IN THE HIGH COURT OF AUSTRALIA
~~MELBOURNE~~ REGISTRY
SYDNEY

No. S169 of 2014

BETWEEN:

CPCF
Plaintiff

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Defendant

THE COMMONWEALTH OF AUSTRALIA
Second Defendant

ANNOTATED

PLAINTIFF'S SUBMISSIONS

Part 1 — Form of submissions

1 These submissions are suitable for publication on the internet.

Part 2 — Issues arising in the proceedings

2 The issues are those in the questions stated by agreement of the parties pursuant to r. 27.08 of the *High Court Rules 2004* (Cth) on 25 August 2014 (**Special Case**). The plaintiff's proposed answers to those questions are set out below.

Part 3 — Section 78B notices

3 The plaintiff has served notices under s. 78B of the *Judiciary Act 1903* (Cth) (dated 24 July 2014 and 29 August 2014). The plaintiff does not consider that further notice is required.

Part 4 — Material facts

4 The material facts are those set out in the Special Case.

Part 5 — Argument

A. Summary of the plaintiff's submissions

5 The plaintiff seeks to advance the following propositions: *first*, there was an obligation to give the plaintiff an opportunity to be heard prior to any exercise of statutory or (if it exists) non-statutory power to take the plaintiff to a place outside Australia and that obligation was breached; *secondly*, the plaintiff's detention was not authorised by either the *Maritime Powers Act 2013* (Cth) (**MPA**) or (if it exists) any non-statutory power; *thirdly*, the power to take conferred by s. 72(4) of the MPA was constrained such that the places to which the plaintiff could lawfully be taken were confined to places to which the plaintiff could be taken consistently with Australia's non-refoulement obligations; *fourthly*, the maritime officers making the decisions impugned in this matter impermissibly acted under an unlawful policy or under the dictation of the National Security Committee of Cabinet (**NSC**); *fifthly*, the defendants impermissibly purported to exercise the powers conferred by s. 72(4) for the purpose of general deterrence of others; *sixthly*, as regards non-statutory executive power: an executive power to prevent non-citizens entering Australia, absent statutory authority, does not exist; if it did exist, it was abrogated by the MPA; and even if it did exist and was not abrogated, that power is subject to constraints that have been infringed in the current matter.

B. Opportunity to be heard

6 There was an obligation to give the plaintiff an opportunity to be heard prior to any exercise of statutory or (if it exists) non-statutory power to take the plaintiff to a place outside Australia, and inter alia to restrain and detain him for that purpose. That obligation was breached in the current matter. Questions 4 and 5 should be answered 'yes'.

Statutory power: relevant principles of construction

7 It should be uncontroversial that s. 72(4) of the MPA confers power to destroy or prejudice a person's rights or interests.[1] The Special Case illustrates a range of rights and interests having the potential to be affected by such an exercise of power. These include the right to liberty (paras 13(d) and (f), 20(b), 22(b) and 23); the prolongation of the detention during the period in which a decision to take to a place other than Australia was being

[1] *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ (***McCann***); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 258 [11] (***Saeed***).

implemented (paras 16, 21 and see *Plaintiff M61*[2] at 353 [76]); the claims that might be made by the person the subject of the power that she or he is a person in respect of whom Australia owes protection obligations (which, subject to the relevant statutory mechanisms, may culminate in a protection visa being granted under the *Migration Act*); the place (if not Australia) in which those claims will be determined, if they are determined at all (paras 16 and 20); and whether the law of the place(s) (if not Australia) to which the person might be taken protects the person from the risk of refoulement (para 7(b)).[3]

8 A power of that kind necessarily engages the assumption identified by the unanimous decision of this Court in *Saeed:* the legislature, being aware of common law principles of natural justice, would have intended that they apply to the exercise of the power.[4] Therefore even where, as here, the statute does not expressly require that the principles of natural justice be observed in respect of s. 72(4) of the MPA, they will be implied as the outcome of a well-worn process of construction, unless excluded by the statute properly construed.

9 The force of the presumption that operates in that context is to be understood by reference to the fact that the rules of natural justice are deeply embedded as fundamental principles or systemic values that are important within the Australian system of representative and responsible government under the rule of law.[5] That, in turn, attracts the more broadly applicable principles of construction that have come to be described by this Court as the principle of legality: it is presumed that it is 'highly improbable that Parliament would overthrow fundamental principles or depart from the general system of law, without expressing its intention with irresistible clearness'.[6]

10 Importantly, this principle is not exhausted when legislation expresses, with the requisite irresistible clearness, an intention to encroach to some degree upon the relevant right, principle or systemic value. It is for that reason that the principle has been formulated such that it requires that statutes be construed, where constructional choices are open, so as to 'avoid or *minimise*' their encroachment upon those matters.[7] It must be clear from the objects, terms or context of the legislation that Parliament has directed its attention to the 'particular result' or the 'particular effect' in issue.[8]

11 In the context of procedural fairness, those observations may be seen to explain the difficulty with the proposition that (by the application of some form of *expressio unius* reasoning) the fact that the legislature deals expressly with some aspect of the procedural constraints surrounding administrative decision making should be taken to mean that it has determined to exclude all others.[9] They also explain the proposition that even where matters of urgency attend a particular decision making process, that will generally be taken to affect the *content* of the obligation to provide procedural fairness, rather than indicating as a threshold matter that the principles of natural justice are excluded altogether.[10]

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[2] *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 (***Plaintiff M61***).

[3] Note also, *FTZK v Minister for Immigration and Border Protection* [2014] HCA 26 at [14], referring to the 'potentially profound adverse consequences of exclusion from the protection of the Refugees Convention for a person otherwise entitled to that protection'.

[4] At 258–259 [12].

[5] *Lee v NSW Crime Commission* (2013) 87 ALJR 1082 at [312] –[313] per Gageler and Keane JJ (***Lee***).

[6] *Saeed* at 259 [15].

[7] *Momcilovic v The Queen* (2011) 245 CLR 1 at 46 [43] per French CJ (***Momcilovic***) (emphasis added).

[8] *Bropho v Western Australia* (1990) 171 CLR 1 at 18; *Lee* at 1151 [309], 1152 [314].

[9] See *McCann* at 598 per Mason CJ, Deane and Wilson JJ; *Re Minister for Immigration and Multicultural Affairs; Ex Parte Miah* (2001) 206 CLR 57 at 83–84 per Gaudron J, 95 per McHugh J (***Miah***); *Saeed* at 265 per French CJ, Gummow, Hayne, Crennan and Kiefel JJ, 280 [80], 283 [88] per Heydon J.

[10] See, eg, *Baba v Parole Board of NSW* (1986) 5 NSWLR 338 at 347E–G per Mahoney JA, 349E–G per McHugh JA; *South Australia v Slipper* (2004) 136 FCR 259 at 280 [93(iv)] (and the authorities there referred to), 284 [110]–[111] per Finn J (Branson and Finkelstein agreeing at 276 [71] and 289 [148]) (***Slipper***); *Commissioner of Police v Ryan* (2007) 70 NSWLR 73 at 80–81 [28], [29], [32] per Basten JA (Spigelman CJ and Santow J agreeing at 75 [1], [2]).

Relevant features of the MPA

12 There is no basis for asserting that the MPA evinces an intention to exclude the rules of natural justice in the exercise of the power conferred by s. 74(2) with the requisite degree of 'irresistible clearness'. To the contrary, the MPA expressly recognises that those rules operate upon the powers it confers. For example, in the exercise of the power of arrest conferred by ss. 76 and 77, the maritime officer is required to provide notice of the alleged offence (albeit at the time of the arrest).[11] That is of some significance, given that powers of arrest have sometimes been said to be 'totally inconsistent' with the rules of natural justice.[12]

13 Two further matters should be noted in that regard. First, s. 100(3) of the MPA may be seen to reflect the fact that there may be cases in which compliance with that notice provision is not practicable, including (in sub-paragraph (c)) that the officer believes on reasonable grounds that the person does not speak English and 'it is not practicable' for the officer to give the requisite notice in a language the person understands. The extrinsic materials suggest that that provision strikes 'a balance between ... the necessity of treating individuals in accordance with natural justice and, on the other hand, recognising the unique circumstances facing law enforcement in a maritime environment'.[13] What is significant is that those unique circumstances, which only arise in that specific situation, have not led the legislature to seek to do away with the principles of natural justice, which remain a 'necessity', even in the difficult area of arrest. And so, while it is equally true that the exercise of the powers conferred by s. 72 will generally take place in 'maritime areas',[14] consideration of the nature of that somewhat unique environment does not require that the statute be construed so as to exclude any obligation to accord procedural fairness.

14 Secondly, the MPA otherwise contains no express provision that qualifies or limits the principles of natural justice. It cannot be concluded that the specific limitations placed upon notice in connection with arrest powers operate to implicitly exclude the application of the principles of natural justice throughout the MPA,[15] including in s. 72 (note, per s. 75(1) the restraints upon liberty resulting from the operation of s. 72 do not constitute arrest).

15 A further important feature of the statutory design is s. 74 of the MPA, which requires that a maritime officer not 'place' or 'keep' 'a person' in a place unless the officer is satisfied on reasonable grounds that it is 'safe for the person to be in that place'. It is apparent from the text that that state of satisfaction requires the officer to consider, specifically, the safety of *each* person placed or kept in such a place. A condition requiring ongoing medication is an obvious example of a matter that might be advanced by a particular person in that regard, about which the maritime officer would know nothing unless the person was afforded an opportunity to advance material matters to the maritime officer.

16 The position is a fortiori as regards the power to take. It is the plaintiff's submission that that power is subject to constraints associated with Australia's non-refoulement obligations (see further submissions below), and says also that these constraints find a textual basis in s. 74 of the MPA. But whether that be correct or not, it must at least be the case (particularly having regard to the presence of s. 74) that the personal circumstances of an individual — such as those relevant to their safety or security in the country or particular place to which they are to be taken — are relevant considerations for the maritime officer. That, of course, suggests in turn that a person in the position of the plaintiff must be heard on those matters.

17 For this reason, the provisions of the MPA are distinct from the legislative provisions

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[11] See s. 100(1) and, as to the steps that must be taken following an arrest, s. 101.

[12] See, eg, *Grech v Featherstone* (1991) 33 FCR 63 at 67; *Francis v Attorney-General for the State of Queensland* [2008] QSC 62 at [11], [12].

[13] Explanatory Memorandum, Maritime Powers Bill 2012 (Cth) at 62.

[14] See the long title to the MPA and note the geographical limits imposed by ss. 46 and 47.

[15] See *Saeed* at 271 [56]–[59] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.

considered in *Plaintiff S10/2011*.[16] And, further distinguishing s. 72 of the MPA from the dispensing provisions in issue in that matter, that hearing is likely to be the *only* opportunity for a person in the position of the plaintiff to be heard on those matters.[17]

18 Additionally, if the Court accepts the submissions below regarding the limitation of the power to take under the MPA in accordance with the Australia's non-refoulement obligations (including those imposed by the Refugees Convention[18]), the plaintiff would further submit that the right of a person claiming to be a refugee to have that claim assessed is implicit in the obligation of non-refoulement.[19] It has been said by members of this Court that the obligation to determine whether an asylum seeker is a refugee arises under the Refugees Convention.[20] That, of course, points to a requirement to hear the person as to their personal circumstances.

19 Not having been excluded by the statute on its proper construction, the principles of natural justice would ordinarily require a maritime officer to afford a prior opportunity to advance reasons why that officer's powers should not be exercised. It may well be the case that in some instances, some or all of the ancillary powers (the power to detain; to place the person on a vessel or aircraft; to restrain the person on a vessel or an aircraft and to remove a person from a vessel or an aircraft — see ss. 72(2), (3), (4) and (5)) — might be exercised in circumstances where only a limited opportunity to be heard can be afforded to a person, for example, if the person was seeking to evade capture or engaging in violent behaviour.

20 However, as with the power to detain 'without warrant' conferred by s. 253 of the *Migration Act*, considered by Sackville J in *Nguyen v Minister for Immigration (No 1)*,[21] the particular circumstances bear upon the content of procedural fairness in a particular case. The *possibility* that the powers might be exercised in adverse circumstances or in circumstances involving urgency does not require that they be construed such that the principles of natural justice can never apply.[22] A similar point was made by Mason J in *Kioa v West*.[23] It can also be noted that, at least in a case such as the present where the power to take is enlivened by the condition in s. 72(1)(a) (the person is on a 'detained vessel' — see also s. 69 and para 13(c) of the Special Case), the person will already be subject to some form of de-facto constraint upon their freedom of movement.

20 It is of course true that the maritime officer's consideration of those matters will take place against the context identified by the plurality in the *Malaysian Solution Case*.[24] That is, the 'practical necessity' to find a state that will receive a person who is to be taken. It is also true that that those matters of practicality will generally involve discussions between the executive government of Australia and those of other nation states, thus taking on an international political dimension. But, the same is true of deportation decisions, in which the rules of natural justice have been implied into the statutory scheme without difficulty.[25] In each case, none of that 'political' context alters the fact that the exercise of the power

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[16] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 667 [99](vi) (***Plaintiff S10/2011***).

[17] Cf *Plaintiff S10/2011* at 667 [99](vii) and (viii), where the premise for the operation of the various dispensing provisions was that the person had unsuccessfully applied for a visa, or sought to invoke rights to merits review.

[18] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) (**Refugees Convention**) as amended by Protocol relating to the Status of Refugees, opened for accession 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (**Refugees Protocol**).

