ANNOTATED

IN THE HIGH COURT OF AUSTRALIA **No. S195 of 2016**
REGISTRY: SYDNEY

BETWEEN **PLAINTIFF S195/2016**
Plaintiff

AND **MINISTER FOR IMMIGRATION AND BORDER PROTECTION (CTH)**
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

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

THE PLAINTIFF'S WRITTEN SUBMISSIONS

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Part I: Certification

1. The plaintiff certifies that this submission is suitable for publication on the internet.

Part II: Statement of the issues

2. The issues for determination are identified in the questions reserved as per the special case (SC) filed on 14 March 2017.[1]

Part III: Compliance with section 78B of the *Judiciary Act 1903* (Cth)

3. The plaintiff filed and served a notice of a constitutional matter on the states and territories pursuant to section 78B of the *Judiciary Act 1903* (Cth) on 11 January 2017.[2]

Part IV: Statement of Material Facts

4. The facts are set out in the SC filed on 14 March 2017.[3]

Part V: Argument

5. The parties have agreed to a special case for the opinion of the Full Court of the High Court of Australia pursuant to 27.08.01 of the *High Court Rules 2004* (Cth) with regard to the amended application for an order to show cause filed by the plaintiff on 11 January 2017 as to why the constitutional writs pursuant to section 75 of the *Constitution* or section 33 of the *Judiciary Act 1903* (Cth) should not be issued with regard to the "agreements",[4] between the first and second defendants (Commonwealth) and the Independent State of Papua New Guinea (PNG) or the third defendant, (Broadspectrum) to "transfer" and "detain" the plaintiff at the Manus Island Regional Processing Centre (RPC) for the purposes of the regional processing of the plaintiff's refugee claims, including his removal from PNG.

The source of the present controversy

6. This case raises questions about the effect on actions of the defendants of a decision of the Supreme Court of Justice of the PNG in *Belden Norman Namah v Hon. Rimbink Pato, Minister for Foreign Affairs and others*, SC1497 (*Namah* decision) delivered on 26 April 2016. That case concerns the operations of the RPC,[5] (called MIPC by the Supreme Court of PNG).

7. On the court of five justices, Kandakasi J delivered a judgment with which Salika DCJ, Sakora J and Sawong J agreed. Those four justices also agreed with a separate judgment by Higgins J. The latter, however, apart from making it clear that he came to the same conclusion as the others (at [80]), dealt principally with the separate question of the validity of a purported amendment to the Constitution, which does not need to be considered. That issue was also dealt with in the latter part of the judgment of Kandakasi J (at [41] to [56]), which also does not need to be considered.

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[1] SC Book, page 12, [44].
[2] SC Book, page B2.
[3] SC Book, page 1A.
[4] As particularised at [13](a)-(h) of the amended application filed 11 January 2017, SC Book page A6.
[5] SC Book, page 848.

8. In the part of the *Namah* decision relevant to present purposes, the court considered the question:

> "Whether the bringing into PNG by the Australian Government and detaining the asylum seekers at RPC is contrary to their constitutional rights of personal liberty guaranteed by s42 of the Constitution?" (at [7]).

9. It is clear that the court was considering "the constitutionality of the two governments' actions" (at [28]), that is, the actions of both Australia and Papua New Guinea.

10. The essential findings on the question were:

> "It was the joint efforts of the Australian and PNG governments that has seen the asylum seekers brought into PNG and kept at the RPC against their will. This arrangements were outside the Constitutional and legal framework in PNG." (at [39])
>
> "Naturally, it follows that, the forceful bringing into and detention of the asylum seekers on RPC is unconstitutional and is therefore illegal." (at [39])

11. The plaintiff contends that as a result of the *Namah* decision, the "agreements" as particularised at [13](a)-(h) of the amended application, are void ab initio.[6]

12. The plaintiff makes three fundamental arguments. First, the plaintiff contends that it was beyond the statutory or non-statutory power of the Commonwealth to enter into or take action pursuant to the "agreements" with PNG or Broadspectrum to "transfer" and "detain" the plaintiff at the Manus Island RPC, during the first period of detention from the date of his transfer on 21 August 2013 until the gates were opened at the Manus Island RPC on 10 May 2016, given the *Namah* decision. As a consequence, the plaintiff was unlawfully detained from 21 August 2013 until 10 May 2017 and the plaintiff therefore seeks a declaration to this effect.[7]

13. The plaintiff contends it is beyond the statutory or non-statutory power of the Commonwealth to enter into and take action pursuant to the "agreements" with PNG or Broadspectrum, to subject the plaintiff to the "restrictions on liberty" which are "not shared by the public" for the purposes of removal from PNG, as per the removal notice and orders served on the plaintiff on 9 February 2017 by the Minister for Foreign Affairs and Immigration (PNG), which remain in effect, given there are "no reasonable prospects of removal within a reasonable time".[8] The plaintiff seeks a declaration to that effect and either a Writ of Habeas Corpus or mandatory injunction.[9]

14. The plaintiff contends that it is not necessary to show actual detention or a complete loss of liberty for a Writ of Habeas Corpus to sound. Rather, all that is required is that the plaintiff is subject to "restraints on liberty" which are "not shared by the public" and that there are not "reasonable prospects of removal, within a reasonable time." The plaintiff therefore applies to Court to re-open the decision in *Al-Kateb v. Godwin* [2004] HCA 37 (*Al-Kateb*).

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[6] SC Book page A6.
[7] Amended application, filed 11 January 2017, SC Book, A3.
[8] SC Book, page 11, [35]-[38], with the actual removal notices and orders from SC Book, page 870-873.
[9] Amended application, filed 11 January 2017, SC Book, A3.

The role of Australia in the RPC

15. The operation of the RPC has been the subject of several agreements between Australia and Papua New Guinea. At the time the plaintiff was brought to the RPC (21/8/13), the operative principal agreement was a Memorandum of Understanding in effect from 6 August 2013 (MOU).[10] Under the MOU "The Government of Australia will bear all Costs incurred under this MOU" (point 6 under "Guiding Principles", page 3), and there was the promise of "a package of assistance and other bilateral co-operation" (point 7 under "Guiding Principles", page 3).

