HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ

PLAINTIFF M68/2015 PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ORS DEFENDANTS

Plaintiff M68/2015 v Minister for Immigration and Border Protection
[2016] HCA 1
3 February 2016
M68/2015

ORDER

The questions stated by the parties in the amended special case dated 7 October 2015, as paraphrased, be answered as follows:

Question (1)

Does the plaintiff have standing to challenge whether the conduct of the Commonwealth or the Minister in securing, funding and participating in the plaintiff's detention at RPC 3 on Nauru was authorised by a valid law of the Commonwealth or was part of the executive power of the Commonwealth?

Answer

Yes.

Question (2a)

Was the conduct of the Commonwealth in signing the Memorandum of Understanding dated 3 August 2013 authorised by s 61 of the Constitution?

Answer

Yes.

Question (2b)

Was the conduct of the Commonwealth in giving effect to that arrangement authorised by a valid law of the Commonwealth?

Answer

Yes, it was authorised by s 198AHA of the Migration Act *1958 (Cth), which is a valid law of the Commonwealth.*

Question (3)

Were the laws by which the plaintiff was detained on Nauru contrary to the Constitution of Nauru?

Answer

The question does not arise.

Questions (4) and (5)

Was the conduct of the Commonwealth in securing, funding and participating in the plaintiff's detention at RPC 3 on Nauru authorised by a valid law of the Commonwealth?

Answer

Yes, see the answer to questions (2a) and (2b).

Question (6)

If the plaintiff were returned to Nauru, would the Commonwealth or the Minister be authorised to continue to perform the Memorandum of Understanding dated 3 August 2013 and to secure, fund and participate in the plaintiff's detention on Nauru?

Answer

Unnecessary to answer.

Question (7)

If the plaintiff were returned to Nauru would her detention there be contrary to Art 5(1) of the Constitution of Nauru?

Answer

Unnecessary to answer.

Questions (8) and (9)

If the plaintiff were returned to Nauru, would the Commonwealth or the Minister be authorised to secure, fund and participate in the plaintiff's detention by a valid law of the Commonwealth?

Answer

Unnecessary to answer.

Questions (10) and (12)

If the plaintiff were to be returned to Nauru, does s 198AD(2) of the Migration Act *1958 (Cth) require that she be taken there as soon as reasonably practicable?*

Answer

Unnecessary to answer.

Question (11)

If yes to question (10), if the plaintiff were returned to Nauru would her detention be contrary to the Constitution of Nauru?

Answer

Unnecessary to answer.

Question (13)

What, if any, relief should be granted to the plaintiff?

Answer

The plaintiff is not entitled to the declaration sought.

Question (14)

Who should pay the costs of the special case and of the proceedings generally?

Answer

The plaintiff should pay the defendants' costs.

Representation

R Merkel QC and C L Lenehan with R Mansted, D P Hume and E Bathurst for the plaintiff (instructed by Human Rights Law Centre)

J T Gleeson SC, Solicitor-General of the Commonwealth and G R Kennett SC with A M Mitchelmore and P D Herzfeld for the first and second defendants (instructed by Australian Government Solicitor)

S P Donaghue QC with K E Foley and C J Tran for the third defendant (instructed by Corrs Chambers Westgarth Lawyers)

Interveners

G R Donaldson SC, Solicitor-General for the State of Western Australia with F B Seaward for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor (WA))

P J Dunning QC, Solicitor-General of the State of Queensland with F J Nagorcka for the Attorney-General of the State of Queensland, intervening (instructed by Crown Solicitor (Qld))

CATCHWORDS

Plaintiff M68/2015 v Minister for Immigration and Border Protection

Migration – Regional processing – Where plaintiff was "unauthorised maritime arrival" upon entry into Australian migration zone – Where plaintiff was removed to regional processing centre on Nauru pursuant to s 198AD of *Migration Act* 1958 (Cth) – Where Commonwealth entered into arrangement in relation to regional processing functions – Whether plaintiff was detained by Commonwealth at Nauru Regional Processing Centre – Whether principles in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 apply.

Constitutional law (Cth) – Executive power of Commonwealth – Whether conduct of Commonwealth authorised by s 61 of Constitution – Whether conduct of Commonwealth authorised by s 198AHA of *Migration Act*.

Constitutional law (Cth) – Legislative power of Commonwealth – Whether s 198AHA of *Migration Act* is a law with respect to aliens – Whether s 198AHA of *Migration Act* is a valid law of Commonwealth.

Procedure – Standing – Whether plaintiff has standing to challenge lawfulness of conduct of Commonwealth with respect to plaintiff's past detention.

Private international law – Act of State doctrine – Where plaintiff's detention imposed by laws of Nauru – Whether Australian court should pronounce on constitutional validity of legislation of another country.

Words and phrases – "aliens power", "constraints upon the plaintiff's liberty", "control", "detention", "effective control", "memorandum of understanding", "non-statutory executive power", "regional processing country", "regional processing functions".

Constitution, ss 51(xix), 61.
Migration Act 1958 (Cth), ss 198AB, 198AD, 198AHA.

1 FRENCH CJ, KIEFEL AND NETTLE JJ. The plaintiff is a Bangladeshi national who was an "unauthorised maritime arrival" ("UMA") as defined by s 5AA of the *Migration Act* 1958 (Cth) upon entering Australia's migration zone. She was detained by officers of the Commonwealth and taken to Nauru pursuant to s 198AD(2) of the *Migration Act*, which provides that:

> "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."

Section 198AD(3) of the *Migration Act* provides that, for the purposes of sub-s (2), an officer may place and restrain the UMA on a vehicle or vessel, remove the UMA from the place at which he or she is detained or from a vehicle or vessel, and use such force as is necessary and reasonable.

2 Nauru is a country designated by the Minister for Immigration and Border Protection ("the Minister") under s 198AB(1) of the *Migration Act* as a "regional processing country". The reference to "processing" is to a determination by Nauru of claims by UMAs to refugee status under the Refugees Convention[1]. Both Australia and Nauru are signatories to that Convention. Directions have been made under s 198AD(5) of the *Migration Act* by the Minister as to the particular classes of UMAs who are to be taken to Nauru.

3 On 3 August 2013, the Commonwealth and Nauru entered into an arrangement relating to persons who have travelled irregularly by sea to Australia and whom Australian law authorises to be transferred to Nauru. This second Memorandum of Understanding ("the second MOU") recorded an agreement that the Commonwealth may transfer and Nauru would accept such persons, there referred to as "transferees". Administrative arrangements for regional processing and settlement arrangements in Nauru of 11 April 2014 between the governments of the two countries ("the Administrative Arrangements") confirm that transferees will remain on Nauru whilst their claims to refugee status are processed. By the second MOU and the Administrative Arrangements, Nauru undertook to allow transferees to stay lawfully in its territory and the Commonwealth agreed to lodge applications with the Government of Nauru for visas for transferees. The Commonwealth was to bear the costs associated with the second MOU.

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1 Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967).

4 The plaintiff claims to be a refugee to whom the Refugees Convention applies. She has applied to the Secretary of the Department of Justice and Border Control of Nauru to be recognised by Nauru as a refugee. Her application has not yet been determined.

5 Upon her arrival on Nauru the plaintiff was granted a regional processing centre visa (an "RPC visa") by the Principal Immigration Officer of Nauru under reg 9 of the Immigration Regulations 2013 (Nauru). Pursuant to reg 9(6)(a), the plaintiff's RPC visa specified that the plaintiff must reside at the Nauru Regional Processing Centre ("the Centre"). If a person is recognised by Nauru as a refugee an RPC visa becomes a temporary settlement visa pursuant to reg 9A of the Immigration Regulations 2014 (Nauru) (which replaced the Immigration Regulations 2013 (Nauru)) and the person is no longer required to reside at the Centre and may depart and re-enter Nauru.

6 Because the plaintiff is a UMA brought to Nauru pursuant to s 198AD of the Commonwealth *Migration Act*, the plaintiff is a "protected person" for the purposes of the *Asylum Seekers (Regional Processing Centre) Act* 2012 (Nauru) ("the RPC Act"). Pursuant to s 18C(1) of the RPC Act, a protected person may not leave the Centre without the approval of an authorised officer, an operational manager of the Centre, or other authorised persons. Any protected person who attempts to do so commits an offence against the law of Nauru and is liable on conviction to imprisonment for a period not exceeding six months[2].

7 The Centre comprised three sites – RPC 1, RPC 2 and RPC 3. RPC 1 contained the administrative offices of the Centre, other facilities and specialised accommodation. The other sites contained compounds which housed asylum seekers who were single adult males (RPC 2) and single adult females and families (RPC 3). The Commonwealth contracted for the construction and maintenance of the Centre, and funds all costs associated with it, in accordance with the second MOU.

8 From 24 March 2014 to 2 August 2014, the plaintiff resided in RPC 3. It was surrounded by a high metal fence through which entry and exit was possible only through a check-point which was permanently monitored. The plaintiff was able to move freely within RPC 3 save for certain restricted areas and at specified hours. However, if the plaintiff had attempted to leave the Centre without permission, the Centre staff would have sought the assistance of the Nauruan Police Force.

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2 *Asylum Seekers (Regional Processing Centre) Act* 2012 (Nauru), s 18C(2).

9 The plaintiff did not consent to being taken to Nauru. She did not apply for an RPC visa and did not consent to being detained in RPC 3. Pursuant to reg 9(3) of the Nauruan Immigration Regulations 2013, an application for an RPC visa could only be made by an officer of the Commonwealth of Australia. An application was made by an officer of the Commonwealth ostensibly on the plaintiff's behalf in accordance with cl 2.2.6 of the Administrative Arrangements, and the fee for the visa was paid by the Commonwealth.

10 Pursuant to the Administrative Arrangements, it was agreed that the Government of Nauru would appoint an operational manager, to be in charge of the day-to-day management of the Centre; and that the Government of Australia would appoint an officer as a programme coordinator, to be responsible for managing all Commonwealth officers and service contracts in relation to the Centre, including the contracting of a service provider to provide services at the Centre for transferees and to provide for their security and safety. A Joint Committee and a Joint Working Group were to be established.