[19] Andreas Fischer-Lescano, Tillmann Löhr and Timo Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21 *International Journal of Refugee Law* 256, 284–285; Efthymios Papastavridis, 'Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law' (2009) 36 *Syracuse Journal of International Law* 145 at 217.

[20] *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 224 [215] per Kiefel J (***Malaysian Solution Case***), referring to *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 300 per Mason, Deane and Dawson JJ, 305 per Brennan J. See also Gummow, Hayne, Crennan and Bell JJ at 190–191 [94], 192 [98].

[21] (2001) 112 FCR 1 at 15–17. See also authorities at paras 11 and 25 of these submissions.

[22] As in *Slipper* (see at 284, [110]), those possibilities do not require a conclusion that the power is, of its very nature, inconsistent with the obligation to be heard.

[23] *Kioa v West* (1985) 159 CLR 550 at 586.

[24] *Malaysian Solution Case* at 190 [92].

[25] See, eg, *Kioa v West* (1985) 159 CLR 550; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648.

requires consideration of matters personal to the person to be taken, or deported, which may influence the outcome.[26] Again, that indicates that the power is distinctly different to the power at issue in *Plaintiff S10/2011*, which was required to be exercised personally by a Minister, accompanied by a mechanism to secure political accountability for that exercise, and conditioned only by the Minister's judgment as to the broader 'public interest'.[27]

21 It is also necessary to note that the power conferred by s. 72(4) is not confined to matters in which higher-level government decision-making will form a necessary part of the backdrop. It would extend to a variety of situations including the more mundane (eg, contraventions or anticipated contraventions of the *Fisheries Management Act 1991* (Cth) or the *Torres Strait Fisheries Act 1984* (Cth)).

Answer to question 4 and relief

22 It follows from these submissions that the first limb of question 4 should be answered 'yes'.

23 The defendants have sought to preserve for themselves a further line of defence. In particular, they plead that 'in all of the relevant factual circumstances' there was no obligation to afford procedural fairness to the plaintiff of the kind alleged or otherwise, or alternatively that the content of the procedural fairness was reduced to nothing (Second Further Amended Defence (**Defence**) at para 50(c), Special Case Book at 42). It appears, in particular, that reliance is placed upon the fact that, between 29 June 2014 and 27 July 2014, there was a 'significant risk' of some of the persons on the Indian vessel taking 'steps to prevent their effort to reach Australia being thwarted' if they were 'informed that they were being taken to India': para 24(e) of the Special Case. More precisely as to timing, the defendants allege in the Defence that that risk that would arise if those people were informed of that matter 'significantly prior to their arrival' in India: Defence at para 50(c)(iv), Special Case Book at 42.

24 But that speaks only to the position *after* (and seemingly some time after) a decision was in fact made to exercise the power conferred by s. 72(4) to take the plaintiff and the other people detained on the Commonwealth vessel to a *particular place*. There is no factual basis for suggesting that there was any difficulty in notifying the plaintiff, *prior* to any such decision, that consideration was being given to the *possible* exercise of the powers conferred by s. 72(4) (which, putting to one side the inflexible application of government policy — as to which see further below — might equally have been exercised to take the plaintiff to Australia).

25 In any event, it is well established that the content of what is required by the principles of procedural fairness is to be 'moulded to the particular circumstances'.[28] The particular circumstances here included the location of the boat at the time it was intercepted (being 16 nautical miles from Christmas Island — para 12 of the Special Case) and the course of travel identified at para 20(a) of the Special Case (10 days in which the Commonwealth ship travelled towards India). It may be inferred from those matters that it was inevitable, after the decision was made and put into effect, that the persons from the Indian vessel would become aware that some attempt was being made to take them to a place other than Australia. And that is so regardless of whether they were previously notified that consideration was being given to the possible exercise of power under s. 72(4).

26 The particular circumstances also included: the fact that none of the persons from the Indian vessel engaged or threatened to engage in the conduct referred to in para 24(e) of the Special Case (see para 24(f) of the Special Case); the fact that the defendants clearly exercised a considerable degree of control over the liberty, movements, conduct and actions of the persons from the Indian vessel, as is clear from the admissions made in their Defence

[26] See *South Australia v O'Shea* (1987) 163 CLR at 388–389 per Mason CJ, 418–419 per Deane J (in dissent in the result), cf at 411 per Brennan J. See also *F.A.I. Insurances Ltd v Winneke* (1982) 151 CLR 342 at 398 per Wilson J.
[27] See French CJ and Kiefel J at 648–649 [30], Gummow, Hayne, Crennan and Bell JJ at [99](i), (ii), (iv), (v).
[28] *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 99.

at paras 23, 24 and 28–30 (Special Case Book at 36–37); and the fact that, although some language barriers existed, there were readily available means of communicating with the plaintiff (paras 24(d) and (i) of the Special Case).

27 In light of all of those circumstances, and prior to any taking decision under s. 72(4), the defendants were required, at a minimum, to:

(a) notify the plaintiff that consideration was being given to the possible exercise of the powers conferred by s. 72(4); and

(b) give the plaintiff the opportunity to be heard as to that proposed exercise of power, including, in particular, as to his claims (if any) to be a person in respect of whom Australia owes non-refoulement obligations and as to whether being taken to any particular place other than Australia might threaten his safety or security.

28 The defendants did not do so (see para 24(h) of the Special Case). Accordingly, the Court may answer the second limb of question 4, 'yes' and may also answer questions 1 and 2, 'no'.

Non-statutory power: natural justice

29 The plaintiff's primary submission (developed below) is that there is no non-statutory power to take the plaintiff to a place outside Australia for the purpose of preventing the plaintiff from entering Australia (or to detain the plaintiff for the purpose of taking him to that place). If that is accepted, then question 5 does not arise. If that be wrong and such a power does exist, the plaintiff submits that power was subject to the principles of natural justice.

30 It is tolerably clear that the obligation to afford natural justice can extend to non-statutory powers.[29] But the question is more precise: it is whether the particular '*element* of the executive power of the Commonwealth found in Ch II of the Constitution includes a requirement for procedural fairness'.[30] If it does, then this Court has jurisdiction to grant appropriate relief to enforce the observance of the Constitution itself. Assuming that s. 61 of the Constitution includes a power to prevent a person entering Australia absent statutory authority, then self-evidently the exercise of such a power stands to affect the rights and interests of a person in the position of the plaintiff in a similar manner to that identified above in connection with the power conferred by s. 72(4) of the MPA. There is no reason to doubt that any such element of non-statutory power is subject to a similar obligation to afford natural justice in those circumstances. Indeed, the proposition that the foundation for a 'coherent system of law' is supplied by the Constitution[31] rather suggests that similar constraints must be taken to apply to any 'exercise of public power',[32] regardless of the source, and subject to any sufficiently clear legislative exclusion of those requirements. No such legislation operates here. Accordingly, both limbs of question 5 should be answered 'yes'. Further, for reasons similar to those given above in connection with questions 1 and 2, question 3 and 4 should be answered 'no', and question 5 should be answered 'yes'.

C. General limits on the Commonwealth's power to take and detain the plaintiff under s. 72(4) of the MPA

31 The Commonwealth's power to detain the plaintiff under s. 72(4) of the MPA, without judicial warrant, is not at large. The power is constrained by fundamental principle. It can

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[29] See, eg, *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 409 per Lord Diplock; *Victoria v Master Builder's Association of Victoria* [1995] 2 VR 121 at 138–139 per Tadgell J, 147–149 per Ormiston J, 154–159 per Eames J; *Minister for Arts Heritage and Environment v Peko-Wallsend Limited* (1987) 15 FCR 274 at 277–278 per Bowen CJ, 280–282 per Sheppard J, 301–304 per Wilcox J.

[30] *Re Refugee Review Tribunal; Ex Parte Aala* (2000) 204 CLR 82 at 101 [42] per Gaudron and Gummow JJ (emphasis added); *Plaintiff S10/2011* at 665 [93] per Gummow, Hayne, Crennan and Bell JJ.

[31] *Aid/Watch Inc v Commissioner of Taxation of the Commonwealth of Australia* (2010) 241 CLR 539 at 555–556 per French CJ, Gummow, Hayne, Crennan and Bell JJ.

[32] *Miah* at 93 per McHugh J.

only be exercised for *purposes* that are permissible under the MPA and the Constitution and the *period* of detention cannot validly extend for longer than is reasonably capable of being seen as necessary for the completion of those permissible purposes.[33] The section must be construed (and, if necessary, read down) so as not to authorise detention extending beyond that time. In addition, s. 72(4) ought not, absent clear and unmistakeable language, be construed to permit detention which is unlimited in time[34] or at the unconstrained discretion of the Executive.[35] In that context, the plaintiff accepts that s. 72(4) validly authorises detention for two permissible purposes with the associated temporal and other limitations described below.

Initial period of detention

32 First, the order in which the words 'detain' and 'take' appear in the text of s. 72(4) suggest that the subsection authorises a short period of detention anterior to the making of a 'taking' decision. Such detention is for the purpose of completing the administrative processes directed to the making of the taking decision. However, having regard to the fundamental constitutional and constructional principles identified above, that in turn suggests that the taking decision must be made as soon as reasonably practicable or put another way, within a reasonable time.[36] That time includes time for the taking of reasonable steps by the maritime officer to determine whether the person can be discharged at the place to which the person may be taken.

Further permissible period of detention

33 Secondly, after a taking decision is made and so long as the taking decision is otherwise valid, s. 72(4) authorises detention for the purpose of taking the person to the chosen place. Within that formulation, there are a number of specific aspects of the constraints on power that should be further elucidated.

34 First, as to the requirement that the taking decision is otherwise valid, detention under s. 72(4) is plainly not lawful if it is for the purpose of effectuating a taking decision which is invalid. The detention is incidental to the taking, and falls with it. Parliament ought not to be taken to have intended to permit detention for an invalid purpose. Even if it were otherwise, such a law would be invalid: the Constitution does not authorise extra-judicial detention for the purpose of taking a person to a place to which the person cannot lawfully be taken.[37] It follows from that proposition that, if (as the plaintiff contends) the circumstances referred to in questions (1)(a), (b) and (c) of the Special Case render the taking decision invalid, then the plaintiff's detention for the purpose of giving effect to that purported taking decision was also invalid, and those questions should be answered 'no'.

35 There are other relevant limits on the power to take and, accordingly, the power to detain. In particular, the power to take is one that must fasten upon '*a* place' — either 'a place' in the migration zone or 'a place' outside the migration zone, including 'a place' outside Australia. The singular and particular nature of that language, repeated three times, gives rise to the following propositions:

(a) First, there must in fact be *a* particular place to which the person is to be taken, chosen by the maritime officer at the time of making the decision to take.

(b) Secondly, after a taking decision is made, the place chosen by the maritime officer

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[33] *Plaintiff S4/2014 v Minister for Immigration and Border Protection* [2014] HCA 34 at [26] (***Plaintiff S4***); *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 88 ALJR 324 at [140] per Crennan, Bell and Gageler JJ (***Plaintiff M76***). See also *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 581 per Dixon J.

[34] *Al-Kateb v Godwin* (2004) 219 CLR 562 at [117] per Gummow J (in dissent in the result) (***Al-Kateb***).

[35] *Plaintiff S4* at [22]; *Plaintiff M61* at [64]; *Plaintiff M76* at [93] per Hayne J. Note also *Al-Kateb* at [19] per Gleeson CJ (in dissent in the result), [241] per Hayne J (with whom Heydon J agreed).

[36] See *Plaintiff S4* at [28], [34].

[37] *Plaintiff S4* at [26], [28]; *Plaintiff M76* at [139]–[140] per Crennan, Bell and Gageler JJ. See also *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 581 per Dixon J.

cannot vary at the officer's discretion. The power to take to 'a place' would otherwise be converted to a power to take to 'any place', determined from time to time by the maritime officer. It is inherently unlikely that Parliament intended to confer an unrestrained power of that nature upon a 'maritime officer', the definition of which includes members of the defence force, customs officers, the Australian Federal Police and any other person appointed to that office by the Minister (see s. 104(1) of the MPA). That is particularly so where the exercise of that power may have potentially 'profound adverse consequences' for those in the position of the plaintiff.[38]

36 Again, detention that is incidental to a 'taking' which falls outside those statutory constraints will not be authorised by s. 72(4). Indeed, the existence of those constraints is reinforced when one has regard to the incidental detention authorised by that provision. For, if the end-point of the taking could be unspecified at the outset or could change from time to time, the upper limits of the time during which the person could permissibly be detained would not be fixed, at the start of the detention or from time to time during its duration, by reference to what is both necessary and incidental to the fulfilment of the statutory purpose: taking to '*a* place'.[39] Should one accept a construction whereby the MPA would authorise detention that has no certain, judicially-ascertainable and judicially-enforceable purpose? Surely not.

37 Such a case would also engage the constructional principle identified in relation to the Minister's exercise of powers in *Plaintiff M61* at [64]: for, if the plaintiff's construction were not accepted, the person's detention could continue at the unconstrained discretion of the Executive (note also *Plaintiff S4* at [22] and [34] and Hayne J in *Plaintiff M76* at [93]). A construction of the MPA permitting detention of that nature should not be preferred unless Parliament has authorised it with clear and unmistakeable language. It has not done so.

