime areas". The powers available to maritime officers under the Act are (relevantly for this case) enlivened where an authorising officer suspects on reasonable grounds that a person or vessel is involved in a contravention of Australian law (s 17), including where there is an intention to contravene a law (s 9). It is unlikely that a statute which authorises expeditious action to prevent actual or imminent contraventions of the law would be conditioned by obligations of procedural fairness. That is why there is no requirement to afford procedural fairness before police can exercise a power of arrest, though the exercise of that power involves an interference with liberty.[104] For the same reason, to imply a requirement to afford procedural fairness before the power conferred by s 72(4) can be exercised would make the timely exercise of the statutory powers impracticable, and in that way tend to frustrate the operation of the Maritime Powers Act.

86. Thirdly, the Maritime Powers Act does not provide the administrative framework necessary to afford persons to whom s 72 applies a meaningful opportunity to be heard as to whether they should be taken to a place outside Australia and, if so, to what place. The Act makes no provision for interpreters, to make possible the communication necessary to afford a person an opportunity to be heard where he or she does not speak English, which could be expected to be a common occurrence.[105] Further, it would be impossible to anticipate far in advance the interpreter (or interpreters) who may be required. Nor could a Commonwealth ship be expected to hold the materials (books, files, etc) allowing a meaningful assessment of the reliability or correctness of things said by persons about where they wish, or do not wish, to be taken. Further, the number of persons who may be required to be taken to a place other than Australia may be large (as in the present case). Meaningful consultation with each would require a significant number of persons, administrative facilities, etc, none of which would ordinarily be expected to be available on a ship outside Australia's territorial waters. Parliament is highly unlikely to have intended that the powers conferred by the Act be subject to an obligation to consult when those powers fall to be exercised in circumstances where meaningful consultation cannot be expected to occur.

87. Fourthly, the circumstances in which the power under s 72(4) is to be exercised tend against a conditioning of that power by obligations of procedural fairness. The power is to be exercised on a vessel at sea, outside Australia's territorial waters. Some of the difficulties arising as a result are reflected in the specific provision Parliament has made in s 100(3) of the Act in respect of the exercise of powers to arrest (being powers under ss 76 and 77 arising only where an officer suspects on reasonable grounds that a person has committed an indictable offence, or where an arrest warrant is in force under an Australian law, both contexts likely to involve a limited number of individuals and none of the complexities identified below that arise with decisions to take persons to another country). Yet even in the limited context of arrest powers, Parliament has specified that a person must be concurrently informed of the offence for which he or she is arrested (but no more), and has excluded that obligation in circumstances specified in s 100(3). In doing so, Parliament has struck a balance "recognising the unique circumstances facing law enforcement in a maritime environment."[106] No concept of a hearing is involved with the arrest powers.

88. Turning from the arrest powers back to the powers of detention, placing and moving in ss 69-75, Parliament quite clearly has chosen not to require that maritime officers provide any form of notice of the purpose or intent for the exercise of powers. Yet the plaintiff's argument involves reading in obligations to give not just concurrent notice, as in the case of arrest, but advance notice, and then a further requirement for a hearing before the power can be exercised. Such implied requirements would be inconsistent with the nature of the power being conferred.

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104 *Grech v Featherstone* (1991) 33 FCR 63 at 67; *Attorney-General (Qld) v Francis* (2008) 250 ALR 555 at [61]-[62], [99].

105 cf Migration Act ss 192(7), 261AC(2), 258B(2), 366C, 427(7).

106 EM p 62.

89. As the EM recognised in the context of the arrest provisions, being on a vessel at sea poses inherent risks to safety at any time, even more so if conditions are treacherous, and particularly where (as here) a large number of people are detained in a confined space. It will commonly be the case that the number of persons to be taken to a place outside Australia will significantly exceed the number of crew on the vessel: here, there were nearly three times as many people from the Indian vessel as crew. A maritime officer exercising power under s 72(4) cannot reasonably be expected to predict how detained persons who have risked their lives seeking to reach Australia will respond upon being informed of a proposal to take them to a place other than Australia. The officer cannot know what risk there may be of detained persons responding in a way that endangers themselves or others. The special case records the agreed fact that the risk of such reaction in this case was significant (SC [24(e)]). To require a maritime officer to make a judgement about whether it is safe to consult with detained persons as to why they should not be taken to a place outside of Australia is to place that maritime officer in an invidious position. The Maritime Powers Act was intended to ensure "flexibility" in the exercise of maritime powers, and "to assist maritime officers to deal with quickly changing circumstances and often difficult and dangerous situations".[107] That cannot be reconciled with an obligation to afford procedural fairness before maritime powers can be exercised.

90. Fifthly, the political nature of the decision where to take a person counts against the conditioning of s 72(4) by the rules of procedural fairness. As noted above, any decision to take a person to a place outside Australia will often involve considerations of Australia's international relations. This necessarily involves Australia's foreign policy interests and political judgements about them. That is not a decision of a kind likely to be made by reference to matters likely to be influenced by a hearing. The position is different from that concerning deportation, which (unlike taking under s 72(4)) necessarily concerns matters personal to the deportee. Further, commonly the deportee is to be returned to the country of which he or she is a citizen; that may often occur with little or no effect on Australia's international relations (cf PS [20]).

