IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO S195 OF 2016

BETWEEN: **PLAINTIFF S195/2016**
Plaintiff

AND: **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

BROADSPECTRUM (AUSTRALIA) PTY LTD (ACN 000 484 417)
Third Defendant

10 **ANNOTATED SUBMISSIONS OF THE FIRST AND SECOND DEFENDANTS**

Filed on behalf of the first and second defendants by:

Australian Government Solicitor
Level 42 – MLC Centre
19 Martin Place
SYDNEY NSW 2000
DX 44 Sydney

Date of this document: 7 April 2017

Contact: Andras Markus
File ref: 16005810
Telephone: 02 9581 7472
Facsimile: 02 9581 7650
Email: andras.markus@ags.gov.au

PART I PUBLICATION

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

PART II ISSUES

2. Each of the questions in the Special Case filed on 14 March 2017 (**SC**) is concerned with the impact of the decision of the Papua New Guinea (**PNG**) Supreme Court in *Belden Norman Namah, MP Leader of the Opposition v Hon Rimbank Pato, Minister for Foreign Affairs & Immigration* SCA No 84 of 2013 (***Namah Decision***), upon the lawfulness of the following actions of the first and/or second defendants (**the Commonwealth**):

10 2.1. the Minister's designation of PNG as a regional processing country (Q.1);

2.2. the Commonwealth's entry into the 2013 Memorandum of Understanding, the Regional Resettlement Arrangement, the 2014 Administrative Arrangements and the Broadspectrum Contract (Q.2);

2.3. the direction made by the Minister on 29 July 2013 regarding the taking of unauthorised maritime arrivals to PNG (Q.3);

2.4. the taking of the plaintiff to PNG on 21 August 2013 (Q.4);

2.5. the Commonwealth's undertaking conduct in respect of regional processing arrangements in PNG (Q.5); and

2.6. the Commonwealth's assisting PNG in taking action in relation to the
20 plaintiff pursuant to a removal order made under s 12 of the *Migration Act 1978* (PNG) (**PNG Migration Act**), and a direction as to custody made under s 13 of that Act.

3. Most of the above actions were itemised in paragraph 13 of the plaintiff's Amended Application to Show Cause (**Amended Application**) (special case book (**SCB**) A6). The questions in the special case were formulated so as to reflect what was accepted during the directions hearings in this matter to be the plaintiff's central concern with the validity of those actions, namely the effect of the *Namah Decision*.

4. In the directions hearings, and in written submissions prepared for the
30 purposes of those hearings, the Commonwealth and the Court identified paragraph 13 of the Amended Application as raising an issue of law that might be suitable for disposition on the basis of limited facts.[1] At the directions hearing on 21 December 2016, the plaintiff saw the attraction of what Bell J described as a "proceeding to determine the issue that all along has been central to this application, and that is the effect of the *Namah* Decision on the arrangements".[2] In the course of that hearing the plaintiff agreed to proceed on the special case as drafted by the Commonwealth, which was directed to

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1 See [2016] HCATrans 295 at L37-44 (p 2), L180-182 (p 5), L211-219 (p 6), L241-254 (p 7), L276-286 (p 8), L341-347 (p 9); [2016] HCATrans 315 at L182-197 (p 6).

2 [2016] HCATrans 315 at L201-223 (p 6).

resolving only that central issue, subject to a number of refinements which are not presently relevant.[3]

5. The limitation of the questions to the effect of the *Namah Decision* is reflected in the terms of the questions themselves. It is further reflected in the fact that, in SC [45], the parties expressly agreed that "questions (1) to (4) and (6) do not raise any questions as to the validity of the actions referred to other than by reason of the *Namah Decision*". For the reasons above, these aspects of the special case represent a deliberate, and agreed, confinement of the issues that would be referred to the Full Court. In short, the issues before the Full Court concern, and concern only, the effect, if any, of the *Namah Decision* upon the actions referred to in the questions.

6. Contrary to the limitation of the Special Case on its face, and the agreed way in which the matter before the Full Court is to proceed, the plaintiff's written submissions, filed on 17 March 2017 (**PS**), seek to address issues which either do not arise on the Amended Application or were expressly excluded from the terms of the Special Case.

7. ***First***, at PS [49]-[50] (see also PS [14]), the plaintiff advances an argument to the effect that it is beyond the statutory or non-statutory power of the Commonwealth to impose restrictions on the liberty of the plaintiff in circumstances where he has been detained for four years and there are no reasonable prospects of his removal within a reasonable time. The argument, which involves an application to reopen this Court's decision in *Al-Kateb v Godwin*[4] (PS [49]), does not fall within the scope of any of the questions in the special case, and is directly inconsistent with the parties' agreement in SC [45]. Consistently with the absence of any question in the special case, there is no ground in the Amended Application the resolution of which would require this Court to rule on the correctness or otherwise of *Al-Kateb*. Further, and related to the last point, the special case does not contain the facts that would be necessary for the Court to determine, one way or the other, whether the plaintiff is being detained in the custody ***of the Commonwealth***, such as may give rise to the application of *Al-Kateb*.

8. ***Secondly***, at PS [51]-[58] (see also PS [14]), the plaintiff makes submissions in support of relief in the form of a writ of habeas corpus and/or a mandatory injunction. As the defendants and the Court raised with the plaintiff, on more than one occasion, those claims for relief were controversial and would raise a "raft of factual questions" about which there may be significant dispute and in relation to which significant additional work would need to have been done in relation to the special case.[5] As explained by senior counsel for the Commonwealth in the directions hearing on 21 December 2016, the special

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[3] [2016] HCATrans 16 at L291-303 (p 7). Before the directions hearing, the plaintiff had circulated amendments to the special case, including by adding questions regarding relief, but it did not ultimately press the amendments.

[4] (2004) 219 CLR 562 (***Al-Kateb***).

[5] See eg, Submissions of the First and Second Defendants filed 10 November 2016 at [13]; [2016] HCATrans 295 at L341-7 (p 9); [2016] HCATrans 315 at L59-64 (p 3), L100-122 read with 145-157 (p 4-5).

case as prepared by the Commonwealth — and agreed to by the plaintiff — contains no question about relief for that very reason.[6]

9. ***Thirdly***, apparently for purposes connected with the previous two matters, at various points in his submissions (see PS [18]–[19], [26]–[27], [30]), the plaintiff makes submissions as to findings that this Court should make concerning Australia's role in the running of the Manus Regional Processing Centre (**RPC**). Some of those submissions (eg PS [30]) are made on the apparent basis that this Court must follow the findings in this regard of the PNG Supreme Court in the *Namah Decision*, notwithstanding that none of the present defendants were parties to that decision. The submissions are evidently directed towards establishing that the plaintiff is detained in the custody of the Commonwealth and/or that the Commonwealth's control is sufficient to warrant relief being directed to the Commonwealth.