38 For essentially similar reasons, at the time that detention commences for the purpose of taking a person to a particular place, the Commonwealth must be able not only to take the person to that place but also must be able to lawfully discharge the person at that place. Indeed, were it otherwise, the Commonwealth would be able to circumvent the constitutional limits on its power to detain without judicial warrant. It would be empowered to select a place for the person to be taken and then call in aid the difficulties of lawfully effecting that taking — or indeed, simply elect for discretionary reasons to delay taking steps towards effecting the taking — to justify the person's continuing detention for a further (entirely uncertain) period. And this Court would be prevented from holding the Commonwealth within constitutional limits. Chapter III, being concerned with substance not form,[40] does not permit circumvention of that kind.

39 A question may arise (although it does not do so here) as to the legal position if, after detention incidental to a taking decision commences, an unforeseen circumstance renders it impracticable to lawfully effect the person's discharge at the place to which the person is to be taken — for example, if a natural disaster made the place unsafe within the meaning of s. 74 of the MPA or if the country to which the person was to be taken revoked its agreement to take the person. In those circumstances, in the plaintiff's submission, the decision to take is exhausted (because it can no longer be effectuated) and must be remade as soon as reasonably practicable. For the reasons set out above, a further period of detention is permissible while the taking decision is being remade.

40 As to the *period* of detention authorised after a taking decision has been made, the plaintiff

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[38] See *FTZK v Minister for Immigration and Border Protection* (2014) 310 ALR 1 at 7. See also *Malaysian Solution Case* at [98]; *Plaintiff M47/2012 v Director General of Security* (2012) 86 ALJR 1372, at [99]-[100] per Gummow J, [509] per Bell J (*Plaintiff M47*).

[39] *Plaintiff S4* at [29]; *Plaintiff M76* at [99] per Hayne J.

[40] See, eg, *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at [82] per McHugh J.

accepts that it can extend for as long as is reasonably required, in the sense of reasonably capable of being seen as necessary, to take the person to the chosen place. That time comprises the time reasonably required to travel to the chosen place and the time reasonably required to effect the discharge at that place. The detention cannot, however, extend any longer, having regard to the principles identified above.

41 Consideration of those temporal limits points to a further reason why the Commonwealth must be able to lawfully discharge the person at the chosen place at the time the detention commences. One starts that analysis by observing that it will generally be both possible and lawful to take a person subject to the exercise of that power to Australia — indeed that path is specifically provided for under s. 72(4)(a) of the MPA and the *Migration Act*.[41] Assuming that to be so, an attempt to take to a place where the discharge may not be effected involves a choice to embark upon an exercise of power that may *never* be able to be completed, over one with a reasonably clearly fixed end-point and which, all else failing, must occur.[42] The time reasonably required to take the plaintiff to Australia is properly regarded as marking the outer bounds of permissible detention in such a case.[43] For, save for serendipity or happenstance, an attempt to take the plaintiff to another place where they may not lawfully be discharged will result in their being detained for longer than is reasonably necessary to complete the permissible purpose of 'taking' to a place in such circumstances. Indeed, that is precisely what came to pass in the current matter.

D. Lawfulness of the defendants' taking and detention of the plaintiff

42 The Court can and should be satisfied of the following facts. At the time that the defendants decided to take the plaintiff to India: the plaintiff was not entitled to enter India; the Commonwealth had no arrangement with India for the plaintiff to enter India, whether lawfully or unlawfully; and it was not practicable for the Commonwealth to effect the plaintiff's discharge there. Further, at all times between 1 July 2014 and 23 July 2014, and having regard to paras 17, 20(b) and 23 of the Special Case, those circumstances continued. In addition, and having regard to paras 20 and 21 of the Special Case, at no time before 23 July 2014 did any person re-make the initial decision to take the plaintiff.

43 Because, at the time of the decision to take the plaintiff to India, it was not practicable to effect his discharge there, the decision to take was not authorised by s. 72(4). So too, for the same reason, was his detention. Even if (contrary to the above) it was practicable at the outset to discharge the plaintiff in India, the Court should find (having regard to para 20(b) of the Special Case) that it subsequently became impracticable to discharge the plaintiff, a Sri Lankan national, there. The plaintiff's detention then became invalid from that time until the decision was made to take the plaintiff to Australia.

44 In those circumstances, s. 72(4) of the MPA did not authorise a maritime officer to take the steps set out in para 20 of the Special Case in implementing the decision to take the plaintiff to India and to detain the plaintiff for that purpose. The steps in para 20 of the Special Case all involved the coercive taking of the plaintiff to India by means of his detention. Section 72(4) did not authorise those steps if either the decision to take was invalid or if the incidental detention was invalid. In the plaintiff's submission, both of those circumstances obtained. Accordingly, questions (2)(a) and (b) should be answered 'no'.

E. Australia's international obligations

45 Questions 1(a) and 3 raise for consideration aspects of Australia's international obligations which the plaintiff says are constraints on the power conferred by s. 72(4). It is convenient first to identify those and the other relevant international obligations which are critical to

[41] See s. 42(2A)(c)(i) of the *Migration Act*. It is also contemplated by s. 72(4)(b) of the MPA, insofar as it applies to places inside Australia that are outside the migration zone.
[42] Note *Plaintiff S4* at [32], [33]. Note that there was no question in the current matter of the exercise of the power conferred by s. 72(3) – see para 13(e) of the Special Case.
[43] *Plaintiff S4* at [33], [34].

the plaintiff's construction arguments.

46 Australia, as a signatory to UNCLOS, has the power under international law to exercise necessary control in its contiguous zone for the prevention or punishment of infringements of Australia's laws on particular subject matter, including migration (UNCLOS art 33). Art 58(3) provides, in relation to the exclusive economic zone (of which the contiguous zone is part[44]), 'In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to ... other rules of international law in so far as they are not incompatible with this Part'. More broadly, the powers under UNCLOS are to be exercised with regard for the principles of international law.[45]

47 Australia is party to the International Convention on Maritime Search and Rescue, which binds Australia, including in its contiguous zone, to (among other things) cooperate to ensure that 'survivors assisted are disembarked from the assisting ship and delivered to a place of safety'.[46]

48 Australia's non-refoulement obligations are described in the treaties to which Australia is party, referred to in the Special Case at para 7.

49 The Refugees Convention provides at art 33 that 'No Contracting State shall 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'. This Court has recognised that Australia, through the Refugees Convention, has accepted an international obligation not to directly or indirectly refoule.[47] Indirect refoulement includes leaving a person with 'no option but to return to ... a third State that would return them [to a place of persecution]'.[48] The ICCPR[49] at art 7 imports an obligation not to return a person to a place where they are at risk of torture or cruel, inhuman or degrading treatment or punishment.[50] The Convention Against Torture[51] provides at art 3(1) that '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'.

50 The principle of non-refoulement has attained the status of customary international law: states may not reject, return or expel a person to face a real risk of torture or cruel, inhuman or degrading treatment or punishment, or to face a threat of persecution or a threat to life, physical integrity, or liberty.[52]

51 The plaintiff submits that the non-refoulement obligations of the Commonwealth extend to any place under the Commonwealth's jurisdiction or control. It would appear that the

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[44] See UNCLOS arts 55, 57.

[45] See UNCLOS, Preamble, arts 2(3), 293; see also *The M/V Saiga Case (St Vincent and the Grenadines v Guinea)* Case No 2, ICGJ 336 (ITLOS 1999) at [155].

[46] *International Convention on Maritime Search and Rescue, 1979*, concluded 22 June 1985, 1405 UNTS 119 (entered into force 22 June 1985), including the 2004 amendments contained in msc.155(78) (entered into force 1 July 2006) Annex 3.1.9 (**SAR Convention**).

[47] *Malaysian Solution Case* at [94] per Gummow, Hayne, Crennan and Bell JJ, [214] per Kiefel J.

[48] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (OUP, 3rd ed) 277.

[49] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (**ICCPR**).

[50] UN Human Rights Committee, General Comment 20, article 7, UN Doc HRI/GEN/1/Rev.1 (1992) at [9]. Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth) at 1.

[51] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (**CAT**).

[52] Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) 87 at [253], referred to in *Malaysia Solution Case* at [4] per French CJ, [98] per Gummow, Hayne, Crennan and Bell JJ, [214] per Kiefel J; referred to also in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at [25] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ; UN High Commissioner for Refugees (**UNHCR**), *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93* (31 January 1994); *Hirsi Jamaa v Italy* (App No 27765/09) ECHR Grand Chamber (23 February 2012) at 62–63 per Albuquerque J.

defendants accept this proposition in relation to all aspects of the non-refoulement obligation save for the Refugees Convention (Defence at para 3(f)(i), Special Case Book at 32). Internationally, a state is responsible for any act of a state organ, or a person or entity exercising elements of governmental authority, or a person or entity directed or controlled by that state.[53]

52 Contrary to what is seemingly asserted by the Commonwealth (Defence at para 3(f)(i), Special Case Book 32), the non-refoulement obligation in the Refugees Convention contains no textual restriction in relation to where a person must not be refouled to for the purposes of the Convention; and no territorial restriction in relation to where they must not be refouled from. 'Frontiers' must include land as well as maritime boundaries that do not abut. For example, this Court has impliedly accepted that refoulement to Sri Lanka from Australia is possible, notwithstanding Australia has no 'frontier' with Sri Lanka.[54] Further, art 1(3) of the Refugees Protocol provides, 'The present Protocol shall be applied by the States Parties hereto without any geographic limitation ...',[55] which application must include the undertaking in art 1 of the Protocol of States Parties to apply arts 2 to 34 of the Convention (including the non-refoulement obligation at art 33). The decisions of this Court dealing with territoriality in relation to the Refugees Convention have dealt only with the question of whether there is a right to seek asylum outside the territory of Australia — not whether the obligation of non-refoulement extends to Australian actions beyond Australian territory.[56] The UNHCR has plainly stated that the principle of non-refoulement does not imply any geographical limitation.[57] The IMO Guidelines[58] (to which Australia is bound to have regard)[59] provide for the consideration of non-refoulement with reference to refugees or asylum seekers rescued at sea — without circumscribing that obligation by reference to a particular oceanic zone.

53 In the jurisprudence of the European Court of Human Rights, persons on board a vessel interdicted on the high seas have been held to be subject to the control of the state conducting the interdiction, such that the international human rights obligations owed by that state are engaged.[60] In the contiguous zone, the coastal state exercises a greater degree of jurisdiction and control than on the high seas and is bound to comply there with its international obligations.[61]

F. Incorporation of international law into the common law of Australia

54 The customary international law principle of non-refoulement should be recognised by this Court as having transformed, or become incorporated into, the common law of Australia.

55 International law is a legitimate and important influence on,[62] or alternatively a source of,[63] the common law of Australia. Australia's international law obligations may be transformed

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[53] International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (2001) ch IV(E) arts 4, 5, 8.
[54] *Plaintiff M61*.
[55] Refugees Protocol art 1(3).
[56] *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at [41]-[48] per McHugh and Gummow JJ; *Applicant A v Minister for Immigration and Citizenship* (1997) 190 CLR 225 at 272-273 per Gummow J.
[57] UNHCR Executive Committee, *Interception of Asylum Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, 8th meeting, UN Doc EC/50/SC/CPR.17 (9 June 2000) at [23].
[58] International Maritime Organisation, Maritime Safety Committee, *Guidelines on the Treatment of Persons Rescued At Sea*, MSC Res 167(78), IMO Doc MSC 78/26/Add.2; Annex 34, para. 6.17 (adopted 20 May 2004).
[59] SAR Convention, Annex 3.1.9.
[60] See, eg, *Medvedyev and Others v. France* (App No 3394/03) ECHR Grand Chamber (29 March 2010); *Women on Waves and Others v Portugal* (App No 31276/05) ECHR Grand Chamber (3 February 2009).
[61] See Anja Klug and Tim How, 'The Concept of State Jurisdiction and the Applicability of the Non-Refoulement Principle to Extraterritorial Interception Measures' in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff, 2010) 69, 93–94; Seline Trevisanut, 'The Principles of Non-Refoulement at Sea and the Effectiveness of Asylum Protection' in A von Bogdandy and R Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (Koninklijke Brill NV, 2008) Vol 12, 205, 232.
[62] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42 per Brennan J.
[63] *Chow Hung Ching v The King* (1948) 77 CLR 449 at 477 per Dixon J (***Chow Hung Ching***).

or incorporated into the common law of Australia in circumstances where: the relevant obligation is widely accepted as binding among nations;[64] there is no rule in an Australian statute or in judge-made law in Australia contradicting the relevant obligation;[65] and the relevant obligation relates to the rights or responsibilities of the sovereign, rather than individuals.[66]

56 The plaintiff submits that the above characteristics unite the international law principles that have previously been acknowledged by this court as a source of, or influence on, common law.[67]

57 The non-refoulement obligation is a widely accepted norm of customary international law[68] (and indeed, although it is not necessary to prove it here, may have attained the status of a *jus cogens* norm);[69] it relates to the conduct of the sovereign; there is no contrary rule of statute or judge-made law. Moreover, the non-refoulement obligation is enshrined in statute,[70] with the Commonwealth thereby indicating a clear intention to be bound by and implement the obligations through the *Migration Act* (including the ICCPR and CAT non-refoulement obligations through the complementary protection provisions). Assuming that to be so, the non-refoulement obligation plainly applied in relation to the Commonwealth ship.[71]