16. A further more detailed agreement was constituted by Administrative Arrangements for the Temporary Regional Processing Centre (RPC), in effect from 3 April 2013.[11] Among their provisions were:

> 3.1 The Centre will be established by Australia and managed by the Administrator, supported by contracted service providers. Management of the contracts will be the responsibility of the Government of Australia.
>
> 3.10 The Government of Australia will appoint an Australian official as a Coordinator to work with the Operational Manager to assist in the management and control of the Centre.
>
> 3.11 The Australian Coordinator will be responsible for managing all Australian officials and service providers. This will include ensuring all contractors deliver services to standards outlined in their contracts. This will be done in close liaison with the Operational Manager.
>
> 3.12 The Coordinator will coordinate transfer of Transferees to and from the Centre during their arrival and departure from Manus.
>
> 3.13 The Coordinator, with assistance from service providers, will monitor the welfare, conduct and security of the Transferees and provide regular reports on these matters to the Operational Manager.
>
> 3.14 The Operational Manager will also liaise with the Manus Provincial Government, the Commander of the Naval Base and the Joint Committee. The Coordinator will also liaise with the Joint Committee.
>
> 3.15 Australia will establish a funding mechanism to meet all operating costs for Government of PNG officials involved with the establishment and operation of the Centre.
>
> 3.16 Australia will fund and arrange the establishment of the PNG Border Management System in Manus Province."

17. The 2013 Administrative Arrangements were replaced by others operative from 17 July 2014.[12] Among their provisions were:

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[10] SC Book, page 89.
[11] SC Book, page 70.

1.1 Consistent with Clause 9 of the RRA and Clause 6 of the MOU, the Government of Australia will bear all agreed Costs incurred under and incidental to the RRA and MOU, including any reasonable Costs associated with legal claims arising from activities under the MOU, excluding costs resulting from actions by employees or agents of the Government of PNG that are malicious, fraudulent, illegal or reckless.

3.1 The Government of Australia will manage the establishment and development of facilities at Centres. Construction will meet the Australian National Construction Code, as well as, PNG planning and building regulations.

5.1.1 A Centre will be established by Australia and managed by an Administrator, supported by contracted Service Providers. Management of relevant contracts will be the responsibility of the Government of Australia.

5.3.3 The Government of Australia will appoint an officer as a Programme Coordinator. The Programme Coordinator will be responsible for managing all Australian officers and services contracts in relation to a Centre. This will include ensuring all contractors deliver services to standards outlined in their contracts. This will be done in close liaison with the Operational Manager.

5.3.4 The Programme Coordinator or delegate will ensure Service Providers coordinate the transfer of Transferees to and from a Centre during their arrival and departure.

18. Thus, Australia paid the entire cost of the RPC. It managed its establishment and development, and managed all the contracted Service Providers.[13] A Programme Coordinator appointed by the Government of Australia was to manage all Australian officers and services contracts. She or he was also to ensure that service providers coordinate the transfer of transferees arriving and departing. These activities constitute the major part of the RPC's operation. They were undertaken by Australia alone, with no participation by PNG. Australia would have been doing very little more if it had been conducting alone a centre established in Australian territory.

19. The RPC is in effect an Australian operation conducted in the territory of Papua New Guinea. Though under the jurisdiction of Papua New Guinea, that has minimal impact on its daily operation. The essential division of functions is that Australia runs the centre, while Papua New Guinea takes over the processing of refugee claims, and the settlement of refugees.

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[12] SC Book, page 95.
[13] SC Book, page 8, [28].

Detention an integral part of the scheme

20. The *Namah* decision establishes that the plaintiff was detained at the RPC. The foundation for that detention was provided by the Administrative Arrangements in combination with the Papua New Guinea Migration Act. The 2013 Administrative Arrangements provided:

> 1.3 The PNG Minister for Foreign Affairs and Immigration will direct Transferees to reside in the Centre in accordance with section 15C(1) of the PNG *Migration Act 1978.*

21. The 2014 Administrative Arrangements provided:

> 2.3 The PNG Minister for Foreign Affairs and Immigration will direct a Transferee to reside in a Centre in accordance with section 15C(1) of the *Migration Act 1978.*

22. Section 15C of the Migration Act 1978 provides:

> (2) A direction under Subsection (1) is sufficient authority for an officer, police officer or authorized person to detain and take into custody the refugee or class of refugees or non-citizen claiming to be a refugee specified in the order for the purpose of taking that refugee or class of refugees or non-citizen claiming to be a refugee to a relocation centre and keeping that refugee or class of refugees or non-citizen claiming to be a refugee in that relocation centre.
>
> (3) An officer, police officer, or authorised person acting under a direction under Subsection (1) may use such force as is reasonably necessary for the purpose of taking a person to a relocation centre.

23. Pursuant to Section 16(d), a person who disobeys or disregards an obligation imposed on him under or by virtue of the Act is guilty of an offence, and liable to be fined up to K5000 or imprisoned for up to six months. Thus transferees were to be compelled to "reside" in the Centre. [14]

24. Other parts of the Administrative Arrangements show that departure from the centre required permission. The 2013 Administrative Arrangements:

> 3.18 For Transferees in the process of having their claims to protection assessed, or who have been determined to be a refugee, the transferee will be permitted to move in and outside the Centre during the day, subject to appropriate security arrangements being in place, for escorted activities including sporting events, shopping, cultural activities and any other activities approved by the Administrator.
>
> 3.19 The Administrator may approve Transferees who are in the process of having their claims to protection assessed or who have been determined to be a refugee, and who have skills that may be useful to the local community, to leave the Centre to work during the day.

[14] SC Book, page 567.

3.20 Where a Transferee is found not to be a refugee, they will not be permitted to leave the Centre without appropriate security arrangement in place.