11 A Ministerial Forum was established to oversee the implementation of the regional partnership between Australia and Nauru and to provide updates on the delivery of projects in Nauru, including the operation of the Centre, and was co-chaired by the Commonwealth Minister and by the Nauru Minister for Justice and Border Control. The Joint Committee, comprised of representatives of the respective governments, met regularly to discuss the operation of the Centre. The Joint Working Group, chaired by the Nauru Minister, met each week to discuss matters relating to the Centre, including regional processing issues.

12 Transfield Services (Australia) Pty Ltd ("Transfield") has been a service provider at the Centre pursuant to a contract with the Commonwealth, represented by the Department of Immigration and Border Protection ("the Transfield Contract"), since March 2014. Transfield undertook to provide "garrison and welfare services" to transferees and personnel at the regional processing centres. "Garrison services" include security, cleaning and catering services. As service provider it was required to ensure that the security of the perimeter of the site was maintained. The Department provides fencing, lighting towers and other security infrastructure.

13 Transfield subcontracted the Transfield Contract to Wilson Security Pty Ltd ("Wilson Security"). Representatives of the two companies attend regular meetings with, and report to, the Department of Immigration and Border Protection and to the Government of Nauru. The Commonwealth occupies an office at RPC 1 at which officers of the Australian Border Force carry out functions in relation to the Centre or transferees at the Centre, including managing service provider contracts, Commonwealth-funded projects, such as

construction projects, and relationships and communications between the Commonwealth, the service providers and the Government of Nauru.

14 On 2 August 2014, officers of the Commonwealth brought the plaintiff to Australia from Nauru temporarily for purposes relating to her health, pursuant to s 198B(1) of the *Migration Act*. The plaintiff no longer needs to be in Australia for those purposes and is liable to be returned to Nauru.

Section 198AHA

15 The principal statutory authority relied upon by the Commonwealth for its participation in the plaintiff's detention on Nauru is s 198AHA of the *Migration Act*. It was recently inserted[3] into Pt 2 Div 8 ("Removal of unlawful non-citizens etc") subdiv B ("Regional processing"), but has effect from 18 August 2012. It provides:

> "(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.

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3 *Migration Amendment (Regional Processing Arrangements) Act* 2015 (Cth).

(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."

The proceedings

16 In the proceedings brought by the plaintiff in this Court part of the relief she claims is an injunction against the Minister and officers of the Commonwealth and a writ of prohibition prohibiting them from taking steps to remove her to Nauru if she is to be detained at the Centre. The plaintiff also seeks orders prohibiting and restraining the Commonwealth from making future payments to Transfield pursuant to the Transfield Contract.

17 Recent steps taken by the Government of Nauru suggest that it is unlikely that the plaintiff will be detained at the Centre if and when she is returned to Nauru.

18 In early 2015, "open centre arrangements" were implemented at RPC 2 and RPC 3 in the exercise of the discretion of the operational managers. Pursuant to those arrangements, persons who resided there could be granted permission to leave the Centre on certain days, between certain hours and subject to certain conditions. Those arrangements were not formalised in writing.

19 Shortly prior to the hearing of this matter, the Government of Nauru published a notice in its Gazette to the effect that it intended to expand the open centre arrangements to allow for freedom of movement of asylum seekers 24 hours per day, seven days per week and that the arrangements were to be made the subject of legislation at the next sitting of the Parliament of Nauru. The operational managers of RPC 2 and RPC 3 were said to have approved all asylum seekers residing there to be eligible to participate in these new open centre arrangements. Regulations 9(6)(b) and 9(6)(c) of the Nauruan Immigration Regulations 2014, which placed restrictions on the movements of

RPC visa holders, have been repealed. Given these developments, the injunction and writ that the plaintiff seeks no longer assume relevance in these proceedings. There is not a sufficient basis for making them.

20 The focus of these proceedings is therefore upon another remedy that the plaintiff seeks, namely, a declaration to the effect that the conduct of the Minister or the Commonwealth in relation to her past detention was unlawful by reason that it was not authorised by any valid law of the Commonwealth nor based upon a valid exercise of the executive power of the Commonwealth under s 61 of the Constitution. The conduct, in summary, is particularised as the imposition, enforcement or procurement by the Commonwealth or the Minister of constraints upon the plaintiff's liberty, including her detention, or the Commonwealth's entry into contracts and expenditure of monies in connection with those constraints, or the Commonwealth having effective control over those constraints.

21 The questions stated for the opinion of the Court are lengthy and we will not set them out in these reasons. They are to be found in the document which follows the judgments in this case. They are directed principally to the plaintiff's standing and to whether the Commonwealth and the Minister were authorised to engage in the conduct by which the plaintiff was detained at the Centre. If the answer to the latter question is in the affirmative, it is further asked whether the restrictions on the plaintiff are contrary to the Constitution of Nauru.

Standing

22 The question of standing cannot be detached from the notion of a "matter"[4] and is related to the relief claimed.

23 It is submitted[5] by the first and second defendants, being the Minister and the Commonwealth (hereinafter together referred to as "the Commonwealth"), that these proceedings concern past conduct and would have no further consequences for the plaintiff beyond the making of the declaration. The plaintiff does not seek damages for her wrongful detention. Nevertheless the declaration sought by the plaintiff would resolve the question as to the lawfulness of the Commonwealth's conduct with respect to the plaintiff's detention and whether such conduct was authorised by Commonwealth law. This is not a

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4 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 528 [32]; [1999] HCA 14; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 637 [122]; [2000] HCA 11.

5 By reference to *Gardner v Dairy Industry Authority (NSW)* (1977) 52 ALJR 180 at 188; 18 ALR 55 at 69.

hypothetical question[6]. It will determine the question whether the Commonwealth is at liberty to repeat that conduct if things change on Nauru and it is proposed, once again, to detain the plaintiff at the Centre.

The issues – non-statutory executive power and s 198AHA

24 The Commonwealth relies upon s 61 of the Constitution to authorise its entry into the second MOU with Nauru. The Commonwealth submits that such entry either is within the Executive's power to conduct external relations or falls within the express terms of s 61 of the Constitution, in that it is for the "execution and maintenance of … the laws of the Commonwealth". The purpose of the entry into the second MOU is to give effect to the scheme of the *Migration Act*, by ensuring that Nauru remains willing and able to perform the functions of a regional processing country under that scheme. It may be taken that the scheme to which the Commonwealth refers includes ss 198AB(1) and 198AD(2) and, following entry into the second MOU, s 198AHA.

25 The Commonwealth relies on s 198AHA as statutory authority for the Executive to give effect to the arrangement made between the Commonwealth and Nauru by the second MOU. It submits that, in recently enacting s 198AHA, the Parliament gave its permission to the Executive to implement the arrangements contemplated by the second MOU. Alternatively, the Commonwealth contends that it had non-statutory executive power or executive power under s 61 of the Constitution to give effect to the MOU.

26 The Commonwealth does not, however, rely on either s 198AHA, non-statutory executive power or executive power under s 61 of the Constitution as authorising the detention of the plaintiff. It consistently maintained the position that the detention of the plaintiff on Nauru was by the Executive government of Nauru.

27 As will be explained in these reasons, although the declaration which the plaintiff seeks was claimed in terms that the Commonwealth itself detained the plaintiff, that was not the argument which the plaintiff presented at the hearing of the matter. The plaintiff's case as put is that the Commonwealth participated in a practical sense, and at a high level, in her detention, and that the extent of the Commonwealth's participation in her detention was not authorised by statute or otherwise.

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6 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582; [1992] HCA 10.

28 For these reasons, whether or not the Commonwealth had statutory power or executive power to itself detain the plaintiff is not in issue. The issue is whether the Commonwealth had power to participate, to the extent that it did, in Nauru's detention of the plaintiff.

Detention on Nauru

29 The central question identified by the plaintiff is whether the Commonwealth's involvement in her detention was authorised by a valid Commonwealth statute.

30 It is necessary at the outset to be clear about who detained the plaintiff on Nauru. "Detention" in this context is detention in the custody of the State[7] and involves the exercise of governmental power.

31 There can be no doubt that the Commonwealth had the statutory power to remove the plaintiff from Australia to Nauru and to detain her for that purpose. In *Plaintiff S156/2013 v Minister for Immigration and Border Protection*[8] it was held that s 198AD(2) of the *Migration Act* is a law with respect to a class of aliens and so is a valid law within s 51(xix) of the Constitution. *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[9] holds that the legislative power conferred by s 51(xix) encompasses the conferral upon the Executive of authority to detain an alien in custody for the purposes of deportation or expulsion. That power is limited by the purpose of the detention and exists only so long as is reasonably necessary to effect the removal of the alien. It follows that the Commonwealth's power to detain the plaintiff for the purpose of removing her from Australia and taking her to Nauru ceased upon her being handed over into the custody of the Government of Nauru.

32 The plaintiff thereafter was detained in custody under the laws of Nauru, administered by the Executive government of Nauru. The *Immigration Act* 2014 (Nauru) requires that a person who is not a citizen must have a valid visa to enter or remain in Nauru[10]. Even if the plaintiff was taken to Nauru without her consent, the *Immigration Act* applied to her. The plaintiff was obliged to remain

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7 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27; [1992] HCA 64.

8 (2014) 254 CLR 28 at 42-43 [22]-[25], 46 [38]; [2014] HCA 22.

9 (1992) 176 CLR 1 at 10, 32-33.

10 *Immigration Act* 2014 (Nauru), s 10.

at the Centre under supervision and was not free to leave it, because of the residency requirements of the RPC visa issued by the Government of Nauru, the prohibition on leaving the Centre in s 18C(1) of the RPC Act, which applies to the plaintiff because she has the status of a "protected person", and the offence provision in s 18C(2).

33 The only exception to the prohibition in s 18C(1) is where prior approval is given to a resident of the Centre by an authorised officer, an operational manager of the Centre or other authorised persons. The Secretary of the Department of Justice and Border Control of Nauru appoints authorised officers and must declare the appointment of an operational manager by notice in the Government Gazette[11]. No Commonwealth officers were appointed as authorised officers by the Secretary for the purposes of the RPC Act. Staff of Wilson Security were appointed by the Secretary as authorised officers and were therefore authorised by the law of Nauru to exercise powers under the RPC Act.