10. In circumstances where the above-referenced paragraphs of the plaintiff's submissions go beyond issues which are raised on the special case, the Commonwealth does not propose to address them as part of its submissions, and the Court should not entertain them.

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

11. Notices have been issued pursuant to s 78B of the *Judiciary Act 1903* (Cth).

PART IV FACTS

12. The facts are set out in the special case.

PART V LEGISLATIVE PROVISIONS

13. Attached to the plaintiff's submissions is a copy of Part 2 Division 8 of the *Migration Act 1958* (Cth) (**Migration Act**), as at 25 October 2016. That version includes s 198AHA, which was inserted on 30 June 2015 with effect from 18 August 2012. Attached to these submissions and marked 'Annexure A' is a copy of Part 2 Division 8 of the Migration Act as at 21 August 2013, the date of the taking decision.

PART VI ARGUMENT

SUMMARY

14. In summary, the Commonwealth submits as follows:

    (a) The designation of PNG as a regional processing country is not beyond the power conferred by s 198AB(1) of the Migration Act by reason of the *Namah Decision* ([22]-[31] below). That answers Q.1.

    (b) Neither the direction of the Minister on 29 July 2013 pursuant to s 198AD(5), nor the taking of the plaintiff to PNG on 21 August 2013, were beyond the power conferred by s 198AD of the Migration Act by reason of the *Namah Decision* ([32]-[36] below). That answers Q.3 and Q.4.

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[6] [2016] HCATrans 315 at L95–112 (p 4), 145–151 (p 5), 211–295 (pp 6–7).

(c) Entry into the 2013 Memorandum of Understanding and the Regional Resettlement Arrangement were acts of the Executive Government under s 61 of the Constitution. The validity of those actions is not affected by the *Namah Decision* ([37]-[44] below). That answers Q.2a and b, and provides the foundation for s 198AHA of the Migration Act to operate.

(d) Section 198AHA of the Migration Act, or alternatively the non-statutory executive power of the Commonwealth conferred by s 61 of the Constitution, provides authority for all of the other conduct impugned in the special case. In particular:

(i) The authority for the Commonwealth to undertake conduct in respect of regional processing arrangements in PNG that is conferred by s 198AHA does not depend on whether those arrangements are lawful under the law of PNG ([45]-[52] below). That answers Q.5.

(ii) The 2014 Administrative Arrangements and the Broadspectrum Contract are not beyond the power of the Commonwealth conferred by s 198AHA of the Migration Act by reason of the *Namah Decision* ([53]-[55] below). That answers Q.2c and d.

(iii) The *Namah Decision* does not preclude the Commonwealth from assisting PNG to take action pursuant to the orders outlined in SC [35], directed to the plaintiff's removal from PNG and detention in PNG by PNG authorities pending that removal ([56]-[62] below). That answers Q.6.

15. Before addressing these matters, it is necessary to summarise the terms of the *Namah Decision*.

THE *NAMAH DECISION*

16. The PNG Supreme Court handed down the *Namah Decision* on 26 April 2016 (SC [24]). As set out in the reasons of Kandakasi J at [5] (SCB 837), the application to the Court sought the following declarations:

> (i) The transferees brought to Papua New Guinea by the Australian Government and detained at the relocation centre on Manus Island is contrary to the constitutional rights and interests of the transferees to personal liberty guaranteed by Section 42 of the *Constitution*.
>
> (ii) Section 42(1)(g) of the Constitution does not apply to the transferees under the Memorandum of Understanding (MOU) signed on 08th September 2012 and the new MOU signed on 05 and 06 April 2013...
>
> (iii) ...That Section 1 of the Constitution Amendment (No 37) (Citizenship) Law is unconstitutional and invalid.

The references to "the Constitution" are, of course, to the *Constitution of the Independent State of Papua New Guinea* (**PNG Constitution**).

17. The PNG Supreme Court proceeded on the basis of a Statement of Facts filed by the plaintiff (at [20], SCB 842). The respondents had sought to dispute certain facts, but Kandakasi J, with whom the other members of the Court

agreed, considered the notification of such disputes to be dilatory and otherwise without merit (at [16]-[18], SCB 841-2). The facts included:

17.1. The PNG Government entered into the MOUs "under which the asylum seekers who were seeking asylum in Australia were forcefully brought into PNG" (at [20]).

17.2. The "two governments" proceeded to bring in asylum seekers under Australian Federal Police escort ***and*** have them held at the RPC against their will (at [20]).

17.3. The RPC is enclosed with razor wire and manned by security officers to prevent the asylum seekers from leaving the centre (at [20]).

17.4. All costs are paid for by the Australian government (at [20]).

17.5. "For the purposes of the arrangement between the two governments", the PNG Minister granted approval under s 20 of the PNG Migration Act for the asylum seekers to be brought to PNG, albeit under detention (at [21]).

17.6. By a series of notices published in the National Gazette, the PNG Minister exempted all transferees who travelled to PNG pursuant to the first MOU from ss 3 and 7 of the PNG Migration Act; declared the RPC to be a regional processing centre for the temporary residence of asylum seekers pending the determination of their refugee status; and directed all persons permitted to enter and reside in PNG under the first MOU to temporarily reside at the RPC (at [23]).

18. None of the defendants to this proceeding was a party to or otherwise represented in the proceeding which led to the *Namah Decision*, and the defendants are not aware of all of the facts that the PNG Supreme Court adopted for the purposes of its decision (SC [25]). To the extent that the facts are identified in the reasons for judgment of Kandakasi J and Higgins J, the defendants do not accept that all of them are correct (SC [25]). In particular, had they been parties the Commonwealth defendants would have disputed the fact, extracted at [17.2] above, that ***the Commonwealth*** held transferees in PNG against their will. The equivalent question in respect of the regional processing arrangements with the Republic of Nauru was a matter of real controversy in this Court in *Plaintiff M68/2015 v Minister for Immigration and Border Protection*.[7]

19. The concern of the Court in the *Namah Decision* was the validity of the "arrangements" between PNG and Australia (as found on the uncontested facts) as a matter of PNG law. In concluding that "the forceful bringing into and detention of the asylum seekers on MIPC is unconstitutional and is therefore illegal" (at [39]), Kandakasi J, with whom the other members of the Court agreed, adopted the following reasoning:

19.1. Section 42(1) of the PNG Constitution precludes any person within PNG's territorial jurisdiction from being detained or held against his or

[7] (2016) 257 CLR 42 (***Plaintiff M68***).

her will, by anybody, save for the reasons or circumstances set out in paragraphs (a) to (i) (at [29], SCB 845).