25. The 2014 Administrative Arrangements contain practically identical terms (5.4.2, 5.4.4, 5.4.5).[15] A person who is required under the threat of a penalty to reside in a location, and not allowed to leave without permission, and then only under escort, is detained. That was an integral part of the agreed scheme from the start.

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26. It is not to the point that Australia would not have sought to impose such a restriction if Papua New Guinea had not done so. Australia clearly knew that such a condition was part of the scheme, and agreed to it. Australia had no power to impose such a condition if Papua New Guinea did not want it. In any event, it would scarcely have been diplomatic to offend the independence of Papua New Guinea by attempting to require detention if Papua New Guinea had not itself required it.

27. The RPC was a joint enterprise between Australia and Papua New Guinea in which Australia took the major role, providing the whole of the funding and controlling the bulk
20 of its practical operation.[16]

28. There was, and is, a contract between the Commonwealth and Broadspectrum, for the provision of services at the RPC in effect from 24 March 2014.[17] That contract serves the purpose of the detention of the plaintiff and others at the RPC, and thus has among its purposes a breach of the law of Papua New Guinea. For that reason it was beyond the power of the Commonwealth to enter into it. That contract is therefore void ab initio.

29. There is a quite separate basis on which Australia had no power to enter into any of the two Memoranda of Understanding, or the two sets of Administrative Arrangements. The
30 *Namah* decision establishes that Papua New Guinea had no power to enter into them. A contract is a reciprocal arrangement. One cannot enter into an agreement with another party who has no power to enter into the agreement. No Australian statute could confer such power on Papua New Guinea. That would have the effect of over-riding the constitution of Papua New Guinea, an utterly impossible prospect. Thus on this basis alone all the agreements and arrangements between Australia and Papua New Guinea are necessarily void ab initio.

The consequences of the *Namah* decision

40 30. The *Namah* decision establishes that the transfer of the plaintiff to Papua New Guinea and his detention at the RPC was unconstitutional and illegal under the law of PNG. It is thereby established that Australia took part in PNG in actions that were unconstitutional and illegal under the law of PNG. Despite the fact that Australia was not a party in the *Namah decision*, the Supreme Court of PNG was entitled to consider and adjudicate upon the actions of Australia as incidental to its exercise of its jurisdiction.[18]

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[15] SC Book, page 95.
[16] SC Book, page 8, [28].
[17] SC Book, page [112].
[18] "The Sacrosanctity of the Foreign Act of State", *Studies in International Law*, 1973, 420 pp 433–4, quoting von Bar, *Das Internationale Privat- und Strafrecht*, 1889, Vol 2 at 685, translated by Gillespie as *Private International Law*, 1892, p 1121. See also *Ditfort* at FCR 372–3

The principles of international comity

31. Consistent with the principles of international comity, the courts of one state defer to the judicial decisions by the superior court of another state, subject to the exceptions.[19] In *Somerset v Steward* (1772) 98 ER 499 and *Robinson v Bland* 2 Burr R 1077; 97 ER 717 (KB) per Lord Mansfield at 509 observed:

> In the silence of any positive rule, affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interests.

32. In *Hilton v Guyot* 159 US 113 (1895) at 164:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand nor of mere courtesy and good will, upon the other. But it is the recognition, which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protections of its laws.

33. More recently, in the context of Australia's participation in the regional processing regime in Nauru, Keane J., observed in *M68/2015* at [250], "[c]onsiderations of international comity and judicial restraint militate strongly against a construction of s 198AHA(5) that would require an Australian domestic court to accept an invitation to rule upon the validity or invalidity of a law of Nauru as a matter of Nauru's domestic law."

The decisions of the executive government

34. The Commonwealth had no power to enter into the first or second Memoranda of Understanding, or the 2013 and 2014 Administrative Arrangements, because each had as an inherent part of its purpose the illegal transfer of the plaintiff to Papua New Guinea and his illegal detention at the RPC.

35. Similarly, the second defendant had no power to designate Papua New Guinea as a regional processing country. The Statement of Arrangements to which his Statement of Reasons refers at para 12(2) also envisaged detention (see clause 2b).[20]

36. In the domestic sphere, the position in relation to the power of the executive is clear:

> "the executive has no power to authorise a breach of the law."
> (*A v Hayden* [1984] 156 CLR 532 at 540.4 per Gibbs CJ)

> "The incapacity of the executive government to dispense its servants from obedience to laws made by Parliament is the cornerstone of a parliamentary democracy" (ibid per Brennan J at 580.3)

; ALR 288 ; *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 ; 195 ALR 502 ; 72 ALD 613 ; [2003] HCA 6 at [100] per McHugh and Gummow JJ, [122] per Hayne J.

[19] See generally, Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights and Remedies, and Especially in regard to Marriages Divorces Wills Successions and Judgments* (1834; Hilliard, Gray and Co), §38; Dicey and Morris, Conflict of Laws, 11th ed. (1987), pp. 100-101.

[20] Court Book, page 63

... "neither the Crown nor the executive has any common law right or power to dispense with the law or to authorise illegality..." (ibid per Deane J at 592.6)

Murphy J went further:

"Neither the Commonwealth nor any of its Ministers, officers or agents, military or civilian, can lawfully authorize the commission by anyone in another country of conduct which is an offence against the laws of that country and is not authorized by international law (for example, by the laws of war). Whether Parliament could empower such authorization does not arise for decision; it has never purported to do so. Under our Constitution and laws, Australia is a law-abiding member of the community of nations." (at 562.6)

37. One way of approaching the fundamental issue in this case is to ask whether the principle that applies domestically applies also to acts in other jurisdictions. There are powerful reasons why it should.

38. First, it is desirable that the law be coherent as between the domestic and international spheres. Second, respect for the sovereignty of other states is affronted by the existence or exercise of power to engage in illegal activity in their jurisdictions. Even more so when that does not exist in one's own jurisdiction. Third, peaceful co-existence between nations would be seriously undermined by regarding one's constitution as conferring such a power, let alone using it.