G. Power to take and non-refoulement

58 Section 72(4) does not extend to permitting the Commonwealth to take the plaintiff to a place where he would not be entitled by the law applicable in that place to the benefit of the non-refoulement obligations. The MPA manifests an intention, evident from the Act as a whole, that its provisions facilitate Australia's compliance with its non-refoulement obligations, in light of the following:

59 *First*, the MPA's text and purpose evince a clear intention that the MPA be construed in light of and in accordance with Australia's international legal obligations. Section 7 of the MPA states that '[i]n accordance with international law, the exercise of powers is limited in places outside Australia'.[72] Section 95, which imports the terminology of the ICCPR non-refoulement obligation,[73] provides that '[a] person ... detained or otherwise held under this Act ... must not be subject to cruel, inhuman or degrading treatment'.[74] Critical parts of the MPA, particularly s. 41(1)(c) and (d),[75] employ verbatim the text of UNCLOS.[76] The Explanatory Memorandum manifests an intention that s. 41(1)(c) and (d) are to 'reflect the limits of international law in relation to the use of enforcement powers against foreign vessels'.[77] Those 'limits' include the limits to which the powers under UNCLOS are

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[64] *Polites v Commonwealth* (1945) 70 CLR 60 at 80 per Williams J; *Chow Hung Ching* at 462 per Latham J.
[65] *Chow Hung Ching* at 470–1 per Starke J, 487 per McTiernan J.
[66] *Gerhardy v Brown* (1985) 159 CLR 70 at 125 per Brennan J; cf *Nulyarimma v Thompson* (1999) 96 FCR 153, in which the majority (Wilcox and Whitlam JJ) declined to incorporate an international crime (genocide) into the common law (cf Merkel J at [186] and the authorities cited therein).
[67] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 288 per Mason CJ and Deane J (and the citations therein) (***Teoh***); *New South Wales v Commonwealth (Seas & Submerged Lands Act Case)* (1975) 135 CLR 337 at 407 per Gibbs J, 496 per Jacobs J; *Bonser v La Macchia* (1969) 122 CLR 177 at 214 per Windeyer J.
[68] See above at para 50.
[69] See *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690 at [35] per Glazebrook J.
[70] *Plaintiff M61* at [27].
[71] *Parker v Commonwealth* (1965) 112 CLR 295 at 306 per Windeyer J; see also art 94 of the UNCLOS which requires a state to establish jurisdiction over vessels flying its flag.
[72] See also Explanatory Memorandum, Maritime Powers Bill 2012 (Cth) at 39, discussing cl 41 of the Maritime Powers Bill 2012 (Cth) and noting that the limited powers recognised by cl 41 'reflects the limits of international law in relation to the use of enforcement powers against foreign vessels'.
[73] See above at para 49.
[74] Because it imports the terminology of art 7 of the ICCPR, s. 95 of the MPA must itself be construed in the context of Australia's ICCPR obligation: see, eg, *Plaintiff M47* at [11] per French CJ.
[75] 'Contiguous zone', which is defined in s. 8 of the MPA by reference to UNCLOS.
[76] The text of s. 41(1)(c) derives from art 33(1) of UNCLOS. The text of s. 41(1)(d) derives from art 73(1) of UNCLOS.
[77] Explanatory Memorandum, Maritime Powers Bill 2012 (Cth) at 39.

subject according to UNCLOS itself, being treaty and customary international law, including non-refoulement obligations.[78] Further, s. 74 of the MPA, which prohibits maritime officers from placing a person in a place unless the officer is satisfied on reasonable grounds that it is 'safe' for the person to be in that place, picks up the language of Australia's international obligations under Annex 3.1.9 of the SAR Convention: to take maritime rescuees to a 'place of safety', and in doing so to take into account the IMO Guidelines, which require consideration of the need to avoid disembarkation of asylum seekers alleging a well-founded fear of persecution in places where their lives or freedoms would be threatened.[79]

60 *Secondly*, the MPA is to be read with the *Migration Act*, a statute that this court has held to be an 'interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugees Convention and the Refugees Protocol'.[80] The *Migration Act* refers on a number of occasions to the MPA,[81] and the MPA in turn refers back to the *Migration Act*, as a 'monitoring law' under s. 18 (see also s. 8). Significantly, it was for a suspected contravention of the *Migration Act* that the person in command of the Commonwealth ship authorised the exercise of powers under the MPA in relation to the plaintiff (Special Case at para 13(a)). The two enactments therefore form part of a legislative scheme that relevantly deals with the same subject matter. As such, they are to be read together,[82] which supports a substantially similar constraint upon power in each case (further identified below).

61 *Thirdly*, the MPA confers powers which operate on vessels flagged to a foreign sovereign and at sea in areas regulated by international maritime law. There are special reasons to construe such statutes by 'reference to maritime practice' and 'international comity'.[83] The principle in *Barcelo v Electrolytic Zinc Co of Australasia Ltd*[84] and *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society*[85] that 'an enactment describing acts, matters or things in general words, so that, if restrained by no consideration lying outside its expressed meaning, its intended application would be universal, is to be read as confined to what, according to the rules of international law administered or recognized in our Courts, it is within the province of our law to affect or control' is also relevant. Laws conferring power in relation to foreign-flagged vessels and outside the territorial sea have as their very subject matter things over which Australia does not have sovereignty at international law. Such laws necessarily operate in the milieu of the powers and limitations on power which Australia has under international law over those things or in those areas. Those powers include Australia's powers under international maritime law; those limitations on power include the non-refoulement obligations which bind Australia at international law and cut down Australia's international maritime law powers.

62 *Fourthly*, the context in which the MPA was enacted includes its 'legislative history and extrinsic materials', including the Explanatory Memorandum.[86] The Explanatory Memorandum includes a statement of compatibility prepared pursuant to the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (**Human Rights Act**), which states that the Bill 'is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3' of the Human Rights Act.[87] The rights listed in the Human

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[78] See above at para 46.
[79] IMO Guidelines Annex 34 para 6.17.
[80] *Plaintiff M61* at [27].
[81] *Migration Act* ss. 5, 5AA, 42, 43, 164B, 164BA, 236E.
[82] *Sweeney v Fitzhardinge* (1906) 4 CLR 716; cf *Certain Lloyds Underwriters v Cross* (2012) 248 CLR 378 at [36]–[37] per French CJ and Hayne J, [96]–[102] per Kiefel J.
[83] *Zachariasssen v The Commonwealth* (1917) 24 CLR 166 at 181 per Barton, Isaacs and Rich JJ.
[84] (1932) 48 CLR 391 at 423–4 per Dixon J.
[85] (1934) 50 CLR 581 at 601 per Dixon J.
[86] *Federal Commissioner of Taxation v Consolidated Media Holdings Pty Ltd* (2012) 87 ALJR 98 at [39] per French CJ, Hayne, Crennan, Bell and Gageler JJ.
[87] Explanatory Memorandum, Maritime Powers Bill 2012 (Cth) at 3.

Rights Act include those articulated in the ICCPR and CAT and therefore include some of the non-refoulement obligations. The Explanatory Memorandum noted the potential intersection between s. 72(4) and the ICCPR and CAT and said that 'on its face, th[e] Bill is compatible with Australia's non-refoulement obligations under the ICCPR and CAT'.[88]

63 *Fifthly*, the Act should be construed 'so far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of international law'.[89] The non-refoulement obligations are established rules of international law and form part of the context in which the MPA is to be construed.

64 *Sixthly*, so far as the language of the MPA 'is susceptible of a construction which is consistent with the terms of [Australia's treaty obligations], then that construction should prevail'.[90] The non-refoulement obligations are treaty obligations and, again, form part of the context in which the MPA is to be construed.

65 In those circumstances, s. 72(4) of the MPA should be given a meaning similar to that which this Court gave to s. 198(2) of the *Migration Act* in the *Malaysian Solution Case*.[91] Accordingly s. 72(4) of the MPA should not be ascribed a meaning which would permit the Commonwealth to take the plaintiff to *any* place: the places to which the plaintiff may lawfully be taken are confined to places to which the plaintiff can be taken consistently with Australia's non-refoulement obligations and the associated obligation to determine whether an asylum seeker is a refugee.[92]

66 Alternatively, s. 72(4) of the MPA must be construed consistently with the principle of legality. It should not be given a meaning which affects 'fundamental rights' unless its text is 'clear and unambiguous' and 'any ambiguity must be resolved in favour of the protection of those fundamental rights'.[93] The fundamental rights and freedoms protected by the principle of legality are rights and freedoms recognised or protected by the common law.[94] The High Court should declare that those freedoms include a freedom not to be taken coercively to a place in breach of the non-refoulement obligations.

67 It follows from these submissions that question 1(a) of the Special Case should be answered 'no'.

H. Maritime officers improperly exercised discretionary power

68 The application by the maritime officers of the 'Government policy of general application' in relation to taking the plaintiff and the other passengers on the Indian vessel (Special Case, paras 19 and 20) was unlawful, both because the policy applied by the NSC itself admitted of no discretion, and because the maritime officers were acting under the dictation of the NSC.

69 A policy must allow the decision-maker to take into account the relevant circumstances; must not require the decision-maker to take into account irrelevant circumstances; and must not serve a purpose foreign to the purpose for which the discretionary power was created.[95]

70 The Government policy that 'anyone seeking to enter Australia by boat without a visa...will

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[88] Explanatory Memorandum, Maritime Powers Bill 2012 (Cth) at 6.
[89] *Polites v The Commonwealth* (1945) 70 CLR 60 at 68 per Latham CJ (citing *Maxwell on Interpretation of Statutes* (1937, 8th ed)); see also at 77 per Dixon J, 81 per Williams J. See also *Maloney v The Queen* (2013) 87 ALJR 755 at [134] per Crennan J; *Malaysian Solution Case* (2011) 244 CLR 144 at [247] per Kiefel J; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at [97] per Gummow and Hayne JJ; *Queensland v The Commonwealth* (1989) 167 CLR 232 at 239 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.
[90] *Teoh* at 287 per Mason CJ and Deane JJ. The qualification referred to by Gleeson CJ in *Coleman v Power* (2004) 220 CLR 1 at [19] does not arise: the conventional non-refoulement obligations were all assumed by Australia prior to the enactment of the MPA.
[91] At [54] per French CJ, [97], [98] per Gummow, Hayne, Crennan and Bell JJ, [239] per Kiefel J.
[92] *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 300 per Mason, Deane and Dawson JJ, 305 per Brennan J; *Malaysian Solution Case* at [94] per Gummow, Hayne, Crennan and Bell JJ, [215], [234] per Kiefel J.
[93] *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522 at [86] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.
[94] see, eg, *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at [42] per French CJ.
[95] *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 640 per Brennan J.

be removed from Australian waters' (Special Case, para 20) admits of no discretion in the event that it is not possible to safely or properly remove a person from Australian waters in accordance with the legislative powers bestowed on officers of the Commonwealth. As per the submissions at para 34 above, it was not open to the Commonwealth to decide to take the plaintiff to a place at which the plaintiff could not be lawfully disembarked. There is no evidence that there was, at the time of the decision to take, a place outside of Australia to which the plaintiff could have been lawfully disembarked. The policy was unsatisfactory on its face, in that it did not admit of the exercise of a discretion by the maritime officer to decide to bring a person to Australia. The maritime officers in taking the actions in para 20 of the Special Case, acted in accordance with unlawful policy.

71 Further and in the alternative, the maritime officers implementing the decision to take were impermissibly acting under the dictation of the NSC. It is true, as was accepted above, that the decisions to be taken under s. 72(4) the MPA may take place against a backdrop of international negotiations at high levels of the executive government, but the power conferred by s. 72(4) is not subsumed into those processes, and unless the words of the statute are to be rendered meaningless, it must be given a separate operation. The NSC is not an entity which has power under the MPA. The NSC is not an authorising officer as defined in s. 16(1) or a maritime officer as defined in s. 104. Maritime officers who simply 'implemented' the NSC directive were improperly exercising their power under s. 72(4).

72 The power to take in s. 72(4) confers a discretion on the maritime officer exercising the power, by the word 'may'. The power is further conditioned by s. 74, which requires the maritime officer to be 'satisfied on reasonable grounds', when placing or keeping a person in a place, that it is 'safe for the person to be in that place'. And, as submitted above, the exercise of these powers is linked — that is, a maritime officer may not take a person to a place under s. 72(4) unless he is reasonably satisfied that the place is safe, under s. 74.

73 Repositories of powers must turn their own minds to the exercise of that power, rather than acting at the direction or behest of another person.[96] The maritime officers were entitled to consider the NSC directive. However, they did not turn their own minds to the exercise of their power under s. 72. In implementing the NSC decision, they were left with no scope to consider those matters they were required to take into account under the MPA.

74 Since the powers under s. 72(4) and s. 74 relate to individual cases, the 'predominant aspect' of the exercise of power 'must be the consideration of the particular case.'[97] In accordance with the submissions at para 72 above, the maritime officers were obliged to take into account Australia's non-refoulement obligations, necessitating consideration of individual circumstances.[98] These considerations were precluded by the NSC directive.

I. Other statutory constraints

75 The plaintiff accepts that s. 72(4) of the MPA authorises a maritime officer to take the plaintiff to a place outside Australia for the purpose of preventing a contravention of, or ensuring compliance with, the *Migration Act*. However, the plaintiff submits that those purposes do not encompass a purpose of general deterrence of others, and s. 72(4) does not authorise the exercise of power for such a purpose. In particular, the power coercively to take under s. 72(4) cannot be exercised for a substantial purpose of deterring other people from entering Australia by sea. This is for two reasons.