19.2. The circumstances enumerated in s 42(1) are subject to Acts of Parliament which must give meaning and effect to each of the exceptions (at [33], SCB 847).

19.3. Any detention or arrest outside what is authorised by s 42(1), as elaborated upon or provided for by specific legislation, would be unconstitutional and therefore illegal (at [33], SCB 847).

19.4. The relevant exception in relation to migration is s 42(1)(g) (at [34]): "for the purpose of preventing the unlawful entry of a person into Papua New Guinea, or for the purpose of effecting the expulsion, extradition or other lawful removal of a person from Papua New Guinea, or the taking of proceedings for any of those purposes". The PNG Migration Act gives meaning to, and a framework for, that exception (at [35]). Detention under the PNG Migration Act is only available, pursuant to s 13, against persons who have entered or remain in the country without a valid entry permit or exemption (at [38], SCB 848).

19.5. The "undisputed facts" revealed that the asylum seekers did not enter PNG and do not remain in PNG on their own accord. The "joint efforts" of the Australian and PNG governments to bring them to PNG and keep them at the RPC against their will were thus outside the Constitutional and legal framework in PNG (at [39], SCB 848-849).

19.6. Although "the governments of PNG and Australia took steps to regularise the forceful transfer and detention of the asylum seekers", with the issue of permits under s 20 of the Migration Act, the requirements under ss 3 and 7 do not exist and thus no situation had arisen for the purposes of s 13 of the Act or s 42(1)(g) of the PNG Constitution to warrant detention (at [39], SCB 849).

19.7. The respondents failed to demonstrate that the constitutional amendment (adding s 42(1)(ga) complied with s 38 of the Constitution and was valid (at [54], SCB 854). Further, and in any event, there were no provisions in the PNG Migration Act specifying how asylum seekers were to be treated whilst having due regard to their rights and freedoms as guaranteed under the various international conventions and the PNG Constitution.

20. Justice Higgins similarly concluded that in circumstances where the asylum seekers were not being held under the PNG Migration Act pending deportation (at [77]), they had been deprived of their liberty otherwise than for the purposes authorised under s 42 of the PNG Constitution (at [80], SCB 862). The amendment to the PNG Constitution which sought to add to the list of exceptions in s 42 was invalid and, in any event, said nothing about the manner and form of detention (at [97]-[98], SCB 864). His Honour did conclude that the Minister had validly exempted the asylum seekers referred to in the Gazette Notices from compliance with ss 3 and 7 of the PNG Migration Act, in accordance with s 20 of the Act (at [108], CB 865).

21. The orders of the Court in the *Namah Decision*, which are set out in [74] (SCB 860), are confined to the lawfulness of the bringing of asylum seekers to PNG, and their being detained at the RPC, as a matter of PNG law. Although Order 6 sought to bind the Commonwealth to take the steps enumerated therein, the Court did not undertake any detailed consideration of the Commonwealth government's involvement, or the powers that it was exercising in support thereof.

(a) DESIGNATION OF PNG AS A REGIONAL PROCESSING COUNTRY

22. Section 198AB(1) of the Migration Act confers power on the Minister to designate, by legislative instrument, that a country is a regional processing country. Pursuant to s 198AB(2), the ***only*** condition on the exercise of that power is that "the Minister thinks that it is in the national interest to designate the country to be a regional processing country". In considering the national interest, s 198AB(3)(a) requires the Minister to have regard to whether or not the country has given Australia any assurances (which are not required to be legally binding: s 198AB(4)) to the effect that:

> (i) the country will not expel or return a person taken to the country under section 198AD to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; and
>
> (ii) the country will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country under that section is covered by the definition of ***refugee*** in Article 1A of the Refugees Convention as amended by the Refugees Protocol.

The Minister may otherwise have regard to "any other matter which, in the opinion of the Minister, relates to the national interest": s 198AB(3)(b).

23. As this Court unanimously held in *Plaintiff S156/2013 v Minister for Immigration and Border Protection*,[8] s 198AB of the Migration Act facilitates the removal of aliens from Australia "by identifying a place to which they may be removed". Neither the section, nor the Subdivision of which it forms part, makes provision for what is to happen to unauthorised maritime arrivals after they are taken to a regional processing country.[9] All that the Minister is required to consider is the national interest, "largely a political question".[10] In *Plaintiff S156*, the plaintiff's attempt to add further mandatory considerations, including PNG's international obligations and its domestic law, was unanimously rejected.[11]

24. The Minister designated PNG a regional processing country pursuant to s 198AB(1) of the Migration Act on 29 October 2012 (SCB 20). In his Statement of Reasons (SCB 60), the Minister considered, in accordance with s 198AB(3)(a), that he had received the assurances from PNG referred to in (i) and (ii). He was otherwise satisfied that designating PNG as a regional

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8 (2014) 254 CLR 28 (***Plaintiff S156***) at 43 [27] (the Court).

9 (2014) 254 CLR 28 at 44 [32] (the Court).

10 (2014) 254 CLR 28 at 44 [40] (the Court).

11 (2014) 254 CLR 28 at 44 [40] (the Court).

processing country was in the national interest (at [13]-[14], SCB 63-64). In its terms, there is no basis on which to contend that the Minister's designation exceeded the power conferred by s 198AB. Indeed, this Court rejected a challenge to the designation of PNG as a regional processing country – being the same designation that is challenged in this case, in *Plaintiff S156*.

25. In the present case, the plaintiff asserts, ***first***, that s 198AB(1) should not be construed as authorising "illegal activity" in another country (PS [40]) and, ***secondly***, that the designation decision is "void, ab initio" because "the purpose" of the designation decision was declared illegal by the *Namah Decision* (PS [42], see also PS [35]). That submission should be rejected for the following reasons.

26. ***First***, the first step in the plaintiff's argument is misconceived. Section 198AB(1) of the Migration Act does not authorise any conduct in a regional processing country. There is no occasion to apply to s 198AB(1) the principle of construction, asserted by the plaintiff, that Australian legislation should be construed as authorising conduct which is unlawful in a foreign country only if that is manifested by unambiguous and unmistakable language. In any event, the plaintiff cites no authority for the proposition that lawfulness under foreign law is a fundamental common law principle which attracts the principle of legality, on which he relies.