34 Contrary to the plaintiff's submissions, it is very much to the point that the restrictions applied to the plaintiff are to be regarded as the independent exercise of sovereign legislative and executive power by Nauru. The recognition that it was Nauru that detained the plaintiff is important, for it is central to the plaintiff's case that the legislative authority which the Commonwealth required, and which it is argued was not provided, is an authority to detain the plaintiff, with the concomitant power to authorise others to effect that detention.

35 Contrary also to the plaintiff's submissions, it is very much to the point that the Commonwealth could not compel or authorise Nauru to make or enforce the laws which required that the plaintiff be detained. There was no condominium, which exists where two or more States exercise sovereignty conjointly over a territory[12], and no suggestion of any other agreement between Nauru and Australia by which governmental authority is to be jointly exercised on Nauru; assuming such an agreement to be possible. Paragraph 76 of the facts agreed by the parties for the purposes of the special case assumes relevance here:

> "If Nauru had not sought to impose restrictions on the plaintiff as set out … above, none of the Commonwealth, the Minister, Transfield or its subcontractors would have sought to impose such restrictions in Nauru or asserted any right to impose such restrictions."

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11 *Asylum Seekers (Regional Processing Centre) Act* 2012 (Nauru), s 3(2).

12 See the discussion in Jennings and Watts (eds), *Oppenheim's International Law*, 9th ed (1992), vol 1 at 565 §170; Brownlie, *Principles of Public International Law*, 7th ed (2008) at 113-114.

This statement recognises that if Nauru had not detained the plaintiff, the Commonwealth could not itself do so.

36 Once it is understood that it was Nauru that detained the plaintiff, and that the Commonwealth did not and could not compel or authorise Nauru to make or enforce the laws that required that the plaintiff be detained, it is clear that the Commonwealth did not itself detain the plaintiff.

37 Accordingly, although the declaration the plaintiff seeks claims the Commonwealth itself detained the plaintiff and the word "detention" was used loosely in argument in connection with the Commonwealth's conduct, it is apparent that the plaintiff's case concerns the participation by the Commonwealth and its officers in the detention by Nauru of the plaintiff. It is that participation which is required to be authorised.

The principle in *Lim*

38 The plaintiff contends that her detention on Nauru was "funded, authorised, caused, procured and effectively controlled by, and was at the will of, the Commonwealth". She relies upon the statement in *Lim*[13] that an officer of the Commonwealth Executive who "purports to authorize or enforce the detention in custody of … an alien" without judicial mandate will be acting lawfully only to the extent that their conduct is justified by a valid statutory provision.

39 Clearly the Commonwealth sought the assistance of Nauru with respect to the processing of claims by persons such as the plaintiff. It may be accepted that the Commonwealth was aware that Nauru required the plaintiff to be detained. In order to obtain Nauru's agreement to receive the plaintiff, the Commonwealth funded the Centre and the services provided there in accordance with the Administrative Arrangements. The Commonwealth concedes the causal connection between its conduct and the plaintiff's detention. It may be accepted that its involvement was materially supportive, if not a necessary condition, of Nauru's physical capacity to detain the plaintiff. But, for the reasons given above, it cannot be said that the Commonwealth thereby authorised or controlled the plaintiff's detention in the sense discussed in *Lim*. That is sufficient to remove the basis for the plaintiff's reliance upon what was said in that case.

40 In any event, the plaintiff's reliance upon *Lim* is misplaced. The principle established in *Lim* is that provisions of the *Migration Act* which authorised the detention in custody of an alien, for the purpose of their removal from Australia,

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13 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 19.

did not infringe Ch III of the Constitution because the authority, limited to that purpose, was neither punitive in nature nor part of the judicial power of the Commonwealth. As a general proposition, the detention in custody of a citizen by the State is penal or punitive in character and exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt[14]. A qualification to this proposition is provided by the recognition that the Commonwealth Parliament has power to make laws for the expulsion and deportation of aliens and for their restraint in custody to the extent necessary to make their deportation effective[15].

41 Contrary to the plaintiff's submissions, *Lim* does not refer more generally to a "concept of 'authorise or enforce' detention" which extends to a situation in which the detention is "not actually implemented" by the Commonwealth and its officers. *Lim* has nothing to say about the validity of actions of the Commonwealth and its officers in participating in the detention of an alien by another State. It is nevertheless necessary that the Commonwealth's indisputable participation in the detention of the plaintiff on Nauru be authorised by the law of Australia. This directs attention to the statutory authority claimed by the Commonwealth under s 198AHA of the *Migration Act*. For the reasons set out below, that section provides the requisite authority. It is not necessary, therefore, to consider the hypothetical question whether, absent that statutory authority, the Commonwealth would otherwise be authorised by s 61 of the Constitution, or as a matter of non-statutory executive power, to participate in Nauru's detention of the plaintiff.

Authorisation for participation in detention?

42 The plaintiff submits that s 198AHA is not supported by the aliens power in s 51(xix) of the Constitution because it does not single out that class of persons in its text or in its practical operation, and any connection with the enumerated subject matter is too remote or insubstantial. The submission should not be accepted. Section 198AHA is concerned with the regional processing functions of a country declared by the Minister under s 198AB(1) as a regional processing country to which UMAs may be taken under s 198AD(2). Just as s 198AD(2) is a law with respect to aliens[16], so too is s 198AHA. Section 198AHA concerns

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14 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27.

15 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 30-31.

16 See [31] above.

the functions of the place to which an alien is removed for the purpose of their claim to refugee status being determined. The requirement that there be a connection between the subject matter of aliens and the law that is more than insubstantial, tenuous or distant[17] is satisfied.

43 The plaintiff next submits that s 198AHA does not apply because the arrangement referred to in sub-s (1) is one with "a person or body" and the Government of Nauru is neither. The sub-section itself makes a distinction between a "person or body" and a "country".

44 Were it necessary to resolve the meaning of "a person or body", resort could be had to s 2C(1) of the *Acts Interpretation Act* 1901 (Cth), by which "person" is to be taken to include a body politic. In any event the "body" referred to in s 198AHA(1) is apt to include the Executive government of a country through which arrangements would be made. The arrangements spoken of must include international arrangements which would be effected with the government of a regional processing country. So much is confirmed by the Explanatory Memorandum[18] and the Second Reading Speech[19] of the Bill inserting s 198AHA. It would be an odd construction which has s 198AHA applying to contracts by the Commonwealth with service providers in a regional processing country but not to arrangements with the country itself relating to the provision of services.

45 According to the natural and ordinary meaning of s 198AHA, it applies where the Commonwealth has entered into an arrangement with a regional processing country for the regional processing of unlawful non-citizens. The section does not in terms authorise the Commonwealth to enter into any such arrangement. It is, however, within the scope of the executive power of the Commonwealth with respect to aliens to enter into such an arrangement in order to facilitate regional processing arrangements. The second MOU provides for the regional processing of UMAs who are sent to a regional processing country in accordance with ss 198AB(1) and 198AD(2). It is essential to the scheme for the

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17 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 314; [1994] HCA 44; *New South Wales v The Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1 at 143 [275]; [2006] HCA 52.

18 Australia, House of Representatives, Migration Amendment (Regional Processing Arrangements) Bill 2015, Explanatory Memorandum at 2.

19 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 24 June 2015 at 7488.

removal of aliens to a regional processing country for that purpose that that country not only be willing but also have the practical ability to do so.

46 Section 198AHA(2) authorised the Commonwealth to give effect to the second MOU including by entry into the Administrative Arrangements with Nauru and the Transfield Contract. The Commonwealth had power to fund the Centre and the other services to be provided under those arrangements. "Regional processing functions" are defined in sub-s (5) to include the implementation of any law in connection with the role of the country as a regional processing country, and therefore the authority in sub-s (2) would extend to permitting the Commonwealth to provide services to carry into effect the laws of Nauru. In so far as those services extend to the exercise of physical restraint over the liberty of a person, that was authorised by the definition of "action" in sub-s (5). The nature and duration of that action, including participation in the exercise of restraint over the liberty of a person, is limited by the scope and purpose of s 198AHA. Section 198AHA is incidental to the implementation of regional processing functions for the purpose of determining claims by UMAs to refugee status under the Refugees Convention. The exercise of the powers conferred by that section must also therefore serve that purpose. If the regional processing country imposes a detention regime as a condition of the acceptance of UMAs removed from Australia, the Commonwealth may only participate in that regime if, and for so long as, it serves the purpose of processing. The Commonwealth is not authorised by s 198AHA to support an offshore detention regime which is not reasonably necessary to achieve that purpose. If, upon a proper construction of s 198AHA, the section purported to authorise the Commonwealth to support an offshore detention regime which went beyond what was reasonably necessary for that purpose, a question might arise whether the purported authority was beyond the Commonwealth's legislative power with respect to aliens.

The Nauru Constitution

47 The plaintiff seeks to agitate the question whether the laws by which the plaintiff was detained on Nauru are valid laws, given Art 5(1) of the Constitution of Nauru. Article 5(1) provides that a person shall not be deprived of their personal liberty except as authorised by law for purposes there specified. The plaintiff says that this point is raised in response to the Commonwealth's defence that her detention was required by the laws of Nauru. The plaintiff also raises a point relating to the construction of ss 198AHA(2) and 198AHA(5) in order to argue for the invalidity of the Nauruan laws. It is submitted that these sub-sections should not be construed as referring to detention which is unlawful under the law of the country where the detention is occurring. In that regard the laws cannot be viewed in isolation from the Constitution of that country.

48 These submissions raise questions about whether an Australian court should pronounce on the constitutional validity of the legislation of another country. Whilst there may be some occasions when an Australian court must come to some conclusion about the legality of the conduct of a foreign government or persons through whom such a government has acted[20], because it is necessary to the determination of a particular issue in the case, those occasions will be rare. This is not such an occasion.

49 The Commonwealth's amended defence does not raise any question as to the constitutional validity of the laws of Nauru. It merely pleads that the plaintiff's detention was imposed by the laws of Nauru; which is to say, she was not detained by Australian law.

50 Strictly speaking, no issue arises on the plaintiff's case either. The plaintiff's case concerns, and the declaration she seeks is framed around, the question whether the Commonwealth's conduct was authorised by a valid statute of the Commonwealth. It concerns the power of the Commonwealth. It does not concern the lawfulness of her detention by reference to the laws of Nauru.