91. Sixthly, the nature of the interest affected by an exercise of power under s 72(4) must be accurately identified. It is not an interest in entering Australia, that being a prerequisite to any claim that "may culminate in a protection visa being granted under the Migration Act" (cf PS [7]). The plaintiff has no greater right to enter Australia than any other country of which he is not a citizen, ie no right at all.[108] Nor do the plaintiff's interests extend to a choice about the place that may consider any protection claims he may make. The relevant interest is no more than the effect of the exercise of power under s 72(4) on a person's liberty while the person is taken from Australia (where he or she attempted to go, but had no right to go) to another place. That interest is of a kind that Parliament must necessarily have intended to override when it conferred power to take a person who sought to enter Australia in contravention of the Migration Act to a place other than Australia.

92. These matters go well beyond a contention that there is a possibility that in some cases the power under s 72(4) will fall to be exercised in circumstances involving urgency or otherwise inapt to affording procedural fairness (cf PS [19]). They go to elucidating the nature of the power. That power should not be construed as subject to implied limitations that would result in the power failing to fulfil its evident purpose.

93. Nor is the plaintiff's case advanced by reference to s 74 of the Maritime Powers Act (cf PS [15]). As explained above, s 74 is not a limit on the power conferred by s 72(4) (cf PS [16]). In any event, for largely similar reasons to those above, it cannot require that each person be given an individual opportunity to make submissions as to why a place in which it is proposed that each person will be placed or kept is a safe place for them to be placed or kept (cf PS [15]).

94. Finally, the plaintiff has identified nothing that he could have said that, within the statutory scheme, could have made a difference to the outcome.

Content was reduced to nothing

95. What procedural fairness demands may vary considerably depending on the circumstances.[109] The circumstances may be such that, though procedural fairness is in general required to be given, its content reduces even to nothing.[110] For the following reasons, that was so here.

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107 Second Reading Speech, 30 May 2012, House of Representatives, Hansard p 6224.

108 *Haji Ibrahim* (2000) 2014 CLR 1 at [137]; SC [5].

109 *Mobil Oil Australia Pty Ltd v FCT* (1963) 113 CLR 475 at 505; *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [25].

110 *Kioa v West* (1995) 159 CLR 550 at 615; *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 472.

96. First, even if the power in s 72(4) is, in some circumstances, conditioned upon affording procedural fairness, that cannot be so where the power is exercised, as here, within the context of a chain of command, stretching from the NSC down. As explained above, there would be no point to giving an opportunity to be heard as to the place a person should be taken, where the maritime officer would be bound in any event to carry out his or her orders. Any obligation to afford procedural fairness could arise, at most, where the power is not exercised within the context of a chain of command, perhaps in the allegedly "more mundane" circumstances canvassed in PS [21] or referred to in paragraph 49 above.

97. Secondly, there was a "significant risk" that if persons from the Indian vessel were informed that they were being taken to India they would take steps to prevent their effort to reach Australia from being thwarted, including by engaging in "actions that may have jeopardised the safety of the Australian vessel, one or more maritime officers and/or one or more passengers from the Indian vessel" (SC [24(e)]). A hearing about whether the plaintiff should be taken to India could not have been conducted without generating that risk. Contrary to PS [24], the same risk would have arisen if a hearing had been held prior to commencing any process of taking the passengers to India. Indeed, it can properly be inferred that to have afforded such a hearing may have resulted in actions that made it practically impossible to achieve that option. The assertion at PS [25] that it should be "inferred" that it was "inevitable" that passengers would become aware that some attempt was being made to take them to a place other than Australia should be rejected. It invites speculation: even assuming the passengers were aware how close they were to Christmas Island (a matter not established on the special case), the Australian mainland was a possible destination and it is a very considerable distance from Christmas Island. The submission in PS [26] that the persons from the Indian vessel did not actually engage in the conduct referred to in SC [24(e)] is irrelevant, because those persons were not aware that they were being taken to India and it was that awareness that (it is agreed) would have generated the risk.

98. The Court could hold that a breach of procedural fairness occurred in this case only if maritime officers were legally required to afford a hearing, notwithstanding that this would have created a significant risk of actions that may have jeopardised the safety of their vessel, its crew, and/or the passengers. Procedural fairness should not be held to require this.

(ii) Procedural fairness and non-statutory executive power (question 5)

99. The traditional view is that, once the existence and extent of a prerogative power has been established, a court cannot inquire into the propriety of an exercise of the power.[111] However, in the UK, the amenability to judicial review of a particular prerogative power is now seen to depend on the nature and subject matter of that power.[112] Assuming that the exercise of a non-statutory executive power under s 61 of the Constitution is potentially susceptible to judicial review,[113] it remains necessary to have regard to the nature and subject matter of the power in order to determine the extent to which, and the grounds on which, review is available.