27. ***Secondly***, and in any event, if, as this Court held in *Plaintiff S156*, the Minister is not required to consider the proposed scheme, in a regional processing country, for the treatment of transferees, or the domestic law of that country, as a precondition to the exercise of the power in s 198AB. It follows from that conclusion that findings of a court of that country as to the validity or otherwise of such a scheme cannot affect the lawfulness of a designation otherwise made in accordance with the section. Still less could such findings have that effect if those findings are not made until after the Minister has made the designation decision.

28. ***Thirdly***, there is no factual basis for the plaintiff's contention that the "purpose" of the designation was something declared in the *Namah Decision* to be unlawful under the law of PNG. That is so for two reasons:

    (a) The *Namah Decision* held only that ***detention*** of persons taken from Australia to PNG while their refugee claims were processed in PNG was unlawful. Nothing in the special case establishes that detaining transferees in PNG formed any part of the Minister's purpose in designating PNG. To the contrary, the special case provides that if PNG had not sought to impose a restriction or interference with the plaintiff's personal liberty, the Minister (relevantly for present purposes) would not have sought to impose such a restriction or interference on his personal liberty in PNG or asserted any right to impose such a restriction or interference (SC [43]). Consistently with this, nothing in the 2012 Memorandum of Understanding (SCB 14), which preceded the Instrument of Designation, required the detention of transferees.

    (b) That 2012 Memorandum of Understanding, and the one which superseded it, makes clear that PNG was to conduct all of its activities in respect of the Memoranda of Understanding in accordance with the

PNG Constitution and PNG laws (see cll 4 and 5, which are in the same terms in both Memoranda of Understanding (SCB 16, 91)). It is implicit in that guiding principle that the arrangements may have to make allowance for, and accommodate, the content of PNG law, including what is and is not lawful under the law of PNG as declared by the PNG Supreme Court.

29. ***Fourthly***, the Minister's statement of reasons for designating PNG expressly stated that he had chosen not to have regard to *inter alia* the domestic laws of PNG (at [37]) (SCB 39). As explained above, the Minister was permitted to adopt this course (see also s 198AA(d)). Accordingly, even if the Minister knew, at the time of the designation, that detention (at the insistence of PNG) was a feature of the scheme (see PS [26]), it is not apparent how any holding by the PNG Supreme Court as to the content of the law of PNG can be used to impugn the designation, as a matter of Australian administrative law. At most, even if the Minister had an erroneous understanding that the domestic laws of PNG permitted detention, that understanding would relate to a matter that the Minister was not *required* to take into account, and in fact *did not* take into account. An error of that kind, even if proved to have been made, could not constitute a jurisdictional error that would invalidate the designation.[12]

30. ***Fifthly***, even if, contrary to the Minister's statement of reasons, it were found that the Minister had assumed that the arrangements then proposed by PNG complied with PNG law, the subsequent holding of the PNG Supreme Court to the contrary provides no basis, as a matter of Australian administrative law, on which to hold the Minister's decision to be invalid. For one thing, as noted above, it was implicit in the Memoranda of Understanding that the arrangements may have to change to accommodate the content of PNG law. In any event, at most, this would amount to an error of fact by the Minister — the content of foreign law being a question of fact[13] — on a matter which the Minister was not bound to take into account. An error of fact of this kind provides no basis to impugn an administrative decision.[14]

31. The above matters are not contradicted by the plaintiff's vague reliance on the "principles of international comity" (PS [31]–[33]). The continuing validity, as a matter of Australian law, of the designation of PNG as a regional processing country does not call into question the conclusion of the PNG Supreme Court in the *Namah Decision*. The plaintiff makes no submission as to how the principles which he asserts, and on which he relies, connect in any way with the construction of s 198AB or the validity of the Minister's designation of PNG pursuant to it.

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[12] *Snedden v Minister for Justice* (2014) 230 FCR 82 at 109-110 [153]-[155], 111 [164].

[13] *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at 370 [115] (Gummow and Hayne JJ); *Tahiri v Minister for Immigration and Citizenship* (2012) 87 ALJR 225 (HCA) at 230 [21] (the Court).

[14] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355–6 (Mason CJ).

(b) SECTION 198AD(5) DIRECTION AND TAKING TO PNG UNDER SECTION 198AD(2)

(i) The Minister's direction under s 198AD(5)

32. The reasons above concerning the Minister's designation of PNG as a regional processing country apply equally to the direction made by the Minister under s 198AD(5) of the Migration Act. The plaintiff makes no independent submission about this provision or the direction (PS [42]), the validity of which was unsuccessfully challenged in *Plaintiff S156*.

(ii) Taking to PNG under s 198AD(2)

33. The plaintiff likewise makes no independent submission about s 198AD(2) (PS [42]). That is unsurprising: in the face of a valid designation of a regional processing country pursuant to s 198AB(1), s 198AD(2) imposes an obligation (and hence confers authority) to take a person to whom s 198AD applies to that regional processing country as soon as reasonably practicable. There is no independent basis to attack such a taking if the designation is valid.

34. In any event, s 198AD is not dependent on consideration of the circumstances of unauthorised maritime arrivals after they are taken to a regional processing country. That this is so is apparent from *Plaintiff S156*. The plaintiff in that case was refused leave to amend his statement of claim to argue that s 198AD did not authorise the Executive to imprison persons in foreign countries for an indefinite period. In refusing leave, French CJ observed that s 198AD did not make any provision for imprisonment in third countries.[15] The Full Court endorsed his Honour's observation in rejecting a similar contention advanced as an attack on validity.[16]

35. *A fortiori*, s 198AD of the Migration Act is not dependent on whether the circumstances of unauthorised maritime arrivals in a regional processing country accord with the domestic law of that country. The contrary view is denied by the statement in s 198AA(d) that "the designation of a country to be a regional processing country need not be determined by reference to the international obligations ***or domestic law*** of that country" (emphasis added). Consistently with this, the assurances to which the Minister must have regard when determining whether to designate a country to be a regional processing country pursuant to s 198AB(3) do not involve assurances of compliance with the country's own domestic law.

36. Accordingly, whether it is "reasonably practicable" to take an unauthorised maritime arrival to a regional processing country is not to be assessed by reference to whether the unauthorised maritime arrival will be treated, in that country, in accordance with that country's domestic law. Consideration of that issue would place an impossible burden on officers of the Commonwealth who are obliged to take an unauthorised maritime arrival to a regional processing country. The criterion of reasonable practicability is instead directed to

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[15] Unreported, French CJ, 19 December 2013 at 13.