51 The plaintiff did not articulate any basis to conclude that s 198AHA depends for its operation upon the constitutional validity of the laws of a regional processing country under which regional processing functions are undertaken.

52 It may be observed, however, that s 198AHA tends to point the other way. Due to the definition of "regional processing functions" in sub-s (5), authority is given by sub-s (2) to implement Nauruan law, which, in context, must be a reference to laws passed by the Nauruan Parliament relating to regional processing. Such authority is not further qualified by a requirement that such laws be construed as valid according to the Constitution of Nauru.

A further submission?

53 On 28 January 2016, the parties filed in the Melbourne Registry of this Court a proposed consent order seeking re-opening of the proceedings for the limited purpose of amending the special case to make reference to the swearing-in of staff members of Wilson Security as reserve officers of the Nauru Police Force Reserve in July 2013. The amendment was based on documents which were disclosed to the plaintiff on 17 October 2015, after completion of the hearing in this matter. It is not apparent why no step was taken to re-open the proceedings before 28 January 2016. In any event, the amendment would not affect the outcome. The proposed consent order was therefore refused.

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20 *Moti v The Queen* (2011) 245 CLR 456 at 475 [51]; [2011] HCA 50.

Orders

54 The questions raised by the special case, and which are set out in the document which follows the judgments in this case, should be answered only to the extent necessary for the resolution of the matters truly in controversy. Paraphrasing the relevant aspect of the question stated, we would answer as follows:

Question (1): Does the plaintiff have standing to challenge whether the conduct of the Commonwealth or the Minister in securing, funding and participating in the plaintiff's detention at RPC 3 on Nauru was authorised by a valid law of the Commonwealth or was part of the executive power of the Commonwealth?

Answer: Yes.

Question (2a): Was the conduct of the Commonwealth in signing the second MOU authorised by s 61 of the Constitution?

Answer: Yes.

Question (2b): Was the conduct of the Commonwealth in giving effect to that arrangement authorised by a valid law of the Commonwealth?

Answer: Yes, it was authorised by s 198AHA of the *Migration Act*, which is a valid law of the Commonwealth.

Question (3): Were the laws by which the plaintiff was detained on Nauru contrary to the Constitution of Nauru?

Answer: The question does not arise.

Questions (4) and (5): Was the conduct of the Commonwealth in securing, funding and participating in the plaintiff's detention at RPC 3 on Nauru authorised by a valid law of the Commonwealth?

Answer: Yes, see the answer to questions (2a) and (2b).

Question (6): If the plaintiff were returned to Nauru, would the Commonwealth or the Minister be authorised to continue to perform the second MOU and to secure, fund and participate in the plaintiff's detention on Nauru?

Answer: Unnecessary to answer.

Question (7): If the plaintiff were returned to Nauru would her detention there be contrary to Art 5(1) of the Constitution of Nauru?

Answer: Unnecessary to answer.

Questions (8) and (9): If the plaintiff were returned to Nauru, would the Commonwealth or the Minister be authorised to secure, fund and participate in the plaintiff's detention by a valid law of the Commonwealth?

Answer: Unnecessary to answer.

Questions (10) and (12): If the plaintiff were to be returned to Nauru, does s 198AD(2) of the *Migration Act* require that she be taken there as soon as reasonably practicable?

Answer: Unnecessary to answer.

Question (11): If yes to question (10), if the plaintiff were returned to Nauru would her detention be contrary to the Constitution of Nauru?

Answer: Unnecessary to answer.

Question (13): What, if any, relief should be granted to the plaintiff?

Answer: The plaintiff is not entitled to the declaration sought.

Question (14): Who should pay the costs of the special case and of the proceedings generally?

Answer: The plaintiff should pay the defendants' costs.

55 The answer to question 14 in part responds to a submission by the plaintiff that the defendants should pay for her costs thrown away by amendments to the special case necessitated by changes in the circumstances of detention effected by the Government of Nauru, which were referred to earlier in these reasons. In our opinion, that submission should be rejected.

56 BELL J. The facts, the legislative scheme and the issues, as they were developed at the hearing of the parties' amended special case, are set out in the joint reasons of French CJ, Kiefel and Nettle JJ. They need not be repeated, save to the extent it is convenient to do so in order to explain my reasons.

The claims for relief and standing

57 By her amended application for an order to show cause filed on 21 August 2015, the plaintiff claims writ, injunctive and declaratory relief against the first defendant, the Minister for Immigration and Border Protection ("the Minister"), and against the second defendant, the Commonwealth of Australia ("the Commonwealth") (collectively, "the Commonwealth parties"), arising out of conduct that is said directly or indirectly to have procured or enforced constraints upon her liberty in Nauru.

58 At the hearing of the parties' amended special case, the Commonwealth parties submitted that there is nothing left in the proceeding: the writ and injunctive relief that the plaintiff claims is predicated upon this Court finding that on her return to Nauru it is likely that she will again be subjected to the constraints upon her liberty particularised in her amended statement of claim. The Commonwealth parties contend that there is no longer a basis for that finding.

59 The plaintiff also claims a declaration that the Commonwealth parties' conduct in enforcing or procuring, directly or indirectly, her detention from 24 March 2014, including by entering into contracts requiring or causing the enforcement of constraints on her liberty, was unlawful. The Commonwealth parties contest the plaintiff's standing to seek this relief, because they claim the declaration would produce no foreseeable consequence for her.

60 On 2 October 2015, the Nauru Government Gazette contained an announcement that, from 5 October 2015, open centre arrangements at the Regional Processing Centre in Nauru ("the RPC") were to be expanded to allow asylum seekers freedom of movement 24 hours per day, seven days per week ("the Notice").

61 On 4 October 2015, regs 9(6)(b) and 9(6)(c) of the Immigration Regulations 2014 (Nauru), which required asylum seekers not to leave the RPC without permission, were repealed. At the date of the hearing, it remained a criminal offence for an asylum seeker to leave the RPC without prior approval from an authorised officer, an Operational Manager or other authorised persons[21].

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21 *Asylum Seekers (Regional Processing Centre) Act* 2012 (Nauru), s 18C.

62 The intention of the Government of Nauru to enshrine the expanded open centre arrangements in legislation at the next sitting of Parliament was stated in the Notice. In the interim, effect was given to the new regime by Operational Managers granting general approval to all asylum seekers to participate in the expanded open centre arrangements.

63 While it is open to Nauru to decide to return to a scheme under which asylum seekers are detained in the RPC until their claims for recognition of refugee status[22] ("protection claims") are determined, the introduction of the expanded open centre arrangements has removed the premise for the grant of the writ and injunctive relief claimed by the plaintiff.

64 However, the declaratory relief that the plaintiff claims does not raise some abstract or hypothetical question. It involves the determination of a legal controversy in respect of which the plaintiff has a "real interest"[23]. The declaration sought cannot be said to have no foreseeable consequences given that Nauru may choose to revert to a scheme under which asylum seekers taken to it by the Commonwealth are detained.

The plaintiff's case

65 The plaintiff's pleaded case acknowledges that her detention was required under the law of Nauru. She contends that from 24 March 2014, when the Commonwealth entered into a contract with the third defendant, Transfield Services (Australia) Pty Ltd ("Transfield"), for the provision of garrison and welfare services at the RPC ("the Transfield contract"), until 2 August 2014, when she was brought to Australia for medical treatment, the Commonwealth parties funded, caused and effectively controlled her detention in Nauru. She contends that their conduct in so doing was unlawful because it was not authorised by a valid law of the Commonwealth nor was it a valid exercise of the executive power conferred by s 61 of the Constitution.

66 The Commonwealth parties' principal submission is that it is within the legislative power of the Commonwealth Parliament to authorise the Executive to expend monies to establish, maintain and otherwise provide support to Nauru to

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22 Article 1A of the Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967).

23 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582 per Mason CJ, Dawson, Toohey and Gaudron JJ; [1992] HCA 10; *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 359 [103] per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; [2010] HCA 41, citing *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 355-356 [46]-[47] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; [1999] HCA 9.

detain unauthorised maritime arrivals ("UMAs") who have been removed from Australia under s 198AD of the *Migration Act* 1958 (Cth) ("the Migration Act"), for the purpose of determining any protection claim made by those UMAs. They submit that s 198AHA of the Migration Act is such a law. I accept that is so. This conclusion makes it unnecessary to consider the Commonwealth parties' alternative submissions which invoke s 61 of the Constitution and s 32B of the *Financial Framework (Supplementary Powers) Act* 1997 (Cth), read with several items in the regulations, and a Schedule to the regulations, made thereunder[24]. It also makes it unnecessary to address Transfield's wider submission that the Commonwealth Executive may be invested with functions not forming part of the executive power of the Commonwealth.

67 For the reasons to be given, I agree with French CJ, Kiefel and Nettle JJ that not all the questions asked in the amended special case should be answered and I agree with the orders that their Honours propose.

Section 198AHA and the MOU

68 Section 198AHA was inserted into the Migration Act by the *Migration Amendment (Regional Processing Arrangements) Act* 2015 (Cth). It has effect from 18 August 2012. On 29 August 2012 the Commonwealth entered into a Memorandum of Understanding with Nauru relating to the transfer of persons to and assessment of persons in Nauru. That Memorandum of Understanding was superseded by the Memorandum of Understanding signed on 3 August 2013, which remains in effect ("the MOU"). Each Memorandum of Understanding was entered into in the exercise of the non-statutory executive power of the Commonwealth to establish relations with other countries[25].

69 The MOU records the common understanding of the Governments of Nauru and the Commonwealth with respect to the transfer to Nauru of persons who have travelled irregularly by sea to Australia, or who have been intercepted by Commonwealth authorities in the course of trying to reach Australia by irregular maritime means, and who are authorised to be transferred to Nauru under Australian law ("transferees"). The purpose of the transfer is given as the processing of any protection claims made by transferees and the settlement in Nauru of an agreed number of transferees who are found by Nauru to be in need of international protection. The Commonwealth states its commitment to bearing all of the costs to be incurred under and incidental to the MOU. Nauru states its willingness to host one or more regional processing centres, while reserving the

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24 Financial Framework (Supplementary Powers) Regulations 1997 (Cth), reg 16 and items 417.021, 417.027, 417.029 and 417.042 of Sched 1AA.