39. *A v Hayden* involved the executive government purporting to authorise a breach of the law. It stands as authority for the inability of the executive to do so. It does not deal directly with the circumstance adverted to by Murphy J, of whether such authorisation could be given by the parliament. There maybe no need to consider that issue for the purpose of this case, but if there were, the plaintiff would contend that it is necessarily implied in the constitution of a sovereign state established under the rule of law that its powers are not granted to serve illegal purposes. To do so would undermine the rule of law which is the foundation of such a constitution, and which it in turn is framed to preserve. It is fundamentally inconsistent with the constitution of a sovereign state under the rule of law that its constitution should enable, allow or encourage illegal acts. The reasons advanced in the previous paragraph above support this position.

The powers of the legislature

40. As to the possibility of illegal activity in another jurisdiction being authorised by the legislature, if the constitution allowed it, the serious invasion of foreign rights, with the potentially perilous consequences, would mandate that such a result could be achieved only by the use of the clearest and most express words. See *Coco v R* (1994) 179 CLR 427 at 436-437 per Mason, Brennan, Gaudron and McHugh JJ: "The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language." There are many formulations of this principle by courts of high authority. In *Al-Kateb*, Gleeson CJ., articulated the principle in the following way at 577 [19]: "Where what is involved is the interpretation of legislation said to confer upon the Executive a power of administrative detention that is indefinite in duration, and that may be permanent, there comes into play a principle of legality, which governs both Parliament and the courts. In

exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. That principle has been re-affirmed by this Court in recent cases (60). It is not new. In 1908, in this Court, O'Connor J referred to a passage from the fourth edition of Maxwell on Statutes which stated that "[i]t is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness''(61)." Such words are entirely lacking in Section 198AHA of the Migration Act.

Beyond the scope and purpose of the *Migration Act 1958* (Cth)

41. It is in this context that the plaintiff contends it was beyond the statutory or non-statutory power of the Commonwealth to enter into or take action pursuant to the "agreements" with PNG or Broadspectrum, which were declared "unconstitutional" or "illegal" in PNG. No authority could allow the Commonwealth to engage in illegal conduct in a foreign state.

Section 198AB – The Designation Decision

42. In so far as section 198AB(1) of the *Migration Act 1958* (Cth) provides the Minister of Immigration and Border Protection (Cth) with the power to designate a regional processing country if it is the national interest, the designation decision is invalid if the decision has an illegal purpose. The purpose of the designation decision was declared illegal by the decision of the Supreme Court of PNG in the *Namah* decision and it is therefore void, ab initio. Such a decision could be authorised by statute only by words of irresistible clearness, which are lacking. The same applies to taking direction pursuant to section 198AD(5) of the *Migration Act 1958* (Cth) and the taking decision pursuant to section 198AD(2) of the *Migration Act 1958* (Cth).

Section 198AHA of the *Migration Act 1958* (Cth)

43. Given the declaration by the *Namah* decision at [39] that the "agreements" between PNG and the Commonwealth were "outside the constitutional framework of PNG" and that the "transfer" and "detention" of the plaintiff at the Manus Island RPC, were "unconstitutional" and "illegal" and are therefore void ab initio, it follows that:

    a) there was no lawful "arrangement" with PNG, pursuant to section 198AHA(1);

    b) the "taking of any action" by the Commonwealth in relation to the purported "arrangement" pursuant to section 198AHA(2)(a)-(c) was "unconstitutional" and "illegal" in PNG and therefore beyond the statutory or non-statutory power of the Commonwealth;

Beyond the heads of power of the Australian *Constitution*

44. The plaintiff contends that is was beyond any head of power under the *Constitution of Australia* to engage in illegal conduct in a foreign state. The purported exercise of power

by the Commonwealth under the relevant provisions of the *Migration Act 1958* (Cth), including section 198AHA, to enter into or take action pursuant to the "agreements" between the Commonwealth and PNG or Broadspectrum, being illegal in PNG, therefore had (a) no lawful connection with any of the non-purposive heads of power under section 51 of the *Constitution*, including the aliens power under section 51(xix) of the *Constitution;* or (b) could not be reasonably capable of being seen as necessary nor proportionate to any purposive head of power under the *Constitution,* including the external affairs power under section 51(xxix) of the *Constitution;* or (c) or could not be reasonably capable of being seen as necessary nor proportionate to any incidental exercise of power under section 51 of the *Constitution,* including the aliens or external affairs powers.

45. With regard to the aliens power, defined as a non-purposive power under the Australian *Constitution,* the appropriate test is the "sufficient connection test", whereby there need only be a connection between the law and the subject matter that is not "insubstantial, tenuous or distant".[21] If the actions taken under section 198AHA(2) are declared illegal by the superior court of the regional processing country, there can be no lawful connection between the exercise of power under section 198AHA and the aliens power under the *Constitution,* nor can it be characterised as an exercise of power under a law with respect to that subject matter.

46. Similarly, with regard to the external affairs power, defined as a purposive power, or with regard to any incidental powers under the Australian *Constitution,* the appropriate test to be applied is the test "necessity and proportionality". Thus, if the actions taken under section 198AHA(2) are declared illegal by the superior court of the regional processing country, the exercise of power by the Commonwealth under section 198AHA(2) cannot be reasonably capable of being seen as necessary nor proportionate to the external affairs power, nor any other purposive or incidental power under section 51 of the *Constitution.*

The plaintiff's present situation

47. The plaintiff has recently (9 February 2017) been served with several documents, among them a Notice of Determination advising that his claim for refugee status has been rejected, and a Notice of Removal, advising that the special visa that has allowed him to remain in Papua New Guinea so far has been revoked, and that he therefore will be removed.[22] However, the only country to which he can be removed, Iran, will not accept an involuntary return.[23] He therefore faces restrictions on his liberty not shared by the public and there are no reasonable prospects of removal within a reasonable time.