[16] (2014) 254 CLR 28 at 45-6 [37] (the Court).

practical matters concerned with the taking, not the circumstances of the unauthorised maritime arrival after the taking is complete.[17]

(c) ENTRY INTO THE 2013 MEMORANDUM OF UNDERSTANDING AND THE REGIONAL RESETTLEMENT AGREEMENT

37. The executive power referred to in s 61 of the Constitution "enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution".[18] The Commonwealth contends that the power extends to the conduct of international relations, "including the acquisition of international rights and obligations".[19]

38. Like a treaty, a Memorandum of Understanding is an international instrument whose negotiation and execution is within the sole purview of the executive. It is "an instrument of less than treaty status ... not binding under international law [but creating] commitments which are politically and morally binding".[20] In some areas they are widely used and often provide supplementary details to treaties.[21]

39. In *Plaintiff M68*,[22] all members of this Court accepted that entry into a memorandum of understanding with Nauru in connection with regional processing was within the non-statutory executive power of the Commonwealth. The same must be true of the equivalent memorandum of understanding with PNG.

40. In so far as the plaintiff seeks to invalidate the 2013 Memorandum of Understanding on the basis of an absence of power, "because [it] had as an inherent part of its purpose the illegal transfer of the Plaintiff to PNG and his illegal detention at the RPC" (PS [34]), there are no facts in the special case to

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[17] See also, concerning "reasonably practicable" in s 198 of the Migration Act, *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at 166 [69] (the Court); *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 506 at 516–17 [52]–[53] (the Court); *Kumar v Minister for immigration and Citizenship* (2009) 176 FCR 401 at 415–6 [80] (Besanko J).

[18] *Barton v Commonwealth* (1974) 131 CLR 477 at 498. See also *Williams (No 1)* at 184 [22], 185 [24], 189 [30] (French CJ), 227–8 [123 (Gummow and Bell JJ)], 342 [484] (Crennan J); *Davis v Commonwealth* (1988) 166 CLR 79 at 92–4 (Mason CJ, Deane and Gaudron JJ), 107–8 (Brennan J); *Re Residential Tenancies Tribunal (NSW) and Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 424 (Brennan CJ), 438 (Dawson, Toohey and Gaudron JJ), 455 (McHugh J), 463–4 (Gummow J); *Pape v Commissioner of Taxation* (2009) 238 CLR 1 (***Pape***) at 60–1 [126]–[128] (French CJ), 83 [214]–[215] (Gummow, Crennan and Bell JJ); *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195 at 226 [86] (Gummow, Hayne, Heydon and Crennan JJ); *Ruddock v Vardalis* (2001) 110 FCR 491 at 495–6 [9] (Black CJ), 538 [178] (French J).

[19] *Re Ditfort; ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 369 (Gummow J). See also *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 643–4 (Latham CJ).

[20] Commonwealth, Department of Foreign Affairs and Trade, *Signed, Sealed and Delivered — Treaties and Treaty Making: Officials' Handbook* (14th ed, 2014), p 5.

[21] See, eg, Annex I to the *Agreement Between the Government of Australia and the European Community on Certain Aspects of Air Services* [2009] ATS 17 and the various treaties and memoranda of understanding there listed.

[22] (2016) 257 CLR 42 at [45] (French CJ, Kiefel and Nettle J), [68] (Bell J), [177]–[178] (Gageler J), [201] (Keane J), [370] (Gordon J).

support that submission. Apart from the fact that none of the defendants sought to impose restrictions on the plaintiff's liberty or asserted any right to do so (SC [43]), nothing in the Memorandum of Understanding involves the Commonwealth binding PNG to particular laws or administrative arrangements relating to the plaintiff's residence or conditions:

40.1. The Memorandum of Understanding provided that Australia may transfer, and PNG may accept, transferees under the Memorandum of Understanding (cl 8) but made no provision for the arrangements as to what PNG was to do with transferees once accepted.

40.2. Instead, the Memorandum of Understanding contemplated that administrative arrangements giving effect to the Memorandum of Understanding would be settled between the participants (cl 9) (SCB 92).

40.3. Such arrangements as might be reached are, and remain, subject to the express guiding principle in the Memorandum of Understanding that the Commonwealth will conduct all activities in respect of the Memorandum of Understanding "in accordance with its Constitution and all relevant domestic laws" (cl 4). There is an identical clause in relation to PNG (cl 5) (SCB 91).

41. The Commonwealth makes the same submissions regarding the Regional Resettlement Arrangement, which was signed on 19 July 2013 (SC [7], SCB 85) and thus pre-dated the 2013 Memorandum of Understanding. Signed by the Prime Ministers of Australia and PNG, the Regional Resettlement Arrangement "outlines further practical measures Australia and Papua New Guinea will pursue together to combat people smuggling" (SCB 85). The outline of the arrangement describes unauthorised maritime arrivals being liable for transfer to PNG for processing and resettlement (at [3]), with transferees being accommodated in regional processing centres which would be "managed and administered by Papua New Guinea under Papua New Guinea law, with support from Australia" (at [4]). Consistently with the 2013 Memorandum of Understanding, there is no stipulation that persons be detained whilst residing at a regional processing centre.

42. Although the plaintiff does not refer to the Regional Resettlement Arrangement in his submissions, to the extent that he maintains his challenge to its validity the Commonwealth contends that such a challenge should be disposed of in the same manner as the challenge to the 2013 Memorandum of Understanding.

43. Finally, contrary to PS [29], even if the PNG Government had no authority under the PNG Constitution to enter into the 2013 Memorandum of Understanding or the Regional Resettlement Arrangement, it would not follow that the Commonwealth lacked authority under the Commonwealth Constitution to do so. It would be a radical limitation on the executive power of the Commonwealth for that to be so, effectively requiring the Commonwealth to investigate the internal constitutional affairs of another nation before entering into a treaty with that nation. That would be plainly inimical to the "principle of international comity" on which the plaintiff relies (PS [31]–[33]). The analogy with the law of contract drawn at PS [29] might conceivably have

something to say concerning the validity of the agreements as a matter of international law (if they purported to create any binding obligations), but it has no bearing on whether entry into the agreements by the Commonwealth was authorised by the domestic law of Australia.

44. In any event, it is a misreading of the *Namah Decision* to conclude that the PNG Supreme Court held that the PNG Government had no authority under the PNG Constitution to enter into these international arrangements with Australia. The PNG Supreme Court's holding was linked to its conclusions regarding the impermissibility under the PNG Constitution of detention of transferees. For the reasons above, the 2013 Memorandum of Understanding and Regional Resettlement Agreement do not require such detention.