25 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 643-644 per Latham CJ; [1936] HCA 52.

right to host transferees under other arrangements including community-based arrangements.

70 Neither the MOU, nor the administrative arrangements giving effect to it, require that transferees be detained while their protection claims are being considered. Throughout the period that the plaintiff was in Nauru, however, there was such a requirement under the law of Nauru.

71 On its face, s 198AHA provides a complete answer to the plaintiff's case. Nauru is designated as a regional processing country under s 198AB of the Migration Act. Section 198AHA seemingly applies because the MOU is an arrangement entered into by the Commonwealth in relation to the regional processing functions of Nauru[26]. Section 198AHA(2) confers authority on the Commonwealth to make payments and to take, or cause to be taken, any action in relation to the arrangement or the regional processing functions of Nauru. Action includes exercising restraint over the liberty of a person in a regional processing country[27]. The regional processing functions of a country include the implementation of any law or policy, or the taking of any action, by a country in connection with its role as a regional processing country[28].

72 The plaintiff contends that as a matter of construction s 198AHA does not apply to the arrangement between the Commonwealth and Nauru recorded in the MOU. Alternatively, she submits that s 198AHA is invalid because it is not supported by a head of legislative power or that the provision is invalid to the extent that it exceeds the constitutional limitation on legislative power identified in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[29].

The plaintiff's construction argument

73 Section 198AHA(1) provides that "[t]his section applies if the Commonwealth enters into an arrangement with a person or body in relation to the regional processing functions of a country". The plaintiff submits that the provision does not apply to an arrangement entered into with a "country" as distinct from a "person or body". The submission is maintained in the face of s 2C(1) of the *Acts Interpretation Act* 1901 (Cth) ("the Interpretation Act"), which provides that expressions used to denote persons generally include a body

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26 Migration Act, s 198AHA(1).

27 Migration Act, s 198AHA(5).

28 Migration Act, s 198AHA(5).

29 (1992) 176 CLR 1 at 27-28 per Brennan, Deane and Dawson JJ; [1992] HCA 64.

politic or corporate as well as an individual. Section 198AHA(1) is said to evince an intention that s 2C(1) of the Interpretation Act does not apply because "person" is not used in this setting to denote "persons generally": if "person" had that denotation, the addition of the words "or body" would be superfluous.

74 There is no reason not to interpret "person" in s 198AHA, conformably with s 2C(1) of the Interpretation Act, as including the artificial persons to which s 2C(1) refers, including bodies politic. As the Commonwealth parties submit, the reference to a "body" in the context of this statutory scheme has evident work to do: international bodies such as the United Nations High Commissioner for Refugees and the International Organization for Migration, while not legal persons, are bodies within the scope of s 198AHA(1).

Legislative power

75 The Commonwealth parties submit that s 198AHA is supported by the aliens power in s 51(xix), the external affairs power in s 51(xxix) and the Pacific islands power in s 51(xxx). It is sufficient to consider the parties' submissions with respect to the aliens power.

76 The plaintiff's submissions draw on what is said to be the "limiting effect" of s 198AHA(3), which makes clear that s 198AHA(2) confers authority on the Commonwealth to make payments and to take action in relation to the regional processing functions of a designated regional processing country without otherwise affecting the lawfulness of the payment or action. Thus, it is argued, the provision does not regulate the rights, liabilities or duties of aliens and is not to be characterised as a law with respect to that subject matter[30]. Aliens, it is said, are not singled out in the text or in the provision's practical operation, and any connection to that subject matter is too remote or insubstantial.

77 Section 198AHA is in Pt 2 Div 8 subdiv B of the Migration Act, which provides a scheme for "regional processing". The processing to which the subdivision refers is of the protection claims of aliens who have entered Australia by sea and who become unlawful non-citizens because of that entry. A duty is imposed on Commonwealth officers to take aliens of this description from Australia to a regional processing country[31], designated as such by the Minister[32] following a determination that the designation is in the national interest[33]. In

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30 Cf *Williams v The Commonwealth [No 2]* (2014) 252 CLR 416 at 461 [50] per French CJ, Hayne, Kiefel, Bell and Keane JJ; [2014] HCA 23.

31 Migration Act, s 198AD(2).

32 Migration Act, s 198AB(1).

33 Migration Act, s 198AB(2).

determining whether it is in the national interest to designate a country to be a regional processing country, the Minister must have regard to whether the country has given assurances to Australia that it will not expel or return ("refouler") a person taken to it for processing and that it will make an assessment, or permit an assessment to be made, of whether a person taken to it under the scheme is a refugee[34]. The scheme is predicated upon a country agreeing to take aliens transferred to it from Australia for regional processing[35]. As the Commonwealth parties submit, the actions and payments in relation to the regional processing functions of the regional processing country authorised by s 198AHA(2) are, in legal operation and practical effect, closely connected to the processing of protection claims made by aliens who have been taken by the Commonwealth from Australia to the regional processing country for that processing. This provides a sufficient connection between s 198AHA and the power conferred by s 51(xix)[36].

The *Lim* principles

78 The plaintiff's remaining arguments depend upon the principles enunciated in *Lim* having application to an alien who is removed from Australia and taken, under s 198AD of the Migration Act, to Nauru and there detained under the law of Nauru. The first premise of the plaintiff's argument is that she was involuntarily detained in Nauru and the second premise is that the Commonwealth parties procured, caused and effectively controlled that detention. At the hearing, the Commonwealth parties accepted that they provided the material support necessary for the establishment and maintenance of the detention regime at the RPC. They did not accept that they procured, caused or substantially controlled the plaintiff's detention. These submissions direct attention to the nature of the plaintiff's detention in Nauru between 24 March and 2 August 2014 and to the Commonwealth parties' role in the operation of the RPC, both directly and indirectly through the contractual obligations imposed on Transfield under the Transfield contract.

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34 Migration Act, s 198AB(3)(a).

35 Migration Act, s 198AG.

36 *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at 43 [26]; [2014] HCA 22. See also *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; [2000] HCA 14; *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 143 [275] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; [2006] HCA 52.

Detention at the RPC

79 On 22 January 2014, Commonwealth officers took the plaintiff, a UMA, to Nauru pursuant to s 198AD(2) of the Migration Act. On arrival in Nauru on 23 January 2014, the plaintiff ceased to be in the custody of the Commonwealth under s 198AD(3) of the Migration Act.

80 At that time, s 9(1) of the *Immigration Act* 1999 (Nauru) provided that a person who was not a Nauruan citizen could not enter or remain in Nauru without a valid visa. The Act conferred power on the Cabinet of Nauru to make regulations, including with respect to classes of visa and the conditions of a visa[37]. Regulations made under that power provided for a class of visa known as a "regional processing centre visa" ("RPC visa")[38]. An RPC visa could only be granted to a UMA as defined in the Migration Act, who was to be, or who had been, brought to Nauru under s 198AD of that Act[39]. An application for an RPC visa had to be made before the person to whom it related entered Nauru[40]. The application for an RPC visa could only be made by an officer of the Commonwealth[41].

81 On 21 January 2014, an officer of the Commonwealth applied for an RPC visa in the plaintiff's name without seeking the plaintiff's consent. On 23 January 2014, the Principal Immigration Officer of Nauru granted the application and issued an RPC visa to the plaintiff, conditioned upon the requirement that she reside at the RPC. The plaintiff did not consent to the issue of the RPC visa.

82 The plaintiff was subject to constraints on her freedom in Nauru arising from the conditions of her RPC visa and from her status as a "protected person" under s 3(1) of the *Asylum Seekers (Regional Processing Centre) Act* 2012 (Nauru) ("the RPC Act"). As a protected person, she was required not to leave the RPC without prior approval from an authorised officer, an Operational Manager or other authorised persons[42]. She was subject to the same obligation

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37 *Immigration Act* 1999 (Nauru), s 44.

38 Immigration Regulations 2013 (Nauru), reg 4(1)(d).

39 Immigration Regulations 2013 (Nauru), reg 9(1)(a). The only other category of person to whom an RPC visa could be granted was a person who was to be, or had been, brought to Nauru under s 199 of the Migration Act: reg 9(1)(b).

40 Immigration Regulations 2013 (Nauru), reg 9(2).

41 Immigration Regulations 2013 (Nauru), reg 9(3).

42 RPC Act, s 18C.

under rules made by the Operational Manager of RPC3, the site within the RPC in which she was housed[43], and by the Immigration Regulations 2013 (Nauru), which regulations required the plaintiff to reside in the premises nominated in her RPC visa[44].

83 The Commonwealth did not seek to have Nauru detain persons taken to it for regional processing. Nonetheless, by applying for an RPC visa in the plaintiff's name and by taking the plaintiff to Nauru, in a practical sense the Commonwealth brought about her detention under the regime that applied in Nauru. The Commonwealth parties accept so much, but submit that such a causal connection has nothing to say about the application of the principles enunciated in *Lim*, which apply to detention in custody by the Commonwealth.

84 Under the administrative arrangements giving effect to the MOU, Nauru was required to appoint an Operational Manager to be responsible for the day to day management of the RPC. The administrative arrangements contemplated that the Operational Manager would be supported by contracted service providers and staff members who would provide a range of services, including security services. The Operational Manager would monitor the welfare, safety and conduct of transferees with the assistance of the service providers. The Commonwealth was to appoint a Programme Coordinator to be responsible for managing all Australian officers and service contracts in relation to the RPC, including by ensuring that service providers deliver services to the appropriate standard. The Programme Coordinator has at all times been an officer of the Department of Immigration and Border Protection ("the Department") and is stationed in Nauru.

85 The governance structures for which the administrative arrangements provide comprise a Ministerial Forum, a Joint Advisory Committee and a Joint Working Group. The Ministerial Forum, co-chaired by the Minister and the Nauru Minister for Justice and Border Control, oversees the regional partnership between Nauru and Australia, including the operation of the RPC. The Joint Advisory Committee comprises representatives of Nauru and the Commonwealth, who advise and oversee matters including the practical management of security services for the RPC. The Commonwealth provides secretariat support to the Joint Advisory Committee. The Joint Working Group is co-chaired by the Commonwealth and Nauru, and meets weekly. Its terms of reference include that it is to advise on technical, operational and legal aspects of the management of the RPC, including the delivery of security services.