76 *First*, power under s. 72(4) to take a person to a place against the person's will on a vessel necessarily involves the extra-judicial detention of the person. The categories of

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[96] *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189 per Kitto J; *Bread Manufacturers of NSW v Evans* (1981) 180 CLR 404, at 411 per Gibbs CJ, 429–430 per Mason and Wilson JJ.

[97] *Howells v Nagrad Nominees Pty Ltd* (1982) 66 FLR 169 at 195 per Fox and Franki JJ.

[98] See above at para 49. Note also that the CAT requires that 'all relevant considerations' must be taken into account in determining whether a person has substantial grounds for believing he would be in danger of being subjected to torture in a particular place (art 3(2)) and that the SAR Convention, at 3.1.9, provides that the 'particular circumstances of the case' must be considered when delivering a person to a place of safety.

permissible non-judicial detention by the Commonwealth are confined; punishment which has a penal or punitive purpose or character is not one of them.[99] The line between punitive and non-punitive purposes or characters can of course be difficult to draw.[100] However, detention to deter others is on the punitive side of the line.[101] General deterrence bears a punitive character because it is a 'kindred concept of retribution or punishment'[102] and it has a close historical and contemporary connection to criminal sentencing and punishment for criminal guilt. It can be accepted that general deterrence will often overlap with non-punitive protective purposes, but the two concepts are distinct.[103] Because general deterrence is a punitive purpose, the power coercively to take under s. 72(4) must, to be valid, be read down so as not to permit the power's exercise for that purpose. Even if there are difficulties in characterising detention as punitive or non-punitive, the point can be made at a lower level of abstraction. General deterrence of others is not a recognised constitutionally-permissible purpose or character of detention without judicial warrant. The class of constitutionally-permissible purposes or characters for extra-judicial detention is confined, and should not be extended to include general deterrence.

77 *Secondly*, that outcome is supported by the text and context of ss. 72(4) and 41(1)(c)(ii) and (d) of the MPA even independent of constitutional considerations. Nowhere in the MPA is it stated that maritime powers may be exercised for a purpose of general deterrence. Sections 41(1)(c)(ii) and (d) operate on the premise that they are not ordinarily capable of being enlivened absent a contravention of any Australian law: Parliament should not be taken to have intended to permit power to be exercised for the purpose of punishing a person absent any contravention of the law. However, for the reasons set out above, general deterrence is properly characterised as a punitive purpose. Further, s. 41(1)(c)(ii) implements the terminology of art 33(1)(a) of UNCLOS, which provides that '[i]n ... the contiguous zone, the coastal State may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea'. Notably, s. 41(1)(c) (and the balance of s. 41(1)) do not implement the language of art 33(1)(b) of UNCLOS, which extends control in the contiguous zone to that necessary to '*punish* infringement of [customs, fiscal, immigration or sanitary] laws and regulations committed within its territory or territorial sea' (emphasis added).[104] In circumstances where Parliament has chosen to use the language of prevention from art 33, but not the language of *punishment*, Parliament ought not to be taken to have intended that the purposes articulated in s. 41(1) include a purpose of punishment. Further, the text of s. 41(1)(c)(ii) is positively inconsistent with the position that it incorporates a purpose of general deterrence. The section refers to a purpose of preventing a contravention, not preventing *contraventions*, suggesting it is confined to preventing a particular contravention in issue, not generic future contraventions.

78 The plaintiff was detained pursuant to the policy described in para 19 of the Special Case. The purpose and character of that policy therefore discloses the purpose and character of the plaintiff's detention. The policy is in general terms; it is not sui generis to the plaintiff and those on his boat. The policy can only be explained by a purpose of wishing to deter people (whether the plaintiff or others) from entering Australia by boat. The plaintiff's detention for that purpose is impermissible. Whether as a matter of statutory construction or constitutional requirement, the plaintiff cannot without judicial warrant be detained and his liberty sacrificed so as to deter others.

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[99] See, eg, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ.
[100] See, eg, *Al-Kateb* at [135]–[136] per Gummow J.
[101] *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at [61] per McHugh J.
[102] *Muldrock v The Queen* (2011) 244 CLR 120 at [53].
[103] *Veen v The Queen* (1984) 164 CLR 465 at 476 per Mason CJ, Brennan, Dawson and Toohey JJ; *Pollentine v Bleijie* [2014] HCA 30 at [72]–[73] per Gageler J.
[104] Australia has declared its contiguous zone in s. 13A of the *Seas and Submerged Lands Act 1973* (Cth).

79 For these reasons, question 2 should be answered 'no'.

J. Non-statutory executive power

80 The plaintiff makes essentially three submissions regarding non-statutory executive power (aside from the issue of procedural fairness addressed above). First, an executive power to prevent non-citizens entering Australia, absent statutory authority, does not exist. Secondly, if it did exist, it was abrogated. Thirdly, even if it did exist and was not abrogated, that power is subject to constraints that have been infringed in the current matter.

Any non-statutory power to prevent non-citizens entering Australia absent statutory authority does not exist or was abrogated

81 As is the case with the judicial power of the Commonwealth, it may not be possible to define the executive power conferred by s. 61 of the Constitution in a way that is both exclusive and exhaustive. However, as is also the case with Chapter III power, there are nevertheless 'settled' limits on Commonwealth executive power that are readily identified. They include the need for statutory authority to support extradition from Australia of fugitive offenders (which requirement applies not only to citizens, but to individuals generally).[105] Those constraints also include the incapacity of the executive government to dispense with obedience to the law,[106] a constraint considered further below in connection with customary international law.

82 The identification of those constraints and the content of the power conferred by s. 61 reflect, in part, the process of 'organic evolution' described by French CJ in *Pape*.[107] While that does not mean that s. 61 is to be understood as a relic in a 'constitutional museum', the scope and limits of s. 61 power will necessarily be informed by the common law and matters of history regarding the relationship between the Crown and the Parliament. And of course, that history includes that to which Dixon J drew attention in the *Communist Party Case*.[108] For that reason, any question as to the validity of the coercive executive measures, absent authority supplied by a statute made by some head of power other than s 51(xxxix) alone, is likely to be 'answered conservatively'.[109] Indeed, the position may have been reached where it is possible to state that, of the branches of Commonwealth government, *only* the Parliament has power to institute coercive measures in respect of the regulation of activity.[110]

83 It is unnecessary to go that far in the current matter. Rather, the plaintiff's submission is that, applying an analysis similar to that applied by Mason J in *Barton*[111] and Deane J in *Re Bolton; Ex Parte Beane*[112] in relation to non-statutory powers of extradition, one can conclude that the executive government has no power to prevent non-citizens entering Australia, absent clear statutory authority. Indeed the historical trajectory is similar in each case. It is true that it was at one time understood that the prerogative conferred such powers, but that is best regarded as one of many examples of a precedent derived from a time before the close of the 16th century, when 'constitutional usage was quite uncrystallised'. Many of those 'uncrystallised' precedents were later 'discovered to be gross infringements of the privileges of the Parliament or of the liberties of the people'.[113]

84 In the case of the expulsion or exclusion of aliens, that 'discovery' had clearly been made by the time of the framing of the Constitution, when it was possible to observe that 'for

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[105] *Vasiljkovic v Commonwealth* (2006) 227 CLR 614 at 634–635 [49]–[50] per Gummow and Hayne JJ (***Vasiljkovic***); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 87 [227] per Gummow, Crennan and Bell JJ (***Pape***).
[106] *Pape* at 87 [227] per Gummow, Crennan and Bell JJ.
[107] At 60 [127].
[108] *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 187 (***Communist Party Case***).
[109] *Pape* at 24 [10] per French CJ.
[110] *Williams v Commonwealth* (2012) 248 CLR 156 at 352 [521] per Crennan J and, in the context of s. 51(xxxix), *Davis v Commonwealth* (1988) 166 CLR 79 at 112–113 per Brennan J (cf Mason CJ, Deane and Gaudron JJ at 99).
[111] (1974) 131 CLR 477 at 497.
[112] (1987) 162 CLR 514 at 521.
[113] *Toy v Musgrove* (1888) 14 VLR 349 at 425 per Holroyd J.

nearly three centuries no British Sovereign has attempted to exercise the right of expelling aliens or of preventing their intrusion in time of peace by virtue of his prerogative'.[114] That empirical observation reflected the preponderance of opinion that 'it [was] necessary to pass a statute for the express purpose of enabling that to be done'.[115] The contrary view, expressed in some obiter dicta,[116] may largely be seen as a misunderstanding of what was actually held in *Musgrove v Toy*[117] and in *Attorney-General (Canada) v Cain.*[118] But, neither is authority for the proposition that such a power existed.[119]

85 It can be accepted that the power to determine who may enter Australia is 'central to its sovereignty'.[120] But no lesser question of sovereignty is involved in a decision as to whether Australia may surrender a person to a foreign state for extradition purposes, so as to lose the protection of Australian law. Indeed, given that one is necessarily dealing there with relations between nation states and the surrender of people who may be Australian citizens or members of the Australian community, the issues may be seen to be *more* central to Australian sovereignty – sovereign power being that which resides 'in the people', exercised by their representatives in the constitutionally mandated system of responsible and representative government.[121] Neither those matters, nor the systemic imperative that demands that the Commonwealth executive is empowered to undertake action appropriate to the position of the Commonwealth as a polity created by the Constitution,[122] require that either power is to be taken to have been conferred upon the Commonwealth executive, absent clear statutory authority. No lacunae is thereby created. The result simply reflects a division under the Constitution between the executive and legislative branches of government:[123] for the legislative power conferred by section 51(xix) of the Constitution is ample to support a valid law authorising such an exercise of power.[124]

Abrogation

86 Even if it be otherwise and such a power is able to be exercised in the absence of statute, the comprehensive provision made for the exercise of such powers under the MPA (which, as submitted above, operates seamlessly with the *Migration Act* as a statutory scheme) was sufficient to abrogate any such non-statutory executive power. That enactment was correctly described in the extrinsic materials as a 'single framework'[125] for the exercise of maritime powers, and included (in s. 72(4), read with s. 32(1)(a)) ample power to 'prevent' non-citizens from entering Australia in contravention of s. 42(1) of the *Migration Act*. Importantly, it also put in place an elaborate set of safeguards, including in particular the requirement for authorization under Part 2 Division 2 and the carefully circumscribed circumstantial, geographical and purposive limitations provided for by ss. 17–22 and Part 2, Division 5. In addition, it dealt explicitly with the limited circumstances in which such powers may be exercised without authorisation in an emergency: see s. 29 (for the purpose of ensuring safety).

87 That is sufficient, as a matter of necessary implication, to displace any non-statutory executive power.[126] Should Parliament be taken to have intended that the executive could

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[114] Ibid.
[115] *SS Afghan; Ex Parte Lo Pak* (1888) 9 NSWR 221 at 237 per Darley CJ.
[116] See eg *Johnstone v Pedlar* [1921] 2 AC 262 at 275; *R v Carter; Ex Parte Kisch* (1934) 52 CLR 221 at 223; *R v Bottrill; Ex Parte Kuechenmeister* [1947] 1 KB 41 at 51.
[117] [1891] AC 272.
[118] [1906] AC 542.
[119] See *Ruddock v Vadarlis* (2001) 110 FCR 491 at 497 [14] and 500 [27] per Black CJ (cf French J at 541 [186]) (*Vadarlis*).
[120] *Vadarlis* at 543 [193] per French J.
[121] *Unions NSW v New South Wales* (2013) 88 ALJR 227 at [17] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.
[122] *Pape* at 83 [214] per Gummow, Crennan and Bell JJ.
[123] *Vasiljkovic* at 634 [49] per Gummow and Hayne JJ.
[124] *Plaintiff M76* at 357 [202] per Kiefel and Keane JJ.
[125] Explanatory Memorandum, *Maritime Powers Bill 2012* (Cth) at 1.
[126] See, eg, *Cadia Holdings Pty Limited v New South Wales* (2010) 242 CLR 195 at 204 [14] (and authorities therein).

simply ignore that intricate scheme and resort to 'naked' executive power? Surely not.[127]

88 None of that is altered by the non-specific terms of s. 5 of the MPA, which, is of limited assistance here. An analogy may be drawn in that regard with the statements of legislative intention considered by this Court in *Momcilovic*.[128] Such a provision cannot be determinative of the question of construction that arises as regards abrogation, for that would usurp the place of this Court. It may assist in concluding that the scheme was intended to operate in a relatively more limited fashion, such that non-statutory and statutory executive powers operate concurrently, *if* such a construction is available. But the comprehensive nature of the scheme in issue here necessarily contains an 'implicit negative'[129] as regards any non-statutory power to prevent non-citizens entering Australia. It leaves no room for any concurrent exercise of *that* non-statutory executive power.[130]

Any power that did exist (and was not abrogated) was subject to constraints which were infringed here

89 Even if it were otherwise, any non-statutory executive power which exists for the purpose of preventing non-citizens from entering Australia does not extend to coercively taking the plaintiff to (a) a foreign country, without observing the requirements of procedural fairness; (b) a foreign country to which, at the time the taking commences, the plaintiff cannot lawfully be discharged; (c) a foreign country of the Commonwealth's choosing; and (d) a foreign country whether or not the plaintiff would be entitled by the law applicable in that place to the benefit of the non-refoulement obligations.