(d) OTHER IMPUGNED CONDUCT

(i) Construction of s 198AHA

45. Section 198AHA of the Migration Act applies "if the Commonwealth enters into an arrangement with a person or body in relation to the regional processing functions of a country" (s 198AHA(1)). Although the provision does not refer in terms to entry into an arrangement with a country, the Court in *Plaintiff M68* held unanimously that "person or body" covers an arrangement between the Commonwealth and a regional processing country.[23] By analogy with the memorandum of understanding that was in issue in *Plaintiff M68,* entry into the 2013 Memorandum Of Understanding with PNG provided the necessary foundation for the engagement of s 198AHA(2).

46. Section 198AHA(2) retrospectively authorised the Commonwealth to take the actions impugned by the plaintiff. Although s 198AHA was only inserted into the Migration Act by the *Migration (Regional Processing Arrangements) Act 2015* (Cth), it commenced from 18 August 2012, and thus covers both the past and proposed conduct of the Commonwealth.

47. That being said, as recognised by Gageler J in *Plaintiff M68*,[24] the effect of s 198AHA(2) is limited. It is directed only to putting beyond doubt that the Executive has such authority as is necessary to be conferred by the Parliament so that, as a matter of Australia's internal constitutional arrangements, the Executive has authority to engage in the conduct specified in s 198AHA(2). As is made clear by s 198AHA(3), it is not directed to affecting the rights of other persons by rendering lawful otherwise unlawful conduct. Accordingly, while s 198AHA(2) authorises the Executive to engage in conduct which may be tortious, it does not purport to render that conduct lawful and thus immunise the Executive from a claim for damages.

48. Section 198AHA(2) has that operation whether or not the conduct occurs in Australia or a foreign country. It is not a mandatory law of the forum rendering lawful conduct that is unlawful in the foreign country in which it takes place,

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[23] (2016) 257 CLR 42 at 71 [43]–[45] (French CJ, Kiefel and Nettle JJ), 79 [73]–[74] (Bell J), 109 [177]–[178] (Gageler J), 125-6 [245]–[246] (Keane J), 157 [363]–[365] (Gordon J).

[24] (2016) 257 CLR 42 at 110 [181].

regardless of the law of that place.[25] Reliance upon it would be no answer to a claim, in an Australian court, that conduct which took place in PNG was tortious because it was contrary to the law of PNG as the law of the place of the tort.

49. This understanding of s 198AHA(2) has an important consequence. It is implicit in s 198AHA(3) that s 198AHA(2) may authorise conduct (in the manner explained above) as a matter of Australian law even if that conduct be unlawful in the place in which it is to occur. In this case, then, the authority provided by s 198AHA(2) is not contingent upon whether or not the impugned conduct was lawful under the law of PNG. In particular, it is not contingent upon whether the impugned conduct was or was not contrary to the PNG Constitution.

50. This analysis is consistent with the observations of French CJ, Kiefel and Nettle JJ in *Plaintiff M68*,[26] and separately those of Keane J,[27] that the reference in the definition of "regional processing function" in s 198AHA(5) to the implementation of the "law" of that country is not qualified by a requirement that such laws be valid according to the Constitution of the regional processing country. It provides a complete answer to the plaintiff's submission that the authority provided by s 198AHA(2) of the Migration Act evaporated upon the PNG Supreme Court handing down the *Namah Decision*. For the reasons above, the authority provided by s 198AHA(2) does not turn on whether the conduct which it authorises is lawful as a matter of PNG law (cf PS [40], [43]).

51. Contrary to PS [44]-[46], the construction of s 198AHA of the Migration Act for which the Commonwealth contends does not render it beyond any head of Commonwealth legislative power. In *Plaintiff M68*, s 198AHA was upheld as an exercise of the aliens power.[28] As Gageler J accepted,[29] it is also a law with respect to external affairs. That is so for two reasons:

    (a) ***First***, s 198AHA is a law with respect to Australia's external relations, being a subject "directly within" the subject matter of s 51(xxix).[30] The section is triggered by the existence of an arrangement entered by the Commonwealth in relation to the regional processing functions of another country. Section 198AHA(2) then empowers action or payments in relation to those regional processing functions, and incidental actions. That is necessarily a matter which concerns Australia's external relations, at least its relations with the regional

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[25] Cf, eg, *Intelligence Services Act 2001* (Cth) s 14(1): "A staff member or agent of an agency is not subject to any civil or criminal liability for any act done outside Australia if the act is done in the proper performance of a function of the agency."

[26] (2016) 257 CLR 42 at 73 [52]. Bell J agreed at 87-8 [102].

[27] (2016) 257 CLR 42 at 126-9 [248]–[258].

[28] (2016) 257 CLR 42 at 70 [42] (French CJ, Kiefel and Nettle JJ), 80 [77] (Bell J), 110-1 [182] (Gageler J), 129-130 [259] (Keane J).

[29] (2016) 257 CLR 42 at [182].

[30] *R v Sharkey* (1949) 79 CLR 121 at 136–7 (Latham CJ), see also at 157 (McTiernan J). See subsequently *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (***Polyukhovich***) at 528 (Mason CJ), 599 (Deane J), 637 (Dawson J), 653 (Toohey J), 695–6 (Gaudron J), 714 (McHugh J); *XYZ v Commonwealth* (2006) 227 CLR 532 at 538–9 [10] (Gleeson CJ).

processing country.[31] Such a law may validly authorise or regulate conduct within Australia without losing its character as a law with respect to external affairs.[32] The subject matter of the arrangement, and the matters authorised by s 198AHA(2), are necessarily ones which concern external relations. This characterisation of s 198AHA is independent of whether the arrangement which enlivens it is a treaty which would engage the "treaty implementation" aspect of s 51(xxix).[33] That aspect of the head of power does not limit or constrain other aspects of the head of power.[34] If a law is one with respect to Australia's external relations, it may be characterised as a law with respect to external affairs irrespective of whether those external relations are regulated by a treaty, by a looser international arrangement or by no international arrangement at all.

(b) ***Secondly***, s 198AHA is a law with respect to "places, persons, matters or things physically external to Australia".[35] It is a law with respect to the regional processing functions of another country, necessarily a matter external to Australia. This characterisation is not denied by the fact that the law regulates conduct within Australia, since any such conduct is directed to carrying out an object physically external to Australia.[36] At the least, all of the impugned conduct of the Commonwealth in this case bears that character. The words "in relation to" and "incidental or conducive to" in s 198AHA(2) signify a degree of connection which may be affected by the context.[37] If, on their broadest construction, they extend to *ultra vires* conduct, that construction would not be adopted.[38] But even on their narrowest, valid, construction, they support the conduct at issue here. Alternatively, the 'actions' and 'payments' to which s 198AHA(2) refers are capable of being read down to refer only

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31 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 (***Koowarta***) at 202 (Gibbs CJ), see also at 220–1 (Stephen J), 237 (Murphy J), 257–8 (Brennan J).