48. The plaintiff contends it is beyond the statutory or non-statutory power of the Commonwealth to enter into or to take action pursuant to the "agreements" with PNG or Broadspectrum, to subject the plaintiff to "restrictions on liberty" which are not "shared by the public" for the purposes of his removal from PNG, as per the removal notice and orders served on the plaintiff on 9 February 2017 by the Minister for Foreign Affairs and Immigration (PNG), which remain in effect, given there are no reasonable prospects of removal within a reasonable time. First, for the reasons outlined above, if there was no

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[21] *New South Wales v Commonwealth* (2006) 229 CLR 1 at 143 [275] (Gleeson CJ, Gummow, Hayne, Heydon and Grennan JJ); Cunliffe v Commonwealth (1994) 182 CLR 272 at 314-15 (Brennan J); Commonwealth v Tasmania (1983) 158 CLR 1 (Tasmanian Dam Case) at 152-3 (Mason J).

[22] SC Book, page 11, [35]-[38], with the actual removal notices and orders from SC Book, page 870-873.

[23] SC Book, page 11, [38].

power to enter into and to take action pursuant to the "agreements" to participate in the "transfer" and "detention" of the plaintiff in PNG, then there was no power to participate in the processing of the plaintiff's claims or to impose restrictions on his liberty for removal from PNG without his consent.

Indefinite detention for removal – re-opening *Al-Kateb v. Godwin* [2004] HCA 37

49. The plaintiff contends in the alternative, that it is beyond the statutory or non-statutory power of the Commonwealth to enter into or to take action pursuant to the "agreements" with PNG or Broadspectrum, to subject the plaintiff to "restrictions on liberty" which are not "shared by the public" for the purposes of his removal from PNG, given he has already been detained for almost four years and that there are no reasonable prospects of removal within a reasonable time. The plaintiff therefore applies to the Court to re-open the decision in *Al-Kateb*. It is established that this Court may reconsider and depart from previous decisions,[24] but it should do so with caution.[25] The Court is divided as to whether leave is required to reopen a previous decision, however, where convenient, the Court may avoid that division by considering the established factors, *Plaintiff M47/2012 v Director –General of Security & Ors* (2012) 251 CLR 1, Heydon J., at [350]. They were identified but are not limited to the factors in *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ,. The question as to whether *Al-Kateb* should be re-opened was addressed in *Plaintiff M47/2012 v Director –General of Security & Ors* (2012) 251 CLR 1,[26] and in *Plaintiff M76/2013 v Minister for Immigration and Multicultural Affairs and Citizenship* (2013) 251CLR 322.[27] It cannot be said with confidence that the decision in *Al-Kateb* "rests upon a principle carefully worked out in a significant succession of cases." The majority view in *Al-Kateb* had the effect of bringing into question the approach of this Court in a long line of decisions preceding it, from *Potter* to *Lim*.[28] Whilst there were not significant differences between the reasons of the justices constituting the majority,[29] there were significant differences between the majority and the minority views. There was also considerable support for the minority view by the Full Court of the Federal Court of Australia with Black CJ, Sundberg and Weinberg JJ., unanimously upholding the decision of Merkel J., in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 at 73 and 87.[30] It may be contended that the decision in *Al-Kateb* has "achieved no useful result but on the contrary had led to considerable inconvenience" in light of the widespread criticisim by legislators,[31] the peak professional bodies,[32] academics,[33] the media,[34] and the international community.[35] As Heydon J.,

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[24] *Plaintiff M76/2013* per Keifel and Keane JJ., at [191].
[25] *Attorney-General (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 243-4.
[26] In favour of re-opening *Al-Kateb* were Gummow at [120] and Bell JJ., at [526]; with Heyden J., opposed at [351]; with Hayne J., of the view that Al-*Kateb* need not be examined, with French CJ at [226], Keifel J., at [461] and Crennan J., at [406] agreeing.
[27] Whilst Crennan, Bell and Gageler JJ at [136] did not see the occasion to re-open *Al-Kateb*, their Honours expressed approval at [139] for the principles articulated in *Lim* and the minority view in *Al-Kateb*. French CJ at [31] was of the view that "this [wa]s not a case in which this court should consider reopening the decision in *Al-Kateb*. Nor [w]as it necessary to confirm its correctness." Hayne J., at [125] was of the view that "this court should not depart from what was then held to be the proper construction of the relevant provisions". Kiefel and Keane JJ at [191]-[201] were of a similar view that the decision in *Al-Kateb v Godwin* should be regarded as "having decisively quelled the controversy as to the interpretation of the Act which arose in that case", and "it should not be reopened".
[28] See *Plaintiff M47/2012* Gummow J., at [118] and [120]; Bell J., at [532]; *Plaintiff M76/2013*; per Crennan, Bell and Gageler JJ., at [139] and [141].
[29] *Plaintiff M76/2013* per Kiefel and Keane JJ at [193]
[30] Noting that the application for special leave by the Minister was refused by Gummow, Kirby and Hayne JJ., on the grounds that Mr Al Masri had left the country and the issues would be resolved by the High Court in Al Kateb, see [2003] HCATrans 305, Gummow J., at line 267; Kirby J., [26-27]; [77]-[89].
[31] Senate, Debates, 12 August 2004, p. 25 950.
[32] See various policy statements by the Australian Human Rights Commission, Law Council of Australia, Australian Medical Association, Royal Australian and New Zealand College of Psychiatrists, Royal Australian College of General Practitioners, Royal Australian College of Physicians.
[33] See George Williams, A bill of rights for Australia, UNSW Press, 2000, p. 36.

observed at [334] in *Plaintiff M47/2012,* "[f]rom the day it was handed down…[i]t also became a widely criticised decision because of its impact on liberty." The occasion to overturn a matter should only arise if the critical factual premise of that matter exists in this matter.[36] The essential factual premise that was before this Court in *Al-Kateb* is the same in this matter: Can the Commonwealth exercise power to indefinitely detain or restrict the liberty of an alien who is 'functionally" stateless for the purposes of removal, whether it is from Australia or extraterritorially, if there are no reasonable prospects of removal within a reasonable time? This proposition does not change, whether the plaintiff remains in PNG, is taken to Nauru or another third party state, or indeed, if the plaintiff comes to Australia – he is "functionally" stateless.