90 The first of these constraints — and its application in the present case — appears from the answer to question (5) of the Special Case.

91 The second and third of these constraints appear once the scope of any non-statutory executive power is understood in the context of the principles set out in paras 75–78 above, the effect of which is that the scope of any such executive power, being coercive, is narrow and should be tailored to the purpose which called it into existence. The plaintiff accepts that, if there is a non-statutory executive power to prevent entry by non-citizens, that power extends to what is incidental to achieve that purpose. What is incidental should be answered by a proportionality inquiry — is the conduct reasonably capable of being seen as necessary for the purpose of preventing entry.[131]

92 Having regard to those principles, any non-statutory executive power does not extend to coercively taking a person to a place at which the person cannot lawfully be discharged. This is essentially for the reasons set out in para 75 above read together with the principle from *Lim*: if the Commonwealth could coercively take a person to a place at which they cannot lawfully be discharged, the limits of the power to detain would be within the control of the Commonwealth and the detention would extend for longer than is proportionate to its legitimate purpose.

93 Also, any non-statutory executive power does not authorise the Commonwealth to take the person to a place of the Commonwealth's choosing. The power exists for a purpose (preventing entry) and only so far as it is proportionate to that purpose. An unbridled power to take a person to a place chosen by the Commonwealth is not proportionate to that purpose. The power (if it exists) rises no higher than taking the non-citizen to the edges of Australian territory and, if safe to do so, leaving the person in that place. To go further exceeds the purpose of the power. The qualification 'if safe to do so' arises from the

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[127] See, by way of analogy, *Jarratt v Commissioner of Police* (2005) 224 CLR 44 at 69–70 [85] per McHugh, Gummow and Hayne JJ, 84–85 [129] per Callinan J; *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24 at 58 [27] per Gleeson CJ, Gummow, Hayne and Crennan JJ.

[128] See, eg, *Momcilovic* at 120–121 [271] per Gummow J, 134 [316] per Hayne J (in dissent in the result).

[129] *Momcilovic* at 122 [276] per Gummow J.

[130] Note also *R (Alvi) v Home Secretary* [2012] 1 WLR 2208 at 2220–2221 [30]–[31] per Lord Hope.

[131] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 33 per Brennan, Deane and Dawson JJ (*Lim*). See also *Vadarlis* at 543 [193] per French J, referring to a 'power to prevent the entry of non-citizens and to do such things as are necessary to effect such exclusion'.

criterion of proportionality: having regard to the severity of the adverse impact on the non-citizen's interests, it is not proportionate to the purpose of preventing entry to coercively take a person to an unsafe place at sea and leave them there. The qualification also arises by reason of Australia's obligations under SOLAS. Those obligations require the Commonwealth to take a person retrieved at sea to a 'place of safety': those obligations either affect the contours of what is proportionate or are incorporated into the common law and restrain executive power derived from the prerogative.

94 The fourth of these constraints arises because any non-statutory executive power to prevent entry rises no higher than the common law prerogative to prevent entry. The scope of that common law prerogative is cut down by Australia's conventional and customary international law obligations, including the non-refoulement obligations (see section E above).

95 It follows that question 3 of the Special Case should be answered 'no'.

K. False imprisonment

96 The detention of the plaintiff by the defendants had no lawful justification, for the purposes of the tort of false imprisonment, unless authorised by the powers addressed above. Because questions 1, 2 and 3 of the Special Case should be answered no, the defendants had no lawful justification for the detention of the plaintiff between 1 and 27 July 2014.

97 Accordingly, the plaintiff submits that question 6 should be answered 'yes'.

Part 6 — Constitutional provisions, statutes and regulations

98 See annexure A.

Part 7 — Precise form of orders sought

99 The plaintiff submits that the Court should answer the questions reserved in the manner set out above, and order that the defendants pay the costs of the Special Case. The plaintiff submits that it may be necessary to remit the matter to a lower court for determination of the quantum of damages for false imprisonment, including, if warranted, aggravated and exemplary damages.[132]

Part 8 — Estimate of time

100 The plaintiff estimates that he will require 3 ½ to 4 hours for the presentation of his oral argument.

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[132] See *Commonwealth v Fernando* (2012) 200 FCR 1 at 21 [102] per Gray, Rares and Tracey JJ; also *New South Wales v Ibbett* (2006) 229 CLR 638 at 648–649 [38]–[39] per Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ; see also *Marshall v Watson* (1972) 124 CLR 640.

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

ANNEXURE A TO PLAINTIFF'S SUBMISSIONS

The applicable provisions are still in force at the date of making the plaintiff's submissions.

Applicable provisions of the Constitution

51 Legislative powers of the Parliament

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

...

(xix) naturalization and aliens;

...

(xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

...

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61 Executive power

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

Applicable provisions of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth)

3 Definitions

(1) In this Act:

human rights means the rights and freedoms recognised or declared by the following international instruments:

(a) the International Convention on the Elimination of all Forms of Racial Discrimination done at New York on 21 December 1965 ([1975] ATS 40);

(b) the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5);

(c) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23);

(d) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9);

(e) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 10 December 1984 ([1989] ATS 21);

(f) the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4);

(g) the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 ([2008] ATS 12).

Note: In 2011, the text of an international agreement in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).

member means a member of the Committee.

rule-maker has the same meaning as in the *Legislative Instruments Act 2003*.

the Committee means the Parliamentary Joint Committee on Human Rights for the time being constituted under this Act.

(2) In the definition of ***human rights*** in subsection (1), the reference to the rights and freedoms recognised or declared by an international instrument is to be read as a reference to the rights and freedoms recognised or declared by the instrument as it applies to Australia.

Applicable provisions of the *Maritime Powers Act 2013* (Cth)

An Act to provide for the administration and enforcement of Australian laws in maritime areas, and for related purposes.

5 Effect on executive power

This Act does not limit the executive power of the Commonwealth.

7 Guide to this Act

This Act provides a broad set of enforcement powers for use in, and in relation to, maritime areas. Most of these powers are set out in Part 3.

The powers can be used by maritime officers to give effect to Australian laws and international agreements and decisions.

The following are maritime officers:

(a) Customs officers;

(b) members of the Australian Defence Force;

(c) members of the Australian Federal Police;

(d) other persons appointed by the Minister.

An authorisation is necessary to begin the exercise of powers in relation to a vessel, installation, aircraft, protected land area or isolated person. The only exceptions are the exercise of aircraft identification powers and the exercise of powers to ensure the safety of persons.

Once an authorisation is in force, maritime officers can exercise powers for a range of purposes.

In accordance with international law, the exercise of powers is limited in places outside Australia.

8 Definitions

In this Act:

...

contiguous zone has the same meaning as in the Convention.

...

Convention means the United Nations Convention on the Law of the Sea done at Montego Bay on 10 December 1982.

Note: The text of the Convention is set out in Australian Treaty Series 1994 No. 31 ([1994] ATS 31). In 2013, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).

...

monitoring law means:

(a) the *Customs Act 1901*; or

(b) the *Fisheries Management Act 1991*; or

(c) the *Migration Act 1958*; or

(d) the *Torres Strait Fisheries Act 1984*; or

(e) section 72.13 or Division 307 of the *Criminal Code*; or

(f) clause 8 of Schedule 1 to the *Environment Protection and Biodiversity Conservation Act 1999*; or

(g) a law prescribed by the regulations.

16 Authorising officers

(1) For the purposes of authorising the exercise of maritime powers in relation to a vessel, installation, aircraft, protected land area or isolated person, each of the following is an ***authorising officer***:

(a) the most senior maritime officer who is in a position to exercise any of the maritime powers in person;

(b) the most senior member or special member of the Australian Federal Police who is in a position to exercise any of the maritime powers in person;

(c) the most senior maritime officer on duty in a duly established operations room;

(d) the person in command of a Commonwealth ship or Commonwealth aircraft from which the exercise of powers is to be directed or coordinated;

(e) a person appointed in writing by the Minister.

Limited appointments

(2) The Minister may appoint a person under paragraph (1)(e) as an ***authorising officer***:

(a) for the purposes of authorising the exercise of powers in relation to one or more of the following only:

(i) a specified law;

(ii) a specified international agreement or international decision; and

(b) subject to any other conditions specified in the appointment.

Purported authorisations

(3) A purported authorisation given by a person who reasonably believed that he or she was an authorising officer has effect as if it were an authorisation.

17 Contraventions

Vessels, installations, protected land areas and isolated persons

(1) An authorising officer may authorise the exercise of maritime powers in relation to a vessel, installation, protected land area or isolated person if the officer suspects, on reasonable grounds, that the vessel, installation, land or person is involved in a contravention of an Australian law.

Note: For ***involved*** in a contravention of a law, see section 9.

Aircraft—actionable contraventions

(2) An authorising officer may authorise the exercise of maritime powers in relation to an aircraft if:

(a) the officer suspects, on reasonable grounds, that the aircraft is involved in a contravention of an Australian law; and

(b) the contravention is an actionable contravention in relation to the aircraft.

Note 1: For ***involved*** in a contravention of a law, see section 9.

Note 2: For ***actionable contravention***, see section 10.

18 Monitoring laws

Vessels, installations, protected land areas and isolated persons

An authorising officer may authorise the exercise of maritime powers in relation to a vessel, installation, protected land area or isolated person for the purposes of administering or ensuring compliance with a monitoring law.

Note: For ***monitoring law***, see section 8.

19 International agreements and decisions

Vessels, installations and aircraft

An authorising officer may authorise the exercise of maritime powers in relation to a vessel, installation or aircraft if the officer suspects, on reasonable grounds, that an international agreement or international decision applies to the vessel, installation or aircraft.

Note 1: For when international agreements and international decisions apply, see section 12.

Note 2: The regulations may provide for additional powers, or for limited powers, to be exercised under an international agreement or international decision: see section 33.

20 Evidential material and warrants

Vessels, installations and protected land areas

(1) An authorising officer may authorise the exercise of maritime powers in relation to a vessel, installation or protected land area if the officer:

(a) suspects, on reasonable grounds, that there is evidential material on the vessel, installation or land; or

(b) believes, on reasonable grounds, that the exercise of the powers is necessary to enforce a warrant that is in force under an Australian law.

Meaning of ***evidence and warrants authorisation***

(2) An authorisation under this section is an ***evidence and warrants authorisation***.

21 Identifying vessels and aircraft

Vessels without nationality

(1) An authorising officer may authorise the exercise of maritime powers in relation to a vessel if:

(a) the vessel is not flying the flag of a State; or

(b) the officer suspects, on reasonable grounds, that the vessel:

(i) has been flying the flag of more than one State; or

(ii) is flying the flag of a State that it is not entitled to fly; or

(iii) is not entitled to fly the flag of any State.

Meaning of ***vessels without nationality authorisation***

(2) An authorisation under subsection (1) is a ***vessels without nationality authorisation***.

Aircraft that fail to meet identification requirements

(3) An authorising officer may authorise the exercise of maritime powers in relation to an aircraft if:

(a) a requirement made in the exercise of aircraft identification powers in relation to the aircraft has not been complied with; or

(b) the officer suspects, on reasonable grounds, that information given in response to such a requirement is false or misleading in a material particular.

Note 1: Aircraft identification powers can be exercised without authorisation: see section 28.

Note 2: For ***aircraft identification powers***, see subsection 55(4).

22 Seizable transit goods—aircraft

An authorising officer may authorise the exercise of maritime powers in relation to an aircraft if the officer suspects, on reasonable grounds, that the aircraft is carrying seizable transit goods.

Note: For ***seizable transit goods***, see section 8.

29 Ensuring safety

A maritime officer may, without authorisation, exercise maritime powers to ensure the safety of the officer or any other person.

32 Exercising powers for other purposes

(1) The maritime officer may also exercise maritime powers as follows:

(a) to investigate or prevent any contravention of an Australian law that the officer suspects, on reasonable grounds, the vessel, installation, aircraft, protected land area or isolated person to be involved in;

(b) to administer or ensure compliance with any monitoring law;

(c) in the case of a vessel, installation or aircraft—to administer, ensure compliance with or investigate a contravention of any international agreement or international decision that the officer suspects, on reasonable grounds, applies to the vessel, installation or aircraft;

(d) to access or seize any thing that the officer suspects, on reasonable grounds, is:

(i) evidential material; or

(ii) a border controlled drug or border controlled plant; or

(iii) owned by the Commonwealth or a State or Territory;

(e) to arrest any person whom the officer suspects, on reasonable grounds, has committed an indictable offence against an Australian law;

(f) to enforce any warrant that is in force under an Australian law;

(g) to retain any thing that the officer believes, on reasonable grounds, could be seized under an Australian law;

(h) in the case of a vessel or aircraft—to identify the vessel or aircraft.

Exception—aircraft in flight

(2) Subsection (1) does not apply in relation to an aircraft in flight.

Division 5—Geographical limits

Subdivision A—Exercising powers in other countries

40 Exercising powers in other countries

This Act does not authorise the exercise of powers at a place in another country unless the powers are exercised:

(a) at the request or with the agreement of the other country; or

(b) to administer, ensure compliance with or investigate a contravention of an international agreement or international decision that applies in that place; or

(c) to investigate a contravention of a law that:

(i) applies in that place; and

(ii) is prescribed by the regulations; or

(d) to administer or ensure compliance with a monitoring law that:

(i) applies in that place; and

(ii) is prescribed by the regulations; or

(e) in connection with the exercise of powers in accordance with this section, to ensure the safety of a maritime officer or any other person.