32 *Koowarta* (1982) 153 CLR 168 at 191 (Gibbs CJ), 257–8 (Brennan J). See also *R v Sharkey* (1949) 79 CLR 121.

33 It is not necessary for the Court to decide whether the 2013 Memorandum of Understanding would be sufficient to engage that aspect of s 51(xxix).

34 *Horta v Commonwealth* (1994) 181 CLR 183 at 194. See also *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640 (***De L***) at 650 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ); Stellios, *Zines's High Court and the Constitution* (Federation Press, 6th ed, 2015) at 438, referring to *Koowarta* (1982) 153 CLR 168 at 202 (Gibbs CJ).

35 See, eg, *Polyukhovich* (1991) 172 CLR 501 at 528 (Mason CJ), 602 (Deane J), 632 (Dawson J), 696 (Gaudron J), 714 (McHugh J); *Horta v Commonwealth* (1994) 181 CLR 183 at 193–4; *Industrial Relations Act Case* (1996) 187 CLR 416 at 485 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *XYZ v Commonwealth* (2006) 227 CLR 532 at 538–9 [8]–[10], 544 [20] (Gleeson CJ), 546 [30], 547 [31], 548 [38], 552 [49] (Gummow, Hayne and Crennan JJ).

36 *Thomas v Mowbray* (2007) 233 CLR 307 at 365 [153] (Gummow and Crennan JJ, with Gleeson CJ agreeing). See also *Polyukhovich* (1991) 172 CLR 501 at 716–17 (McHugh J).

37 *R v Khazaal* (2012) 246 CLR 601 at 613 [31] (French CJ).

38 *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 644 [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Wainohu v New South Wales* (2011) 243 CLR 181 at 226–7 [97] (Gummow, Hayne, Crennan and Bell JJ).

to actions and payments within a head of power.[39] All of the conduct at issue here would be within the provision so read down. On either view, it is not necessary to determine whether, in some operation not raised on the facts of this case, s 198AHA is unsupported by the external affairs power.[40]

52. The conclusion that s 198AHA is supported by the aliens power, and also the external affairs power, is unaffected by the construction of s 198AHA in the manner referred to in paragraphs 45–50 above. Any conduct of the Commonwealth authorised by s 198AHA(2) with respect to unauthorised maritime arrivals in PNG was no less connected with the subject matters of aliens and external affairs simply because the PNG Supreme Court subsequently determined that aspects of that conduct, concerned with detention in PNG, were not lawful in PNG. This would be so even if s 198AHA purported to "authorise" such conduct in the stronger sense of rendering it lawful (cf [49] above). It is certainly so when it is recognised that s 198AHA does no more than provide authority to the Commonwealth Executive for that conduct.

(b) The 2014 Administrative Arrangements and the Broadspectrum Contract

53. It follows that s 198AHA did not cease to provide authority to the Commonwealth to enter into the 2014 Administrative Arrangements and the Broadspectrum Contract by reason of the *Namah Decision*.

54. Contrary to PS [28], the Broadspectrum Contract cannot be characterised as having, as any of its purposes, a breach of the law of PNG. To the contrary, that contract expressly required compliance with the law of PNG (cll 3.1.2 and 3.3.1 (SCB 124–125)).

55. It is also submitted that, to the extent that entry into the Broadspectrum Contract was otherwise within the non-statutory executive power of the Commonwealth (a question which does not arise on the Special Case), it was not rendered *ultra vires* by reason of the *Namah Decision*. This is so at least for the reason advanced in the previous paragraph. Further, it has never been suggested that the Commonwealth's capacity to enter into a contract with an Australian entity in Australia is limited by the laws of other countries. Such action does not purport to authorise conduct that is unlawful in another country (cf PS [36]-[39]); at most it gives rise to contractual consequences between the parties when such conduct is or is not undertaken.[41]

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[39] See, eg, *R v Hughes* (2000) 202 CLR 535 at 556–7 [43] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Williams v Commonwealth* (2014) 252 CLR 416 at 457 [36] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

[40] *Tajjour v New South Wales* (2014) 254 CLR 508 at 589 [176] (Gageler J)

[41] For instance, the doctrine that a contract is unenforceable so far as it requires performance in a foreign country of an act which is unlawful in that country: *Ralli Bros v Cia Naviera Sota y Aznar* [1920] 2 KB 287 (CA) at 304 (Scrutton LJ); *R v International Trustee for the Bondholders AG* [1937] AC 500 at 519 (Lord Wright).

(c) Assisting PNG with removal

56. It likewise follows that the *Namah Decision* did not have the consequence that s 198AHA ceased to provide authority for the Commonwealth to assist PNG to take action pursuant to the orders outlined in SC [35], directed to the plaintiff's removal from PNG and detention in PNG by PNG authorities pending that removal.

57. Again, the same submission is made in relation to the non-statutory executive power (noting that the broader question whether that power authorises the provision of assistance to PNG is not raised by the Special Case).

10 58. There is a further reason why the *Namah Decision* does not preclude the Commonwealth from assisting PNG to take action pursuant to the orders outlined in SC [35], directed to the plaintiff's removal from PNG and detention in PNG by PNG authorities pending that removal.

59. As explained above, the *Namah Decision* concerned persons who had been taken from Australia to PNG whose refugee claims had not been determined. It did not concern a person, such as the plaintiff, whose refugee claim has been determined adversely, and whose presence in PNG is no longer lawful and who is therefore liable to be removed from PNG pursuant to the PNG Migration Act. The plaintiff is now the subject of a removal order under s 12 of
20 the PNG Migration Act (SC [35], SCB 870); and s 13 of the PNG Migration Act expressly permits the detention of such a person. A Direction as to Custody has been made under s 13 with respect to the plaintiff (SCB 871), although at the time of settling the special case no step had been taken by the PNG authorities to keep him in the custody of an officer, a member of the Police Force or an Officer-in-Charge of a Corrective Institution pending his removal (SC [42]).