Indefinite detention - beyond the power of the Commonwealth|

50. Based on the principle of legality cited above, it is for the following four substantive reasons that the decision in *Al-Kateb* should be set aside and the minority view adopted. First, the exercise of power by the Commonwealth to participate in an indefinite restriction on the liberty of the plaintiff, for the purposes of removal from PNG, is beyond the scope and purpose of section 198AHA of the *Migration Act 1958* (Cth). Second, there is no lawful sufficient connection with any non-purposive head of power under of Australian *Constitution*, nor can it be contended that the exercise of power to participate in such a detention or restriction on liberty is reasonably capable of being seen as necessary or proportionate for the purposes of removal under any of the purposive or incidental heads of power of the Australia *Constitution*. Third, such a detention or restriction on liberty crosses the line from a non-punitive detention into a punitive detention without curial order and is also therefore beyond the executive or non-statutory power of the Commonwealth and in violation of the separation of powers doctrine under Chapter III of the Australian *Constitution.* Finally, such a restriction on liberty is in violation of the principles of customary international law, including the principle of non-refoulement when combined with the prohibition against arbitrary and indefinite detention and torture, inhuman or degrading treatment, as adopted and incorporated into Australian law.

Remedies - Writ of Habeas Corpus

51. The plaintiff seeks declarations to the effect that his detention from 21 August 2013 until 10 May 2016 and that the restrictions on his liberty for the purposes of removal from 9 February 2017 are illegal and either a Writ of Habeas Corpus or mandatory injunction restoring his liberty. The plaintiff contends that the conditions of the removal order and notices served on 9 February 2017 by the Minister for Foreign Affairs and Immigration (PNG) subject the plaintiff to "restrictions on liberty" which are not "shared by the public" and there are no reasonable prospects of removal within a reasonable time.

Personal liberty

52. Personal liberty is a foundational value of the common law and our constitutional arrangements. The right to personal liberty is inherent in every human being subject to

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[34] Editorial, 'The tragic fate of asylum seekers', The Age, 9 August 2004, p. 12.
[35] The United Nations Human Rights Committee (UNHCR) referred to Australian case law including Al-Kateb v Godwin, saying "the Committee considers that the facts in the present case involve a violation of article 9, paragraph 4." F.K.A.G. et al v Australia, Communication No. 2094/2011, UN Doc CCPR/C/108/D/2094/2011 (2013) para 9.6
[36] *Plaintiff M47/2012* per Heydon J., at [352]

law.[37] As Blackstone observed, protecting the liberty of individuals is "the first and primary end of human laws",[38] and these "rights and liberties [were] our birthright to enjoy entire", unless constrained by law.[39] Blackstone defined the right to liberty as consisting of "the power of loco-motion, of changing situation, or removing one's person to whatever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law."[40] So, said Blackstone, under the common law:[41] keeping a man against his will in a private house, putting him in stocks, arresting or forcibly detaining him in the street, is an imprisonment. The courts have long treated the right to liberty and access to habeas corpus as "inherent"[42] and a human "birthright". Blackstone described the Writ of Habeas Corpus Ad Subjiciendum as "the great and efficacious writ in all manner of illegal confinements".[43]

Broad, flexible and adaptable

53. It is an essential quality of the Writ of Habeas Corpus, that it is a broad, flexible and adaptable remedy. Lord Donaldson observed in *R v Secretary of State for the Home Department; Ex parte Muboyayi*,[44] that the Writ of Habeas Corpus, "the greatest and oldest of all the prerogative writs, is quite capable of adapting itself to the circumstances of the times". Similarly Taylor LJ., said the "great writ of habeas corpus has over the centuries been a flexible remedy adaptable to changed circumstances."[45] In *Al-Kateb*, Gleeson CJ viewed the Writ of Habeas Corpus as "a basic protection of liberty, and its scope is broad and flexible".[46] This quality has enabled the courts to develop the Writ into the swift and efficient means for vindicating personal liberty which it is today.

Power, custody or control: restraints amenable to habeas corpus

There is no basis to adopt a narrow view of the principle of liberty which the Writ of Habeas Corpus seeks to protect, which extends beyond imprisonment to cover all restrictions on personal liberty not subject to law. The leading authorities from the UK and the USA support this approach. In *Barnardo v Ford* [1892] AC 326, Lord Herschell observed at 338, the writ will issue where someone was "in unlawful custody, power or control" of another person. Lord Macnaghten said at 340 that the issue was whether the person was "under ... control or within ... reach." In *R v Secretary of State for the Home Department; Ex parte O'Brien* [1923] 2 KB 361, Atkin LJ., observed at 398, "[a]ctual physical custody is obviously not essential" and that "custody" or "control" are the phrases used passim in the opinions of the Lords in *Barnardo v Ford*." The Supreme Court of USA in *Jones v Cunningham* (1963) 371 US 236 at 239 held that "the use of habeas corpus has not been restricted to situations in which the applicant is in actual physical custody". The court went on to say at 240: "History, usage and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus." In the court's view, the scope of habeas corpus should reflect its fundamental purpose: "It is not

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[37] See eg *Opinion on the Writ of* ***Habeas Corpus*** (1758) Wilm 77 at 83 ; 97 ER 29 at 33 per Wilmot J; *Ex parte Nichols* [1839] SCC 123 at 133 per Willis J (Supreme Court of New South Wales).
[38] Blackstone, *Commentary on the Laws of England*, (1765), Vol 1, p 120.
[39] Ibid p 140.
[40] Ibid p. 130.
[41] Ibid p. 132.
[42] *Ex parte Walsh and Johnson; Re Yates* (1925) 37 CLR 36 at 79 per Isaacs J.
[43] Blackstone, *Commentary on the Laws of England*, (1768), Vol 3, p 131.
[44] [1992] QB 244 at 258 (cited with approval by Gleeson CJ in *Al-Kateb v Godwin* (2004) 219 CLR 562 at 579, [25]).
[45] At 269.
[46] (2004) 219 CLR 562 at 579, [25].