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43 Nauru Regional Processing Centre, Centre Rules, July 2014, r 3.1.3: Republic of Nauru, *Government Gazette*, No 95, 16 July 2014.

44 Immigration Regulations 2013 (Nauru), reg 9(6)(a), (b) and (c).

86 Under the Transfield contract, Transfield undertook to improve the security infrastructure, and to enhance security arrangements, at the RPC. The Department undertook to provide security infrastructure, which might include perimeter fencing, lighting towers and an entry gate. Transfield is required to ensure that the security of the perimeter of the RPC is maintained at all times in accordance with the policies and procedures of the Department as notified to it by the Department from time to time. Transfield undertook responsibility for "access control procedures" that are "sufficiently robust" to eliminate the possibility of unauthorised access to the RPC. Further, Transfield is required to verify that all transferees are present and safe in the RPC at least twice each day, at times which take account of any curfew arrangements.

87 Among the "garrison services" which Transfield undertook to provide are security services, which include "structured security services" enabling Transfield to manage routine events at the RPC and to respond promptly and flexibly to any incident. Transfield is required to provide the Department with security risk assessments and security audits. It may conduct searches within the RPC only with the prior approval, or on the request, of the Department. Transfield is required to discharge its contractual obligations in a manner that is adaptable to and readily accommodates changes in Commonwealth policy during the term of the contract, in order to ensure that the services it delivers accord with Commonwealth policy.

88 The step-in rights under the Transfield contract allow the Secretary of the Department, if he or she considers that circumstances exist which require the Department's intervention, at his or her absolute discretion, to suspend the performance of any service performed by Transfield and arrange for the Department, or a third party, to perform the suspended service or otherwise to intervene in the provision of the services by written notice to Transfield.

89 Transfield provides security and other services at the RPC through a subcontract with a subsidiary of Wilson Parking Australia 1992 Pty Ltd ("Wilson Security"). The subcontract at the time of the hearing was entered into on 28 March 2014. Transfield was required to obtain, and did obtain, the Commonwealth's approval of its subcontract with Wilson Security. Employees of Wilson Security are authorised officers under the RPC Act.

90 Among the other service providers engaged by the Commonwealth to perform services at the RPC is International Health and Medical Services Pty Ltd, which provides primary health care for transferees. Where, as occurred here, a transferee requires medical attention that is not available in Nauru, the transferee may be brought to Australia from Nauru for the temporary purpose of receiving treatment[45]. On no occasion has Nauru refused any permission

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45 Migration Act, s 198B.

necessary under the law of Nauru for a transferee to be taken from Nauru to Australia to receive medical treatment.

91 In the period covered by the plaintiff's claim, from 24 March 2014 until 2 August 2014, when she was removed from Nauru by the Commonwealth for the purpose of being brought to Australia for medical treatment, the plaintiff resided in RPC3. RPC3 was surrounded by a high metal fence through which entry and exit was possible only through a checkpoint. The checkpoint was permanently staffed by employees of Wilson Security, who monitored ingress and egress. The plaintiff was entitled to move freely within RPC3, save that she was not permitted to be present in other transferees' accommodation areas between 5:00pm and 6:00am and was not permitted to enter specified restricted areas. Contrary to the Commonwealth parties' submission, the detention to which the plaintiff was subject is not analogous to the lesser forms of restriction on liberty considered in *Thomas v Mowbray*[46].

92 As a condition of its acceptance of a transferee from Australia, Nauru required that the transferee be detained in custody while any protection claim was processed and while any arrangements were made for removal from Nauru in the event the transferee was found not to be in need of international protection. It is correct, as the Commonwealth parties submit, to observe that while only an officer of the Commonwealth could apply for an RPC visa in the plaintiff's name, it remained for Nauru to determine whether or not to grant the visa. However, Nauru committed itself under the MOU to take those persons whom the Commonwealth transferred to it under s 198AD of the Migration Act. The Commonwealth parties brought about the plaintiff's detention in Nauru by applying for the issue of an RPC visa in her name without her consent.

93 The Commonwealth funded the RPC and exercised effective control over the detention of the transferees through the contractual obligations it imposed on Transfield. The first premise of the plaintiff's *Lim* challenge, that her detention in Nauru was, as a matter of substance, caused and effectively controlled by the Commonwealth parties, may be accepted.

The *Lim* challenge to the validity of s 198AHA

94 In Australia, unlawful non-citizens can be detained in custody without judicial warrant, under valid provisions of the Migration Act, for purposes which include the investigation and determination of any protection claim[47]. The plaintiff is unwilling to return to Bangladesh because she claims to be a refugee.

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46 (2007) 233 CLR 307 at 330 [18] per Gleeson CJ, 356 [114]-[116] per Gummow and Crennan JJ; [2007] HCA 33.

47 Migration Act, s 189.

She has applied to the Secretary of the Department of Justice and Border Control of Nauru to be recognised as a refugee under s 5 of the *Refugees Convention Act* 2012 (Nauru). Her application has not been determined. The plaintiff contends that the Commonwealth Parliament cannot enact a valid law authorising the Commonwealth to engage in conduct causing, or effectively controlling, her detention in Nauru while her protection claim is investigated and determined because detention in Nauru under the scheme for regional processing is avowedly punitive in character.

95 An alternative ground of challenge to the validity of s 198AHA submitted by the plaintiff is that the section does not confine the authority that it confers, to exercise restraint over the liberty of a person in relation to the regional processing functions of a country, to that which is reasonably capable of being seen as necessary for the purposes of investigating and assessing any protection claim and removal from Nauru[48]. Each of these challenges derives from the principles stated in the joint reasons of Brennan, Deane and Dawson JJ in *Lim*.

96 The Commonwealth parties submit that the true principle enunciated in the joint reasons in *Lim*, with the concurrence of Mason CJ, is that legislation conferring power on the Executive to detain a person will only be invalid if it is a conferral of the judicial power of the Commonwealth. Even if officers of the Commonwealth have, directly or indirectly, exercised restraint over the plaintiff's liberty in Nauru, the Commonwealth parties submit that the conferral of authority to do so under s 198AHA(2) is not of the judicial power of the Commonwealth. They contend that the lawfulness of the plaintiff's detention is governed by the law of Nauru and that s 198AHA(3) makes plain that the authority it confers does not make lawful detention that would otherwise be unlawful. To the extent that the joint reasons in *Lim* state that an officer of the Commonwealth who purports to authorise or enforce the detention in custody of an alien will act lawfully only to the extent that the conduct is justified by valid statutory provision[49], the Commonwealth parties submit their Honours are stating a principle of common law. Their Honours' reference to the constitutional immunity of citizens, in other than exceptional cases, from being imprisoned without judicial warrant[50] is criticised by the Commonwealth parties as inconsistent with the "true principle" for which *Lim* stands.

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48 *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 233 [34]; [2014] HCA 34.

49 (1992) 176 CLR 1 at 19 per Brennan, Deane and Dawson JJ.

50 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27-29 per Brennan, Deane and Dawson JJ.

97 The analysis in the joint reasons in *Lim*, which commences with the common law's rejection of the *lettre de cachet* or other executive warrant authorising arbitrary arrest or detention, proceeds to a consideration of that rejection under a system of government in which the separation of judicial from legislative and executive power is constitutionally mandated[51]. It is to be kept in mind that the object of that separation is the protection of individual liberty[52]. It is in this context that their Honours explain that the purported investment of an executive power of arbitrary detention will be beyond the legislative power of the Commonwealth Parliament even if the investment were conferred in a manner which sought to divorce it from the exercise of judicial power[53].

98 It remains that *Lim* allows for the Parliament to confer power on the Executive to detain aliens without judicial warrant for identified purposes[54]. The constitutional holding in *Lim* is that a law, authorising or requiring the detention in custody of an alien without judicial warrant, will not contravene Ch III of the Constitution provided the detention that the law authorises or requires is limited to that which is reasonably capable of being seen as necessary for the purposes of deportation or for the purposes of enabling an application by the alien to enter and remain in Australia to be investigated and determined[55]. So limited, the detention is an incident of executive power. If not so limited, the detention is punitive in character and ceases to be lawful.

99 There is no principled reason why the Parliament may confer a power on the Commonwealth to cause and effectively control the detention of an alien taken from Australia, to a country which has been designated by Australia as a regional processing country, without being subject to the same constitutional limitations as apply to the detention of aliens for the purposes of processing their

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51 (1992) 176 CLR 1 at 27-29 per Brennan, Deane and Dawson JJ.

52 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ; [1996] HCA 18.

53 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ.

54 (1992) 176 CLR 1 at 32 per Brennan, Deane and Dawson JJ.

55 (1992) 176 CLR 1 at 33 per Brennan, Deane and Dawson JJ; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 12-13 [18] per Gleeson CJ; [2004] HCA 49; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 369 [138] per Crennan, Bell and Gageler JJ; [2013] HCA 53.

protection claims in Australia[56]. In my opinion, the plaintiff's invocation of the *Lim* principle fails, not because that principle has no application but because her detention in Nauru did not infringe the principle.

100 The plaintiff points to statements in the MOU as evidencing that the purpose of the detention of transferees in Nauru was punitive. These include the parties' recognition of the need for "practical action to provide a disincentive against Irregular Migration, People Smuggling syndicates and transnational crime", the need to ensure that "no benefit is gained through circumventing regular migration arrangements" and the need to "take account of the protection needs of persons who have moved irregularly and who may be seeking asylum". It may be accepted that a purpose of the regional processing scheme for which Pt 2 Div 8 subdiv B of the Migration Act provides is to deter irregular migration to Australia. This object is pursued by the removal of UMAs to a regional processing country for the determination of their protection claims. However, the requirement for transferees to be detained, while the administrative processes involved in the investigation, assessment and review of their claims take place, does not thereby take on the character of being punitive.

101 Section 198AHA(2) does not confer unconstrained authority on the Commonwealth to take action involving the exercise of restraint over the liberty of persons. The authority is limited to action that can reasonably be seen to be related to Nauru's regional processing functions. Those functions, identified in the MOU, are the processing of any protection claim made by a transferee and the removal from Nauru of transferees who are found not to be in need of international protection. If a transferee were to be detained for a period exceeding that which can be seen to be reasonably necessary for the performance of those functions, the Commonwealth parties' participation in the exercise of restraint over the transferee would cease to be lawful[57].