100. The exercise of the prerogative power to exclude aliens from entering the territory of a State will frequently involve broad (and contentious) political considerations and matters of public policy unsuited to examination by the courts, including matters of defence, border protection and Australia's international relations.[114]

101. These considerations are relevant in determining whether an exercise of the non-statutory power to prevent a non-citizen from entering Australia is subject to requirements of procedural fairness, in particular an obligation to afford a hearing to the non-citizen.[115] In contrast to statutory powers, any such procedural fairness requirement cannot be derived from an implied legislative intention.[116] It must instead be sourced in common law or an inherent limitation in the content of the executive power conferred by s 61. The executive power to prevent entry should not be found to be subject to any such inherent limit. A non-citizen has no right to enter Australia. The Commonwealth has a sovereign power to exclude them. Such a power ordinarily would not be

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111 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (***Council of Civil Service Unions***) at 398, 407. As to the prerogative of mercy, see eg *Horwitz v Connor* (1908) 6 CLR 38 at 40.

112 *Council of Civil Service Unions* [1985] AC 374 at 407; see also *R v Secretary of State for the Home Department; Ex parte Bentley* [1994] QB 349 at 363; *Abassi v Secretary of State* [2003] UKHRR 76. This approach has been accepted by intermediate appellate courts in Australia: eg *Minister for Arts and Heritage and Environment v Peko-Wallsend* (1987) 15 FCR 274.

113 *Jarratt* (2005) 224 CLR 44 at [69].

114 See *Aye v Minister for Immigration and Citizenship* (2010) 187 FCR 449 at [15] and [127]. See also *Al-Kateb* (2004) 219 CLR 562 at [290].

115 See eg *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [42].

116 cf *Plaintiff M61* (2010) 243 CLR 319 at [74].

exercised by reference to any considerations personal to the non-citizen and may often be exercised (as here) in a factual situation inconsistent with a requirement to afford a hearing before any exercise of power.

102. Accordingly, for reasons similar to those set out above regarding s 72(4) of the Maritime Powers Act, the non-statutory executive power to prevent the entry of non-citizens should not be held to be subject to any requirement to afford an opportunity to be heard as to its exercise. Alternatively, even if the power were subject to an obligation to afford procedural fairness, for the same reasons as those applicable to s 72(4), its content was reduced to nothing in this case.

(d) LAWFULNESS OF DETENTION (question 6)

103. It follows that the detention of the plaintiff was not unlawful at any time from 1 to 27 July 2014, when the plaintiff was on board the Commonwealth ship.

104. Even if that were not so, any unlawful detention during that period would not give to the plaintiff an entitlement to claim other than nominal damages. But for the impugned actions of the maritime officers, the plaintiff would either have been lawfully taken to a different place on the same ship, or brought to Australia and lawfully detained pursuant to s 189 of the Migration Act and subject to the operation of the regional processing provisions in Pt 2, Div 8, Subdiv B (SC [25]). Thus, but for the detention of the plaintiff on the Commonwealth ship, which is assumed (contrary to the submissions above) to be unlawful for the purposes of answering this question, the plaintiff would not have been free from detention: he would have been lawfully detained either on the same ship (if a valid taking decision had been made)[117] or pending transfer to a regional processing country (SC [25]). He therefore was not deprived of any liberty he would otherwise have enjoyed. In *R (on the application of Lumba) v Secretary of State for the Home Department*,[118] a majority of the UK Supreme Court held that, where a person was unlawfully detained because of an unlawful policy, but the person would have been detained in any event, the person suffered no loss by reason of the unlawful detention and only nominal damages could be awarded. That analysis is applicable here.

PART VII QUESTIONS STATED

The questions stated for the opinion of the Full Court should be answered as follows: Question 1(a): "Yes". Question 1(b): "Yes". Question 1(c): "Yes". Question 2(a): "Yes". Question 2(b): "Yes". Question 3(a): "Yes". Question 3(b): "Yes". Question 4: "The power was not subject to an obligation to give the plaintiff an opportunity to be heard about the exercise of the power. Alternatively, the obligation was not breached in this case." Question 5: "The power was not subject to an obligation to give the plaintiff an opportunity to be heard about the exercise of the power. Alternatively, the obligation was not breached in this case." Question 6: "The detention of the plaintiff was not unlawful at any period from 1 to 27 July 2014. Alternatively, if the detention was unlawful, the plaintiff is entitled to claim only nominal damages". Question 7: "The plaintiff should pay the costs of the special case." Question 8: "The proceeding should be dismissed with costs."

PART VIII LENGTH OF ORAL ARGUMENT

105. Approximately 4.5 hours will be required for the presentation of the oral argument of the defendants.

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[117] In which case s 75(2) of the Maritime Powers Act would make it clear he had no cause of action in respect of the detention.

[118] [2012] 1 AC 245 at [95]-[101], [169], [222]-[237], [252]-[256], [335]; applied in *Fernando v Commonwealth (No 5)* [2013] FCA 901 at [86]-[99].