Subdivision B—Exercising powers between countries

41 Foreign vessels between countries

(1) This Act does not authorise the exercise of powers in relation to a foreign vessel at a place between Australia and another country unless the powers are exercised:

(a) to investigate a contravention of a law that applies to foreign vessels, or persons on foreign vessels, in that place; or

(b) in relation to a contravention covered by paragraph (a), to:

(i) arrest a person; or

(ii) require a person to cease conduct; or

(c) in the contiguous zone of Australia to:

(i) investigate a contravention of a customs, fiscal, immigration or sanitary law prescribed by the regulations that occurred in Australia; or

(ii) prevent a contravention of such a law occurring in Australia; or

(d) to administer or ensure compliance with a monitoring law that applies to foreign vessels, or persons on foreign vessels, in that place; or

(e) to administer, ensure compliance with or investigate a contravention of an international agreement or international decision that applies to foreign vessels, or persons on foreign vessels, in that place; or

(f) to identify the vessel under a vessels without nationality authorisation; or

(g) in relation to a support vessel supporting a vessel involved in a contravention in Australia; or

(h) in relation to a support vessel supporting a vessel that is:

(i) an Australian vessel involved in a contravention within the exclusive economic zone, or waters above the continental shelf, of Australia; or

(ii) a foreign vessel involved in a contravention of a law that applies to the foreign vessel, or persons on the foreign vessel, in that place; or

(i) after the vessel has been chased without interruption to that place; or

(j) at the request or with the agreement of the country of the vessel's nationality; or

(k) to seize a border controlled drug or border controlled plant; or

(l) in connection with the exercise of powers in accordance with this section, to ensure the safety of a maritime officer or any other person.

Note: For ***chased without interruption***, see section 42.

(2) Only vessel identification powers may be exercised under paragraph (1)(f).

Note: For ***vessel identification powers***, see section 8.

42 Meaning of *chased without interruption*

(1) A vessel is ***chased without interruption*** if:

(a) at a place where a maritime officer may exercise powers in relation to the vessel without having chased the vessel, a maritime officer requires the person in charge of the vessel to:

(i) stop the vessel; or

(ii) facilitate boarding of the vessel; and

(b) the requirement is not complied with; and

(c) the vessel is chased from that place; and

(d) the chase is not interrupted.

Note: For requirements to facilitate boarding and stop, see sections 53 and 54.

(2) The chase is not interrupted only because:

(a) it is continued by another maritime officer; or

(b) it is begun, or taken over, by a vessel or aircraft (including a vessel or aircraft of a foreign country) other than the vessel or aircraft from which the requirement was made; or

(c) if the chase is continued by a vessel or aircraft of a foreign country—there is no maritime officer on board the vessel or aircraft; or

(d) the vessel is out of sight of any or all of the maritime officers, or officers of a foreign country, involved in the chase; or

(e) the vessel cannot be tracked by remote means, including radio, radar, satellite or sonar.

43 Foreign installations between countries

This Act does not authorise the exercise of powers in relation to a foreign installation at a place between Australia and another country unless the powers are exercised:

(a) to administer, ensure compliance with or investigate a contravention of an international agreement or international decision that applies to foreign installations, or persons on foreign installations, in that place; or

(b) at the request or with the agreement of the country that controls the installation; or

(c) in connection with the exercise of powers in accordance with this section, to ensure the safety of a maritime officer or any other person.

44 Foreign aircraft between countries

This Act does not authorise the exercise of powers, other than aircraft identification powers, in relation to a foreign aircraft at a place between Australia and another country unless the powers are exercised:

(a) to investigate a contravention of a law that applies to foreign aircraft, or persons on foreign aircraft, in that place; or

(b) to administer, ensure compliance with or investigate a contravention of an international agreement or international decision that applies to foreign aircraft, or persons on foreign aircraft, in that place; or

(c) at the request or with the agreement of the country of the aircraft's nationality; or

(d) in connection with the exercise of powers in accordance with this section, to ensure the safety of a maritime officer or any other person.

Subdivision C—Exercising powers in Australia

45 Foreign vessels in Australia—evidence and warrants authorisations

(1) This Act does not authorise the exercise of powers in relation to a foreign vessel under an evidence and warrants authorisation at a place in Australia unless:

(a) the vessel is at a place in the internal waters of Australia; or

(b) the vessel is passing through the territorial sea of Australia after leaving the internal waters of Australia; or

(c) the powers are exercised:

(i) at the request or with the agreement of the country of the vessel's nationality; or

(ii) in connection with the exercise of powers in accordance with this section, to ensure the safety of a maritime officer or any other person.

(2) Subsection (1) has effect subject to section 46.

46 Vessels, installations and isolated persons in States and internal Territories

This Act does not authorise the exercise of powers in relation to a vessel, installation or isolated person in a State or internal Territory unless the powers are exercised:

(a) both:

(i) as part of the continuous exercise of powers begun outside the State or internal Territory; and

(ii) in relation to conduct that occurred outside a State or internal Territory; or

(b) in relation to a law of the Commonwealth in waters navigable from waters of the sea; or

(c) in connection with the exercise of powers in accordance with this section, to ensure the safety of a maritime officer or any other person.

Note: The continuous exercise of powers does not end only because there is a period of time between the exercise of one or more of those powers: see section 11.

47 Aircraft in States and internal Territories

This Act does not authorise the exercise of powers in relation to an aircraft in a State or internal Territory unless the powers are exercised:

(a) as part of the continuous exercise of powers begun outside the State or internal Territory in relation to conduct that occurred outside a State or internal Territory; or

(b) in relation to a law of the Commonwealth; or

(c) in connection with the exercise of powers in accordance with this section, to ensure the safety of a maritime officer or any other person.

Note: The continuous exercise of powers does not end only because there is a period of time between the exercise of one or more of those powers: see section 11.

Subdivision D—Requests and agreements of other countries

48 Manner and form of requests and agreements

(1) For the purposes of this Division, a request or agreement of another country:

(a) need not be in writing; and

(b) includes the following:

(i) a standing request or agreement;

(ii) a request or agreement relating to particular circumstances;

(iii) a request or agreement that covers a particular period of time.

(2) The request or agreement may be made or given by any of the following:

(a) the head of state of the country;

(b) the head of the government of the country;

(c) the minister of the government of the country who is responsible for foreign affairs;

(d) the minister of the government of the country who is responsible for defence;

(e) any official or body of the country that has, or could be expected to have, authority to make or give such a request or agreement.

49 Scope of powers under requests and agreements

(1) If:

(a) the request or agreement of another country is made or given for the exercise of powers in relation to a vessel, installation, aircraft or isolated person for a particular purpose (the ***agreed purpose***); and

(b) the request or agreement is relied on for the purposes of this Division;

a maritime officer may exercise any maritime power in relation to the vessel, installation, aircraft or person for the agreed purpose.

(2) However, subsection (1) does not authorise the exercise of a power specified in the request or agreement as a power that must not be exercised under the request or agreement in relation to the vessel, installation, aircraft or person.

69 Vessels and aircraft

(1) A maritime officer may detain a vessel or aircraft.

(2) The officer may:

(a) take the vessel or aircraft, or cause the vessel or aircraft to be taken, to a port, airport or other place that the officer considers appropriate; and

(b) remain in control of the vessel or aircraft, or require the person in charge of the vessel or aircraft to remain in control of the vessel or aircraft, at that place until the vessel is released or disposed of.

Note 1: Written notice must be given if a vessel or aircraft is detained: see section 80.

Note 2: It is an offence to fail to comply with a requirement under paragraph (b): see section 103.

(3) The officer may take the vessel or aircraft, or cause it to be taken, to the port, airport or other place even if it is necessary for the vessel or aircraft to travel outside Australia to reach the port, airport or other place.

(4) A vessel detained under subsection (1) is a **detained vessel**.

(5) An aircraft detained under subsection (1) is a **detained aircraft**.

72 Persons on detained vessels and aircraft

(1) This section applies to a person:

(a) on a detained vessel or detained aircraft; or

(b) whom a maritime officer reasonably suspects was on a vessel or aircraft when it was detained.

Note: For detaining vessels and aircraft, see section 69.

(2) A maritime officer may return the person to the vessel or aircraft.

(3) A maritime officer may require the person to remain on the vessel or aircraft until it is:

(a) taken to a port, airport or other place (see section 69); or

(b) permitted to depart from the port, airport or other place.

Note: It is an offence to fail to comply with a requirement under this subsection: see section 103.

(4) A maritime officer may detain the person and take the person, or cause the person to be taken:

(a) to a place in the migration zone; or

(b) to a place outside the migration zone, including a place outside Australia.

(5) For the purposes of taking the person to another place, a maritime officer may within or outside Australia:

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

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

(c) remove the person from a vessel or aircraft.

74 Safety of persons

A maritime officer must not place or keep a person in a place, unless the officer is satisfied, on reasonable grounds, that it is safe for the person to be in that place.

75 Restraint is not arrest

(1) Any restraint on the liberty of a person that results from the operation of this Division does not constitute arrest, and is not unlawful.

(2) Proceedings, whether civil or criminal, in respect of that restraint may not be instituted or continued in any court against the Commonwealth, a maritime officer or a person assisting.

Note: This section does not affect the jurisdiction of the High Court under section 75 of the Constitution.

76 Arrest for indictable offences

(1) A maritime officer may arrest a person if the officer suspects, on reasonable grounds, that the person has committed an indictable offence against an Australian law.

Note: For dealing with a person who has been arrested, see section 100.

Release from arrest

(2) The person must be released from arrest if, before the person is charged with the offence, the officer ceases to suspect, on reasonable grounds, that the person committed the offence.

77 Enforcing arrest warrants

A maritime officer may arrest a person for whom an arrest warrant is in force under an Australian law.

Note: For dealing with a person who has been arrested, see section 100.

95 Treatment of persons held

A person arrested, detained or otherwise held under this Act must be treated with humanity and respect for human dignity, and must not be subject to cruel, inhuman or degrading treatment.

100 Person to be informed of reason for arrest

(1) A maritime officer must inform the person, at the time of the arrest, of the offence for which the person is being arrested.

Note: For arrest powers, see sections 76 and 77.

(2) It is sufficient if the person is informed of the substance of the offence, and it is not necessary that this be done in language of a precise or technical nature.

Person need not be informed if impracticable etc.

(3) Subsection (1) does not apply if:

(a) the person should, in the circumstances, know the substance of the offence for which he or she is being arrested; or

(b) the person's actions make it impracticable for the officer to inform the person of the offence for which he or she is being arrested; or

(c) the officer believes on reasonable grounds that the person does not speak English and it is not practicable for the officer to inform the person, in a language he or she understands, of the offence for which he or she is being arrested.

101 Person to be brought before magistrate

The officer must:

(a) take the person, or make arrangements for the person to be taken, as soon as practicable, before a magistrate; or

(b) deliver the person, or make arrangements for the person to be delivered, on land, as soon as practicable, to:

(i) the Australian Federal Police; or

(ii) the police force of a State or Territory; or

(iii) if the arrest relates to an offence against another law—a person with the power to arrest, or the power to deal with a person who has been arrested, under that law.

104 Maritime officers

(1) Each of the following is a ***maritime officer***:

(a) a member of the Australian Defence Force;

(b) an officer of Customs (within the meaning of the *Customs Act 1901*);

(c) a member or special member of the Australian Federal Police;

(d) a person appointed as a maritime officer by the Minister.

Limited appointments

(2) The Minister may appoint a person under paragraph (1)(d) as a maritime officer:

(a) in relation to one or more of the following only:

(i) a specified law;

(ii) a specified international agreement or international decision; and

(b) subject to any other conditions specified in the appointment.

(3) The appointment may limit the exercise of powers by the person as a maritime officer.

(4) Subsection (3) does not limit paragraph (2)(b).

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

5 Interpretation

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

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

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

transitory person means:

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

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

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

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

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

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

(iii) disembarked in that other country.

5AA Meaning of *unauthorised maritime arrival*

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

(a) the person entered Australia by sea:

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

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

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

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

Entered Australia by sea

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

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

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

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

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

Excluded maritime arrival

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

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

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

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

Definitions

(4) In this section:

aircraft has the same meaning as in section 245A.

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

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

42 Visa essential for travel

(1) Subject to subsections (2), (2A) and (3), a non-citizen must not travel to Australia without a visa that is in effect.

Note: A maritime crew visa is generally permission to travel to Australia only by sea (see section 38B).

(2) Subsection (1) does not apply to an allowed inhabitant of the Protected Zone travelling to a protected area in connection with traditional activities.

(2A) Subsection (1) does not apply to a non-citizen in relation to travel to Australia:

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

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

(c) if:

(i) the non-citizen is brought to the migration zone under subsection 245F(9) of this Act or 72(4) of the *Maritime Powers Act 2013*; and

(ii) the non-citizen is a person who would, if in the migration zone, be an unlawful non-citizen; or

(ca) the non-citizen is brought to Australia under section 198B; or

(d) if:

(i) the non-citizen has been removed under section 198 to another country but has been refused entry by that country; and

(ii) the non-citizen travels to Australia as a direct result of that refusal; and

(iii) the non-citizen is a person who would, if in the migration zone, be an unlawful non-citizen; or

(e) if:

(i) the non-citizen has been removed under section 198; and

(ii) before the removal the High Court, the Federal Court or the Federal Circuit Court had made an order in relation to the non-citizen, or the Minister had given an undertaking to the High Court, the Federal Court or the Federal Circuit Court in relation to the non-citizen; and

(iii) the non-citizen's travel to Australia is required in order to give effect to the order or undertaking; and

(iv) the Minister has made a declaration that this paragraph is to apply in relation to the non-citizen's travel; and

(v) the non-citizen is a person who would, if in the migration zone, be an unlawful non-citizen; or

(f) if:

(i) the travel is from Norfolk Island to Australia; and

(ii) the Minister has made a declaration that this paragraph is to apply in relation to the non-citizen's travel; and

(iii) the non-citizen is a person who would, if in the migration zone, be an unlawful non-citizen.