102 As French CJ, Kiefel and Nettle JJ observe, the plaintiff's pleaded case does not raise an issue as to the lawfulness of her detention under the law of Nauru. I agree with their Honours' reasons for concluding that the plaintiff's case is not an occasion to pronounce on the constitutional validity of the laws of Nauru.

103 The questions of law stated in the amended special case should be answered in the terms stated by French CJ, Kiefel and Nettle JJ.

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56 *CPCF v Minister for Immigration and Border Protection* (2015) 89 ALJR 207 at 240 [149]-[150] per Hayne and Bell JJ; 316 ALR 1 at 39-40; [2015] HCA 1.

57 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 34 per Brennan, Deane and Dawson JJ.

GAGELER J.

Introduction

104 The *Migration Act* 1958 (Cth) has, since the insertion of subdiv B into Div 8 of Pt 2 in 2012[58], established a regime under which a person who is a non-citizen and who on entering Australia becomes an "unauthorised maritime arrival" must be detained[59] and taken to a designated "regional processing country"[60]. The non-citizen may be brought back to Australia for a temporary purpose[61] but must be returned once the need to be in Australia for that temporary purpose has passed[62].

105 On 29 August 2012, the Commonwealth of Australia and the Republic of Nauru entered into an understanding set out in a document entitled "Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues". Under that Memorandum of Understanding – which was replaced by another Memorandum of Understanding ("the Second Memorandum of Understanding") in relevantly identical terms on 3 August 2013 – the Republic of Nauru agreed to accept the transfer of persons authorised by Australian law to be transferred to Nauru, and assured the Commonwealth, amongst other things, that it will make an assessment, or permit an assessment to be made, of whether or not a transferee is covered by the definition of "refugee" in the Refugees Convention[63].

106 On 10 September 2012, the Republic of Nauru was designated as a regional processing country. More than 2000 unauthorised maritime arrivals have since been taken to Nauru. There they have been detained at a Regional Processing Centre, pending processing of their claims to be refugees within the meaning of the Refugees Convention. Their detention at the Regional Processing

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58 *Migration Legislation Amendment (Regional Processing and Other Measures) Act* 2012 (Cth).

59 Section 189 of the *Migration Act.*

60 Section 198AD of the *Migration Act*.

61 Section 198B of the *Migration Act*.

62 Section 198AH of the *Migration Act*.

63 Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967).

Centre has been under the authority of Nauruan legislation, the validity of which under the Constitution of Nauru is controversial.

107 Since 24 March 2014, the Regional Processing Centre on Nauru has been operated by Wilson Parking Australia 1992 Pty Ltd or a subsidiary ("Wilson Security") in accordance with a written contract between Transfield Services (Australia) Pty Ltd ("Transfield") and the Commonwealth of Australia ("the Transfield contract"). Under the Transfield contract, the Commonwealth has paid Transfield to provide what are generically described in the contract as "garrison and welfare services" to non-citizens taken to Nauru, and the Commonwealth has consented to services within that description being provided by Wilson Security under a subcontract between Transfield and Wilson Security. The Transfield contract requires that the services be provided in accordance with all applicable Australian and Nauruan laws, including Nauruan laws pertaining specifically to the Regional Processing Centre, and in accordance with all applicable Commonwealth policies as notified to Transfield from time to time.

108 The plaintiff is a Bangladeshi national who, as an unauthorised maritime arrival, was taken to Nauru after its designation as a regional processing country and who was detained at the Regional Processing Centre on Nauru. There is no dispute that she was detained there between 24 March 2014 and 2 August 2014, when she was brought back to Australia for a temporary purpose.

109 In a proceeding commenced in the original jurisdiction of the High Court under s 75(iii) and s 75(v) of the Constitution to which the Commonwealth, the Minister for Immigration and Border Protection and Transfield are parties, the plaintiff seeks a declaration to the effect that the Commonwealth and the Minister acted beyond the executive power of the Commonwealth under s 61 of the Constitution by procuring and enforcing her detention at the Regional Processing Centre between 24 March 2014 and 2 August 2014. She also seeks other relief directed to restraining performance of the Transfield contract and to preventing her return to Nauru. Her entitlement to that other relief depends on her first establishing an entitlement to the declaration which she seeks as to past events. No part of her case is to seek damages for wrongful imprisonment.

110 Two events of significance occurred during the course of the proceeding. The first was the enactment on 30 June 2015 of the *Migration Amendment (Regional Processing Arrangements) Act* 2015 (Cth), which inserted s 198AHA into the *Migration Act*, with retrospective effect to 18 August 2012[64]. The efficacy and validity of s 198AHA are now both in issue in the proceeding.

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64 Section 2 of the *Migration Amendment (Regional Processing Arrangements) Act* 2015 (Cth).

111 The second was the announcement on 2 October 2015 by the Government of Nauru of its intention "to allow for freedom of movement of asylum seekers 24 hours per day, seven days per week" from 5 October 2015 and to introduce legislation to that effect at the next sitting of the Nauruan Parliament.

112 The plaintiff, being "affected in [her] person" by the conduct she claims to have been unconstitutional, had a sufficient interest to give her standing to seek such a declaration at the commencement of the proceeding[65]. The plaintiff did not lose that standing by reason of the change of circumstances which can be predicted to occur on Nauru as a result of the announcement[66]. Nor has the announcement rendered the proceeding moot: it could not be said that the declaration, if made, would have no foreseeable consequences for the plaintiff[67].

113 To address the merits of the plaintiff's claim that her detention at the Regional Processing Centre was procured and enforced by Commonwealth action that was in excess of Commonwealth executive power, it will be necessary in due course to examine the operation and validity of s 198AHA. It will also be necessary to examine the practical operation of the Nauruan legislation which authorised her detention and the interaction of that legislation with some of the "garrison" services provided by Wilson Security in accordance with the Transfield contract. It will not be necessary to address the validity of the Nauruan legislation under the Constitution of Nauru.

114 Given the manner in which the proceeding has unfolded and the absence of any concession that the plaintiff's claim was well-founded until the insertion of s 198AHA, it is appropriate to commence with a consideration of the nature of Commonwealth executive power and then to move to an identification of the nature of its relevant limits.

Executive Government in the Constitution

115 The framers of the Australian Constitution engaged in what was fairly described in informed contemporary commentary as an endeavour of "constructive statesmanship", in which they "used the experience of the mother country and of their predecessors in the work of federation-making ... in no

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65 *Toowoomba Foundry Pty Ltd v The Commonwealth* (1945) 71 CLR 545 at 570; [1945] HCA 15, quoted in *Croome v Tasmania* (1997) 191 CLR 119 at 126, 137; [1997] HCA 5.

66 Cf *Wragg v State of New South Wales* (1953) 88 CLR 353 at 371, 392; [1953] HCA 34.

67 Cf *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582; [1992] HCA 10.

slavish spirit, choosing from the doctrines of England and from the rules of America, Switzerland, and Canada those which seemed best fitted to the special conditions of their own country"[68]. Nowhere was their careful appropriation and adaptation of constitutional precedent to local circumstances more apparent than in their framing of what is described in Ch II of the Constitution as "The Executive Government" and of its relationship with what are described in Chs I and III of the Constitution as "The Parliament" and "The Judicature".

116 The second half of the nineteenth century had seen the development of systems of responsible government in each of the colonies which were to become Australian States. Professor Finn (later to become Justice Finn of the Federal Court of Australia) observed of that development[69]:

> "Responsible government left unsevered the many constitutional links with the Queen. Even the royal power of veto of colonial legislation remained. And in each colony the Queen's representative, the Governor, persisted as a fixture on the local stage. But so also did the Executive Council, a body hitherto formed of official appointees to advise the Governor in the exercise of the majority of his powers. Now for the first time composed of the elected ministry of the day, the Executive Council became the institutional symbol of an elected ministry – of 'the government'. Behind it … the cabinet system developed. Through it the colonists expressed a very practical view of the proper allocation of responsibilities in the new order."

117 Professor Finn commented[70]:

> "Untroubled by concerns as to the juristic nature of 'the Crown' the colonists appear to have adopted both a personalized and functionalized view of the Queen (the Crown) and of her constitutional powers and responsibilities. And if the Queen had her place, her province, in the imperial scheme of things, so too in the local arena did 'the Government', of whom a similarly personalized and functionalized view was taken."

118 The practical setting within which that peculiarly functionalised Australian conception of "the Government" took root was acknowledged by the

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68 Bryce, *Studies in History and Jurisprudence*, (1901), vol 1 at 476, 482.

69 Finn, *Law and Government in Colonial Australia*, (1987) at 4 (footnotes omitted).

70 Finn, *Law and Government in Colonial Australia*, (1987) at 4 (footnote omitted).

Privy Council in 1887, when it commented in advice given on an appeal from the Supreme Court of New South Wales[71]:

> "It must be borne in mind that the local Governments in the Colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other works for the construction of which it is necessary to employ many inferior officers and workmen. If, therefore, the maxim that 'the king can do no wrong' were applied to Colonial Governments in the [same] way … it would work much greater hardship than it does in England."

119 Chapter II of the Constitution was framed against that political and practical background. The Executive Government of the Commonwealth was established to take from its inception the form of a responsible government which was to have its own distinct national identity and its own distinctly national sphere of governmental responsibility. The executive power of the Commonwealth, although vested in the monarch as the formal head of State, was to be exercisable by the Governor-General as the monarch's representative in the Commonwealth[72]. There was to be a Federal Executive Council "to advise the Governor-General in the government of the Commonwealth"[73], which was to be made up of "Ministers of State for the Commonwealth" whom the Governor-General was to appoint to "administer such departments of State of the Commonwealth as the Governor-General in Council may establish"[74].

120 After the first general election, Ministers of State were not to hold office for longer than three months unless they were or became senators or members of the House of Representatives[75]. Until the Parliament otherwise provided, as the Parliament was specifically empowered to do under s 51(xxxvi), the Governor-General was to have power to appoint and remove "all other officers of the Executive Government of the Commonwealth"[76]. Transitional provision was made for the transfer to the Commonwealth of "departments of the public service

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71 *Farnell v Bowman* (1887) 12 App Cas 643 at 649.