now and never has been a static narrow formalistic remedy; its scope has grown to achieve its grand purpose — the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."[47] In terms of Australian jurisprudence, in *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452 , the litigation concerning asylum seekers on the *MV Tampa,* North J., at first instance referred to the American authorities and the leading texts,[48] and viewed the test as "whether the restraint imposed is one that is not shared by the public generally."[49] North J., held the asylum seekers were so detained and issued habeas corpus after finding the detention to be unlawful. In the Full Court in *Ruddock v Vadarlis*,[50] Black CJ., and French J., agreed with the approach of North J., regarding the test for the Writ of Habeas Corpus, but ultimately disagreed with the result, with the judgment by North J., overturned on appeal by Beaumont and French JJ., with Black CJ., dissenting, on the ground that the detention was a lawful exercise of the executive power of the Commonwealth. Black CJ., held "it is not necessary to show actual detention and complete loss of freedom to found the issue of habeas corpus. Rather, custody and control are the required elements."[51] Citing authorities including *Jones v Cunningham* (1963) 371 US 236, the Chief Justice said applicants must show they are "subject to restraints not shared by the public".[52] French J., also observed that close custody was not required and nor should be a fetter on the development of the Writ, which was "a remedy for an unauthorised restraint be it total or partial".[53] After citing *Jones v Cunningham*, his Honour held: "In the end it is necessary to consider whether on the facts of the case there is a restraint on liberty which is not authorised by law. The relevant liberty is freedom of movement."[54] French J., held the restraint was not here amenable to habeas corpus because it was an incident of what he found to be lawful action on the part of the Commonwealth.[55] In *Hicks v Ruddock* (2007) 156 FCR 574, at [34]; [47]; [50]; [56] and [77], Tamberlin J refused to strike out an application for habeas corpus directed to an Australian government minister in respect of the applicant's detention in a foreign country because, following *R v Secretary of State for the Home Department; Ex parte O'Brien*, it could not be said the claim had no reasonable prospects of success. On the basis of this analysis, close custody, imprisonment, detention or something analogous is not a necessary element of the right to habeas corpus.[56] Rather, the Writ of Habeas Corpus will sound where there are restrictions on liberty which are not shared by the public generally and are not subject to law.[57]

Mandatory Injunction

54. Finally, in the alternative, the plaintiff applies to the Court for a mandatory injunction directing the Commonwealth and Broadspectrum to take all reasonable steps to bring him before the Court and thereafter submit to the further orders of the Court as to his custody. The court has power to make such an order by virtue of the grant of power given to the court under section 71 of the *Constitution* or under section 32 of the *Judiciary Act 1903* (Cth) and also by reference to the court's power to make orders in matters properly before

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[47] At 243.
[48] At 474, [86], referring to Clark and McCoy, ***Habeas Corpus:*** *Australia, New Zealand, The South Pacific*, (2000), p 66; and Sharpe, *The Law of* ***Habeas Corpus***, 2nd ed, (1989), p 175.
[49] (2001) 110 FCR 452 at 474, [86].
[50] (2001) 110 FCR 491.
[51] At 509, [69].
[52] (2001) 110 FCR 491 at 509, [69].
[53] At 547, [209].
[54] At 547, [210].
[55] At 548, [215].
[56] *R v Secretary of State for Home Affairs; Ex parte O'Brien* [1923] 2 KB 361 at 391 per Scrutton LJ and 398 per Atkin LJ;*Ruddock v Vadarlis* (2001) 110 FCR 491 at 509, [69] per Black CJ and 547, [209] per French J.
[57] *Jones v Cunningham* (1963) 371 US 236 at 240; *Re C (Mental Patient: Contact)* [1993] 1 Fam Law R 940 at 944; *Victorian Council for Civil Liberties v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452 at 474, [86] per North J;*Ruddock v Vadarlis* (2001) 110 FCR 491 at 509, [69] per Black CJ. 547, [211] per French J.

it "as an incident of the general grant to it as a superior court of law and equity of the jurisdiction to deal with such matters": *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at CLR 623; *Patrick Stevedores Operations (No 2) Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 32; 153 ALR 643.[58] It is of no consequence that the order sought against the Commonwealth relates to a person situated outside the jurisdiction as the order is sought in personam. "It has been well established for over 200 years that a court has jurisdiction to make an order against a person or body within the jurisdiction of the court albeit to do an act in respect of a person outside the jurisdiction", *Penn v Lord Baltimore* (1750) 1 Ves Sen 444; 27 ER 1132. The principle is based upon the proposition that the court is acting in its equitable jurisdiction in relation to a person within its jurisdiction: *Tritech Technology Pty Ltd v Gordon* (2000) 48 IPR 52 at 58. The relevant principle was stated succinctly by Brooking J in *National Australia Bank Ltd v Dessau* [1988] VR 521 at 522: "That a court of equity, acting as it does in personam, may order someone amenable to its jurisdiction to do or refrain from doing an act abroad was established quite early in our history, before even the days of the Boston Tea Party: (*Penn v Lord Baltimore* (1750) 1 Ves Sen 444; 27 ER 1132)."

55. The plaintiff's unwilling presence at the RPC exposed him to witnessing the murder of a fellow refugee. He gave evidence at the trial of the perpetrators, who were convicted and sentenced to substantial terms of imprisonment. The plaintiff did not take part in the refugee assessment process because he fears reprisals against him in Papua New Guinea.

56. The plaintiff is in Papua New Guinea because of action taken against him, against his will, by the Commonwealth of Australia. He is now in breach of law of Papua New Guinea because of action taken against him by the Commonwealth of Australia in breach of the law of Papua New Guinea.