(3) The regulations may permit a specified non-citizen or a non-citizen in a specified class to travel to Australia without a visa that is in effect.

(4) Nothing in subsection (2A) or (3) is to be taken to affect the non-citizen's status in the migration zone as an unlawful non-citizen.

Note: Section 189 provides that an unlawful non-citizen in the migration zone must be detained.

43 Visa holders must usually enter at a port

(1) Subject to subsections (1A) and (3) and the regulations, a visa to travel to and enter Australia that is in effect is permission for the holder to enter Australia:

(a) at a port; or

(b) on a pre-cleared flight; or

(c) if the holder travels to Australia on a vessel and the health or safety of a person or a prescribed reason, make it necessary to enter in another way, that way; or

(d) in a way authorised in writing by an authorised officer.

(1A) Subject to the regulations, a maritime crew visa that is in effect is permission for the holder to enter Australia:

(a) at a proclaimed port; or

(b) if the health or safety of a person, or a prescribed reason, make it necessary to enter Australia in another way, that way; or

(c) in a way authorised by an authorised officer.

(1B) Despite subsections 38B(1) and (2):

(a) the holder of a maritime crew visa may enter Australia as mentioned in paragraph (1A)(b) by air; and

(b) the authorised officer may, for the purposes of paragraph (1A)(c), authorise the holder to enter Australia by air.

(2) For the purposes of subsection (1), a holder who travels to and enters Australia on an aircraft is taken to have entered Australia when that aircraft lands.

(3) This section does not apply to:

(a) the holder of an enforcement visa; or

(b) an Australian resident entering Australia on a foreign vessel as a result of the exercise of powers under section 69 of the *Maritime Powers Act 2013* in relation to a fisheries detention offence; or

(c) an Australian resident entering Australia on a vessel (environment matters) as a result of an environment officer, maritime officer or other person in command of a Commonwealth ship or a Commonwealth aircraft:

(i) exercising his or her power under paragraph 403(3)(a) of the *Environment Protection and Biodiversity Conservation Act 1999* in relation to the vessel; or

(ii) making a requirement of the person in charge of the vessel under paragraph 403(3)(b) of the *Environment Protection and Biodiversity Conservation Act 1999*; or

(iii) exercising powers under section 69 of the *Maritime Powers Act 2013* in relation to the vessel;

because the environment officer, maritime officer or person in command had reasonable grounds to suspect that the vessel had been used or otherwise involved in the commission of an environment detention offence.

Note: Subsection 33(10) also disapplies this section.

(4) In subsection (3):

Australian resident has the same meaning as in the *Fisheries Management Act 1991*.

Commonwealth aircraft has the same meaning as in the *Environment Protection and Biodiversity Conservation Act 1999*.

Commonwealth ship has the same meaning as in the *Environment Protection and Biodiversity Conservation Act 1999*.

164B Grant of enforcement visas (fisheries matters)

Non-citizen on foreign vessel outside migration zone

(1) A non-citizen on a foreign vessel outside the migration zone is granted an enforcement visa when the vessel is detained under section 69 of the *Maritime Powers Act 2013* in relation to a fisheries detention offence.

Note: The grant of an enforcement visa effectively cancels any temporary visa that the non-citizen may have held (see subsection 82(2A)).

Non-citizen in migration zone

(2) A non-citizen in the migration zone who does not already hold an enforcement visa is granted an enforcement visa when he or she is detained under Schedule 1A to the *Fisheries Management Act 1991* or Schedule 2 to the *Torres Strait Fisheries Act 1984*.

Note: The grant of an enforcement visa effectively cancels any temporary visa that the non-citizen may have held (see subsection 82(2A)).

Non-citizen in prescribed circumstances

(3) An enforcement visa is granted to a non-citizen (who does not already hold an enforcement visa) when a fisheries officer or a maritime officer exercises under, or for the purposes of, the *Fisheries Management Act 1991* or the *Torres Strait Fisheries Act 1984* a prescribed power in prescribed circumstances in relation to the non-citizen. The visa is granted at the time the power is exercised.

Note: The grant of an enforcement visa effectively cancels any temporary visa that the non-citizen may have held (see subsection 82(2A)).

Non-citizen on foreign vessel in prescribed circumstances

(4) An enforcement visa is granted to a non-citizen (who does not already hold an enforcement visa) who is on a foreign vessel when a fisheries officer or a maritime officer exercises under, or for the purposes of, the *Fisheries Management Act 1991* or the *Torres Strait Fisheries Act 1984* a prescribed power in prescribed circumstances in relation to the vessel. The visa is granted at the time the power is exercised.

Note: The grant of an enforcement visa effectively cancels any temporary visa that the non-citizen may have held (see subsection 82(2A)).

Enforcement visas granted by force of this section

(5) To avoid doubt, an enforcement visa is granted by force of this section.

Note: No administrative action under this Act is necessary to grant the visa.

Exception if Minister's declaration in force

(6) Despite subsections (1), (2), (3) and (4), a non-citizen is not granted an enforcement visa if a declaration under subsection (7) is in force in relation to:

(a) the non-citizen; or

(b) a class of persons of which the non-citizen is a member.

Declaration

(7) The Minister may make a written declaration, for the purposes of this section, that it is undesirable that a person, or any persons in a class of persons, travel to and enter Australia or remain in Australia.

Section does not apply to Australian residents

(8) This section does not apply to non-citizens who are Australian residents as defined in the *Fisheries Management Act 1991*.

164BA Grant of enforcement visas (environment matters)

Non-citizen on vessel (environment matters) outside migration zone

(1) A non-citizen on a vessel (environment matters) outside the migration zone is granted an enforcement visa when, because an environment officer, maritime officer or other person in command of a Commonwealth ship or a Commonwealth aircraft has reasonable grounds to suspect that the vessel has

been used or otherwise involved in the commission of an environment detention offence, the environment officer, maritime officer or person in command:

(a) exercises his or her power under paragraph 403(3)(a) of the *Environment Protection and Biodiversity Conservation Act 1999* in relation to the vessel; or

(b) makes a requirement of the person in charge of the vessel under paragraph 403(3)(b) of the *Environment Protection and Biodiversity Conservation Act 1999*; or

(c) exercises powers under section 69 of the *Maritime Powers Act 2013* in relation to the vessel;

whichever occurs first.

Note 1: Under paragraph 403(3)(a) of the *Environment Protection and Biodiversity Conservation Act 1999*, an environment officer, or the person in command of a Commonwealth ship or a Commonwealth aircraft, may bring a vessel into the migration zone. Under paragraph 403(3)(b) of that Act, an environment officer, or the person in command of a Commonwealth ship or a Commonwealth aircraft, may require the person in charge of a vessel to bring the vessel into the migration zone.

Note 2: The grant of an enforcement visa effectively cancels any temporary visa that the non-citizen may have held (see subsection 82(2A)).

Non-citizen in migration zone

(2) A non-citizen in the migration zone who does not already hold an enforcement visa is granted an enforcement visa when he or she is detained by an environment officer under Schedule 1 to the *Environment Protection and Biodiversity Conservation Act 1999*.

Note: The grant of an enforcement visa effectively cancels any temporary visa that the non-citizen may have held (see subsection 82(2A)).

Non-citizen in prescribed circumstances

(3) An enforcement visa is granted to a non-citizen (who does not already hold an enforcement visa) when an environment officer or a maritime officer exercises under, or for the purposes of, the Environment Protection and Biodiversity Conservation Act 1999 a prescribed power in prescribed circumstances in relation to the non-citizen. The visa is granted at the time the power is exercised.

Note: The grant of an enforcement visa effectively cancels any temporary visa that the non-citizen may have held (see subsection 82(2A)).

Non-citizen on vessel or aircraft in prescribed circumstances

(4) An enforcement visa is granted to a non-citizen (who does not already hold an enforcement visa) who is on a vessel (environment matters) or a foreign aircraft (environment matters) when an environment officer or maritime officer exercises under, or for the purposes of, the *Environment Protection and Biodiversity Conservation Act 1999* a prescribed power in prescribed circumstances in relation to the vessel or aircraft. The visa is granted at the time the power is exercised.

Note: The grant of an enforcement visa effectively cancels any temporary visa that the non-citizen may have held (see subsection 82(2A)).

198 Removal from Australia of unlawful non-citizens

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

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

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

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

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

(c) who either:

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

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

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

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

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

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

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

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

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

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

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

(a) is a detainee; and

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

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

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

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

(c) one of the following applies:

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

(iii) the visa cannot be granted; and

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

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

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

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

(c) either:

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

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

(d) either:

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

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

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

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

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

(c) either:

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

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

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

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

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

(c) either:

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

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

(d) either:

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

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

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

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

236E Evidentiary certificates in proceedings for offences

Issuing a certificate

(1) A written certificate may be issued under this subsection if an authorisation authorises the exercise of maritime powers in relation to a vessel or aircraft (the ***target vessel or aircraft***). The certificate may be issued by:

(a) the authorising officer who gave the authorisation; or

(b) a maritime officer who boards the target vessel or aircraft in accordance with the authorisation.

Note: For definitions for this section, see subsection (6).

Certificate is prima facie evidence of the matters in it

(2) The certificate is to be received in proceedings for an offence against this Subdivision as prima facie evidence of the matters stated in the certificate.

Matters that can be specified in a certificate

(3) The certificate may specify one or more of the following:

(a) the location of the target vessel or aircraft during the exercise of those maritime powers;

(b) the location, during the exercise of those maritime powers, of a Commonwealth ship or Commonwealth aircraft from which the exercise of those maritime powers was directed or coordinated;

(c) the contents of any list of passengers on board the target vessel or aircraft, or passenger cards relating to passengers on board the target vessel or aircraft;

(d) the number of passengers on board the target vessel or aircraft;

(e) the number of crew on board the target vessel or aircraft;

(f) details about anything a maritime officer did under subsection 64(1), or section 66, of the *Maritime Powers Act 2013* (about securing things) in the exercise of those maritime powers;

(j) any other matter prescribed under subsection (5).

(4) Subsection (2) does not apply to so much of the certificate as specifies whether a person is the master, owner, agent or charterer of the target vessel or aircraft.

(5) The Minister may, by legislative instrument, prescribe other matters that may be specified in a certificate issued under subsection (1).

Definitions

(6) In this section:

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

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

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

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

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

253 Detention of deportee

(1) Where an order for the deportation of a person is in force, an officer may, without warrant, detain a person whom the officer reasonably supposes to be that person.

(2) A person detained under subsection (1) or (10) may, subject to this section, be kept in immigration detention or in detention as a deportee in accordance with subsection (8).

(3) Where an officer detains a person under subsection (1) or (10), the officer shall forthwith inform the person of the reason for the detention and shall, if that person so requests, furnish to him or her, as soon as practicable, particulars of the deportation order.

(4) If a person detained under this section (in this subsection called the ***detained person***) claims, within 48 hours after the detention and while the detained person is detention, that he or she is not the person in respect of whom the deportation order is in force, the person to whom the claim is made shall:

(a) if that last-mentioned person is an officer—ask the detained person; or

(b) in any other case—cause an officer to ask the detained person;

to make a statutory declaration to that effect, and, if the person detained makes such a declaration, the officer who asked him or her to make the declaration shall take him or her before a prescribed authority within 48 hours after the making of the declaration, or, if it is not practicable to take him or her before a prescribed authority within that time, as soon as practicable after the expiration of that period.

(5) If a detained person who is required under subsection (4) to be brought before a prescribed authority within a particular period, is not so brought before a prescribed authority, the person shall be released.

(6) Where a person is brought before a prescribed authority under this section, the prescribed authority shall inquire into the question whether there are reasonable grounds for supposing that that person is a deportee and, if the prescribed authority is satisfied that there are such reasonable grounds, the prescribed authority shall, by writing under his or her hand, declare accordingly.

(7) Where a prescribed authority makes a declaration in accordance with subsection (6), the detained person may be held in detention as a deportee in accordance with subsection (8), but otherwise the prescribed authority shall direct the release of that person and he or she shall be released accordingly.

(8) A deportee may be kept in immigration detention or such detention as the Minister or the Secretary directs:

(a) pending deportation, until he or she is placed on board a vessel for deportation;

(b) at any port or place in Australia at which the vessel calls after he or she has been placed on board; or

(c) on board the vessel until its departure from its last port or place of call in Australia.

(9) In spite of anything else in this section, the Minister or the Secretary may at any time order the release (either unconditionally or subject to specified conditions) of a person who is in detention under this section.

(10) An officer may, without warrant, detain a person who:

(a) has been released from detention under subsection (9) subject to conditions; and

(b) has breached any of those conditions.

(11) Nothing contained in, or done under, this section prevents the Supreme Court of a State or Territory or the High Court from ordering the release from detention of a person held in detention under this section where the Court finds that there is no valid deportation order in force in relation to that person.