60. Nothing in the *Namah Decision* addresses the lawfulness of the detention in PNG, by PNG authorities, of a person in the plaintiff's position. To the extent that Kandakaski J made observations in the *Namah Decision* about detention
30 under s 13, those observations indicate a likelihood that such conduct would be considered to fall within s 42(1)(g) of the PNG Constitution, and would therefore be lawful (see [35]-[39], SCB 847-849).

61. Still less does anything in the *Namah Decision* address the power of PNG to remove such a person from PNG. Accordingly, even if the power of the Commonwealth conferred by s 198AHA(2) of the Migration Act or s 61 of the Constitution were dependent on the Commonwealth's conduct being lawful in the regional processing country (which it is not), nothing in the *Namah Decision* speaks to whether assisting PNG to remove the plaintiff from PNG, or to detain him pending such removal, is unlawful in PNG.

40 62. The fact that any assistance provided by the Commonwealth is directed to the removal of the plaintiff from PNG, and detention pending that removal, does not take the conduct outside of that which is authorised by s 198AHA. Removal from a regional processing country is readily to be understood as part of the regional processing functions of that country, within the definition in

s 198AHA(5).[42] It was part of the arrangements in respect of PNG (see eg SCB 18 [18]).

PART VII QUESTIONS STATED

63. Each of questions (1) to (6) stated for the opinion of the Full Court should be answered "No". As to question (7), the plaintiff should pay the costs of the special case.

PART VIII LENGTH OF ORAL ARGUMENT

64. Approximately 1.5 hours will be required for the presentation of the oral argument of the Commonwealth.

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Dated: 7 April 2017

.....
Stephen Donaghue QC
Commonwealth Solicitor-General
T: 02 6141 4139
F: 02 6141 4149
E: stephen.donaghue@ag.gov.au

.....
Geoffrey Kennett SC
T: 02 9221 3933
F: 02 9221 3724
E: kennett@tenthfloor.org

.....
Anna Mitchelmore
T: 02 9223 7654
F: 02 9232 1069
E: amitchelmore@sixthfloor.com.au

.....
Perry Herzfeld
T: 02 8231 5057
F: 02 9232 7626
E: pherzfeld@elevenwentworth.com

[42] *Plaintiff M68* (2016) 257 CLR 42 at 87 [101] (Bell J).

Migration Act 1958

No. 62, 1958 as amended

Compilation start date: 1 August 2013

Includes amendments up to: Act No. 122, 2013

This compilation has been split into 2 volumes

Volume 1: **sections 1–261K**
Volume 2: sections 262–507
Schedule
Endnotes

Each volume has its own contents

Prepared by the Office of Parliamentary Counsel, Canberra

About this compilation

The compiled Act

This is a compilation of the *Migration Act 1958* as amended and in force on 1 August 2013. It includes any amendment affecting the compiled Act to that date.

This compilation was prepared on 16 August 2013.

The notes at the end of this compilation (the ***endnotes***) include information about amending Acts and instruments and the amendment history of each amended provision.

Uncommenced provisions and amendments

If a provision of the compiled Act is affected by an uncommenced amendment, the text of the uncommenced amendment is set out in the endnotes.

Application, saving and transitional provisions for amendments

If the operation of an amendment is affected by an application, saving or transitional provision, the provision is identified in the endnotes.

Modifications

If a provision of the compiled Act is affected by a textual modification that is in force, the text of the modifying provision is set out in the endnotes.

Provisions ceasing to have effect

If a provision of the compiled Act has expired or otherwise ceased to have effect in accordance with a provision of the Act, details of the provision are set out in the endnotes.

Division 8—Removal of unlawful non-citizens etc.

Subdivision A—Removal

198 Removal from Australia of unlawful non-citizens

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

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

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

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

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

(c) who either:

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

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

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

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

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

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

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

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

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

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

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

(a) is a detainee; and

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

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

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

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

(c) one of the following applies:

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

(iii) the visa cannot be granted; and

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

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

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

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

(c) either:

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

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

(d) either:

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

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

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

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

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

(c) either:

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

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

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

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

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

(c) either:

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

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

(d) either:

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

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

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

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

Subdivision B—Regional processing

198AA Reason for Subdivision

This Subdivision is enacted because the Parliament considers that:

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

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

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

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

198AB *Regional processing country*

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

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

(a) may designate only one country; and

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

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

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

(b) immediately after both of the following apply:

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

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

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

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

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

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

(ii) the country will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country under that section is covered by the definition of ***refugee*** in Article 1A of the Refugees Convention as amended by the Refugees Protocol; and

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

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

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

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

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

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

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

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

198AC Documents to be laid before Parliament

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

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

(a) a copy of the designation; and

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

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

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

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

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

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

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

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

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

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

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

198AD Taking unauthorised maritime arrivals to a regional processing country

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

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

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

Powers of an officer

(3) For the purposes of subsection (2) and without limiting that subsection, an officer may do any or all of the following things within or outside Australia:

(a) place the unauthorised maritime arrival on a vehicle or vessel;

(b) restrain the unauthorised maritime arrival on a vehicle or vessel;

(c) remove the unauthorised maritime arrival from:

(i) the place at which the unauthorised maritime arrival is detained; or

(ii) a vehicle or vessel;

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

(4) If, in the course of taking an unauthorised maritime arrival to a regional processing country, an officer considers that it is necessary to return the unauthorised maritime arrival to Australia:

(a) subsection (3) applies until the unauthorised maritime arrival is returned to Australia; and

(b) section 42 does not apply in relation to the unauthorised maritime arrival's return to Australia.

Ministerial direction

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

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

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

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

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

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

Not in immigration detention

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

Meaning of officer

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

198AE Ministerial determination that section 198AD does not apply

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

198AF No regional processing country

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

198AG Non-acceptance by regional processing country

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

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

198AH Application of section 198AD to certain transitory persons

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

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

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

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

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

198AI Ministerial report

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

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

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

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

198AJ Reports about unauthorised maritime arrivals

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

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

(i) assessing those claims in those countries; and

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

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

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

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

(3) A report under this section must not include:
(a) the name of a person who is or was an unauthorised maritime arrival; or
(b) any information that may identify such a person; or
(c) the name of any other person connected in any way with any person covered by paragraph (a); or
(d) any information that may identify that other person.

Subdivision C—Transitory persons etc.

198B Power to bring transitory persons to Australia

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

(2) The power under subsection (1) includes the power to do any of the following things within or outside Australia:
(a) place the person on a vehicle or vessel;
(b) restrain the person on a vehicle or vessel;
(c) remove the person from a vehicle or vessel;
(d) use such force as is necessary and reasonable.

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

199 Dependants of removed non-citizens

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

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

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

(2) If:

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

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

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

(3) If:

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

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

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

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