57. The consequent action taken against him by the PNG Minister for Foreign Affairs and Immigration is the direct result of the scheme of the 2014 Administrative Agreements as follows:

> 2.4 The PNG Minister for Foreign Affairs and Immigration, under section 20 of the *Migration Act 1978* (PNG), will exempt a Transferee from section 3 (prohibition of entry without entry permit) and Section 7 (unlawful presence in country). This exemption ceases to apply when:
>
> a) a Transferee is determined to be a Refugee and granted a visa to stay in PNG, or
>
> b) the Minister determines the Transferee is not a Refugee, or
>
> c) the Transferee departs PNG under voluntary return arrangements or for third country resettlement.
>
> 2.5 The PNG Minister for Foreign Affairs and Immigration, in accordance with the *Migration Act 1978* (PNG), will enable a Refugee to remain lawfully in PNG by issuing a Refugee Visa.

[58] *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 393-396, 399-401; 162 ALR 294.

58. The plaintiff's current situation, facing indefinite detention in Papua New Guinea, is the direct result of agreements between the Commonwealth defendants and Papua New Guinea that are void ab initio. The Commonwealth defendants are no doubt still spending Australian funds, pursuant to those void agreements, maintaining the plaintiff (and hundreds of others) in Papua New Guinea. The plaintiff has suffered a grave wrong that should be remedied.

Part VI: Legislative provisions

59. Division 8, subdivision A-C of the *Migration Act 1958* (Cth) as at 21 August 2013, the time the plaintiff was taken to PNG.

a) Section 198AB of the *Migration Act 1958* (Cth) (designation decision as at 9 October 2012).

b) Section 198AD of the *Migration Act 1958* (Cth) (taking direction as at 29 July 2013).

c) Section 198AD) of the *Migration Act 1958* (Cth) (taking decision as at 21 August 2013).

d) Section 198AHA of the *Migration Act 1958* (Cth) inserted on 30 June 2015 with effect from 18 August 2012)

Part VII: Orders

60. The plaintiff seeks the relief in the amended application filed 11 January 2017.

Part VIII: Estimate

61. The plaintiff estimates up to two hours for the presentation of oral argument.

Date: 20 March 2017

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Division 8—Removal of unlawful non-citizens etc.

Subdivision A—Removal

197C Australia's non-refoulement obligations irrelevant to removal of unlawful non-citizens under section 198

(1) For the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.

(2) An officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen.

198 Removal from Australia of unlawful non-citizens

Removal on request

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

Removal of transitory persons brought to Australia for a temporary purpose

(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).

Note: Some unlawful non-citizens are transitory persons. Section 198B provides for transitory persons to be brought to Australia for a temporary purpose. See the definition of ***transitory person*** in subsection 5(1).

(1B) Subsection (1C) applies if:

(a) an unlawful non-citizen who is not an unauthorised maritime arrival has been brought to Australia under section 198B for a temporary purpose; and

(b) the non-citizen gives birth to a child while the non-citizen is in Australia; and

(c) the child is a transitory person within the meaning of paragraph (e) of the definition of ***transitory person*** in subsection 5(1).

(1C) An officer must remove the non-citizen and the child as soon as reasonably practicable after the non-citizen no longer needs to be in Australia for that purpose (whether or not that purpose has been achieved).

Removal of unlawful non-citizens in other circumstances

(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) neither applied for a substantive visa in accordance with subsection 195(1) nor applied under section 137K for revocation of the cancellation of a substantive visa;

regardless of whether the non-citizen has made a valid application for a bridging visa.

(5A) Despite subsection (5), an officer must not remove an unlawful non-citizen if:

(a) the non-citizen has made a valid application for a protection visa (even if the application was made outside the time allowed by subsection 195(1)); and

(b) either:

(i) the grant of the visa has not been refused; or

(ii) the application has not been finally determined.

(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;
(ii) 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 *Legislation 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.

(2A) However, subsection (2) does not apply in relation to a person who is an unauthorised maritime arrival only because of subsection 5AA(1A) or (1AA) if the person's parent mentioned in the relevant subsection entered Australia before 13 August 2012.

Note 1: Under subsection 5AA(1A) or (1AA) a person born in Australia or in a regional processing country may be an unauthorised maritime arrival in some circumstances.

Note 2: This section does not apply in relation to a person who entered Australia by sea before 13 August 2012: see the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*.

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, the person is covered by subsection (1A) or (1B).

(1A) A transitory person is covered by this subsection 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).

(1B) A transitory person (a ***transitory child***) is covered by this subsection if:

(a) a transitory person covered by subsection (1A) gives birth to the transitory child while in Australia; and

(b) the transitory child is detained under section 189; and

(c) the transitory child is a transitory person because of paragraph (e) of the definition of ***transitory person*** in subsection 5(1).

(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.

198AHA Power to take action etc. in relation to arrangement or regional processing functions of a country

(1) This section applies if the Commonwealth enters into an arrangement with a person or body in relation to the regional processing functions of a country.

(2) The Commonwealth may do all or any of the following:
  (a) take, or cause to be taken, any action in relation to the arrangement or the regional processing functions of the country;
  (b) make payments, or cause payments to be made, in relation to the arrangement or the regional processing functions of the country;
  (c) do anything else that is incidental or conducive to the taking of such action or the making of such payments.

(3) To avoid doubt, subsection (2) is intended to ensure that the Commonwealth has capacity and authority to take action, without otherwise affecting the lawfulness of that action.

(4) Nothing in this section limits the executive power of the Commonwealth.

(5) In this section:

action includes:
  (a) exercising restraint over the liberty of a person; and
  (b) action in a regional processing country or another country.

arrangement includes an arrangement, agreement, understanding, promise or undertaking, whether or not it is legally binding.

regional processing functions includes the implementation of any law or policy, or the taking of any action, by a country in connection with the role of the country as a regional processing country, whether the implementation or the taking of action occurs in that country or another country.

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.