72 Sections 61 and 2 of the Constitution.

73 Section 62 of the Constitution.

74 Section 64 of the Constitution.

75 Section 64 of the Constitution.

76 Section 67 of the Constitution.

in each State"[77]. The departments to be transferred were specified to include not only "departments of customs and of excise", "naval and military defence" and "quarantine", but two which were at the time of the establishment of the Commonwealth involved in the ongoing practical delivery of government services: "posts, telegraphs, and telephones", and "lighthouses, lightships, beacons, and buoys"[78].

121 "[I]t is of the very nature of executive power in a system of responsible government that it is susceptible to control by the exercise of legislative power by Parliament"[79]. That critical aspect of the relationship between the Executive Government of the Commonwealth and the Parliament of the Commonwealth was not left to chance in the design of the Constitution. In addition to giving the Parliament power to legislate for the appointment and removal of all officers of the Executive Government other than the Governor-General and Ministers, and in addition to enumerating other subject-matters of legislative power under which the Parliament might confer statutory authority on an officer of the Executive Government of the Commonwealth, Ch I of the Constitution conferred on the Parliament by s 51(xxxix) specific power to make laws with respect to matters "incidental to the execution" of power vested by the Constitution "in the Government of the Commonwealth" as well as "in any department or officer of the Commonwealth".

122 Subject to constitutional limitations, including limitations imposed by Ch III of the Constitution, the incidental power conferred by s 51(xxxix) extends not only to legislative facilitation of the execution of the executive power of the Commonwealth[80], but also to legislative regulation of the manner and circumstances of the execution of the executive power of the Commonwealth. The result is that[81]:

> "Whatever the scope of the executive power of the Commonwealth might otherwise be, it is susceptible of control by statute. A valid law of the Commonwealth may so limit or impose conditions on the exercise of

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77 Section 69 of the Constitution.

78 Section 69 of the Constitution.

79 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 441; [1997] HCA 36 (footnote omitted).

80 Eg *Davis v The Commonwealth* (1988) 166 CLR 79 at 95, 111-112, 119; [1988] HCA 63.

81 *Brown v West* (1990) 169 CLR 195 at 202; [1990] HCA 7.

the executive power that acts which would otherwise be supported by the executive power fall outside its scope."

123 The Executive Government having been so subordinated to the Parliament, the relationship between the Executive Government of the Commonwealth and the federal Judicature was then spelt out in Ch III of the Constitution. Section 75(iii) entrenched original jurisdiction in the High Court in all matters "in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party". Section 75(v) went on in addition to entrench original jurisdiction in the High Court in all matters "in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth".

124 The purpose of s 75(iii), as Dixon J observed, "was to ensure that the political organization called into existence under the name of the Commonwealth and armed with enumerated powers and authorities, limited by definition, fell in every way within a jurisdiction in which it could be impleaded and which it could invoke"[82]. The term "Commonwealth", Dixon J pointed out, while "[i]t is perhaps strictly correct to say that it means the Crown in right of the Commonwealth", has in s 75(iii) the meaning of "the central Government of the country" understood in accordance with "the conceptions of ordinary life"[83]. The term was used in s 75(iii) to encompass the totality of what is established by Ch II as the Executive Government of the Commonwealth, and the jurisdiction conferred by s 75(iii) was "expressed so as to cover the enforcement of actionable rights and liabilities of officers and agencies in their official and governmental capacity, when in substance they formed part of or represented the Commonwealth"[84].

125 The inclusion of s 75(iii) in the Constitution involved a rejection of any notion, which might otherwise have been drawn from the common law principle then still prevailing in England that the monarch could "do no wrong", that the Executive Government of the Commonwealth was to enjoy immunity from suit for its own actions or for the actions of its officers or agents[85]. The inclusion of

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82 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 363; [1948] HCA 7.

83 (1948) 76 CLR 1 at 362-363. See also Maitland, "The Crown as Corporation", (1901) 17 *Law Quarterly Review* 131 at 140, 143.

84 (1948) 76 CLR 1 at 367.

85 *Werrin v The Commonwealth* (1938) 59 CLR 150 at 167-168; [1938] HCA 3; *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 367; *The Commonwealth v Mewett* (1997) 191 CLR 471 at 549-550; [1997] HCA 29.

s 75(iii) had the consequence of exposing the Commonwealth from its inception to common law liability, in contract and in tort, for its own actions and for actions of officers and agents of the Executive Government acting within the scope of their de facto authority[86]. Any exclusion of actions of the Executive Government from common law liability was to result not from the existence of a generalised immunity from jurisdiction but through the operation of such substantive law as might be enacted by the Parliament under s 51(xxxix)[87] or under another applicable head of Commonwealth legislative power.

126 The purpose of s 75(v), as Dixon J put it, was "to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power"[88]. It was, in particular, to safeguard against the possibility of s 75(iii) being read down by reference to United States case law so as to exclude a matter in which a writ of mandamus was sought against an officer of the Executive Government[89]. The purpose was to supplement s 75(iii) so as to ensure that any officer of the Commonwealth acted, and acted only, within the scope of the authority conferred on that officer by the Constitution or by legislation. Its effect was also to ensure that an officer of the Commonwealth could be restrained by injunction from acting inconsistently with any applicable legal constraint even when acting within the scope of the authority conferred on that officer by the Constitution or by legislation[90].

127 The conception of an officer of the Commonwealth was held at an early stage not to be confined to a person holding executive office under Ch II of the Constitution: so as to encompass judicial and non-judicial officers of courts established by the Parliament under Ch III of the Constitution[91] as well as holders

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86 *James v The Commonwealth* (1939) 62 CLR 339 at 359-360; [1939] HCA 9. Cf *Little v The Commonwealth* (1947) 75 CLR 94 at 114; [1947] HCA 24.

87 *Werrin v The Commonwealth* (1938) 59 CLR 150 at 165. Eg *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155; [1994] HCA 9.

88 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 363.

89 *Ah Yick v Lehmert* (1905) 2 CLR 593 at 608-609; [1905] HCA 22. See also *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 92 [18]; [2000] HCA 57.

90 *Church of Scientology v Woodward* (1982) 154 CLR 25 at 57, 64-65; [1982] HCA 78.

91 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1; [1910] HCA 33; *R v Commonwealth Court of Conciliation*

(Footnote continues on next page)

of independent statutory offices established in the exercise of legislative power under Ch I of the Constitution[92]. Section 75(v) is nevertheless at its apogee in its application to Ministers and other officers of the Executive Government[93].

128 The overall constitutional context for any consideration of the nature of Commonwealth executive power is therefore that, although stated in s 61 of the Constitution to be vested in the monarch and to be exercisable by the Governor-General, the executive power of the Commonwealth is and was always to be permitted to be exercised at a functional level by Ministers and by other officers of the Executive Government acting in their official capacities or through agents. It is and was always to involve broad powers of administration, including in relation to the delivery of government services. Its exercise by the Executive Government and by officers and agents of the Executive Government is and was always to be susceptible of control by Commonwealth statute. And its exercise is and was always to be capable of exposing the Commonwealth to common law liability determined in the exercise of jurisdiction under s 75(iii) and of exposing officers of the Executive Government to writs issued and orders made in the exercise of jurisdiction under s 75(v). In "the last resort" it is necessarily for a court to determine whether a given act is within constitutional limits[94].

The nature of executive power

129 The nature of Commonwealth executive power can only be understood within that historical and structural constitutional context. It is described – not defined – in s 61 of the Constitution, in that it is extended – not confined – by that section to the "execution and maintenance" of the Constitution and of laws of the Commonwealth. It is therefore "barren ground for any analytical approach"[95]. Alfred Deakin said of it in a profound opinion which he gave as

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and Arbitration; Ex parte Brisbane Tramways Group Ltd (1914) 18 CLR 54; [1914] HCA 15.

92 *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117 at 127-128; [1987] HCA 28.

93 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 380; [1975] HCA 52.

94 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 380, quoting *Attorney-General (Vict) v The Commonwealth* (1935) 52 CLR 533 at 566; [1935] HCA 31.

95 Zines, "The Inherent Executive Power of The Commonwealth", (2005) 16 *Public Law Review* 279 at 279, quoting Morgan, *The Separation of Powers in the Irish Constitution*, (1997) at 272.

Attorney-General in 1902 that "it would be dangerous, if not impossible, to define", emphasising that it "is administrative, as well as in the strict sense executive; that is to say, it must obviously include the power not only to execute laws, but also to effectively administer the whole Government"[96].

130 Without attempting to define Commonwealth executive power, Professor Winterton usefully drew attention to its dimensions when he distinguished its "breadth" from its "depth": "breadth" referring to the subject-matters with respect to which the Executive Government of the Commonwealth is empowered to act having regard to the constraints of the federal system; "depth" referring to the precise actions which the Executive Government is empowered to undertake in relation to those subject-matters[97].

131 Put in terms of the nomenclature of Professor Winterton, Mason J referred to the breadth of Commonwealth executive power when, in a frequently cited passage, he said that it "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"[98]. He referred to its depth when he immediately added that it "includes the prerogative powers of the Crown, that is, the powers accorded to the Crown by the common law"[99].

132 Put in terms of the same nomenclature, Brennan J referred exclusively to the depth of Commonwealth executive power when he noted that "an act done in execution of an executive power of the Commonwealth is done in execution of one of three categories of powers or capacities: a statutory (non-prerogative) power or capacity, a prerogative (non-statutory) power or capacity, or a capacity which is neither a statutory nor a prerogative capacity"[100].

133 In framing those categories of actions which the Executive Government is empowered to undertake in relation to subject-matters with respect to which the Executive Government is empowered to act, Brennan J used the term

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96 Deakin, "Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth", in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14*, (1981) 129 at 130, 131.

97 Winterton, *Parliament, the Executive and the Governor-General*, (1983) at 29, 111.

98 *Barton v The Commonwealth* (1974) 131 CLR 477 at 498; [1974] HCA 20.

99 *Barton v The Commonwealth* (1974) 131 CLR 477 at 498.

100 *Davis v The Commonwealth* (1988) 166 CLR 79 at 108.

"prerogative" in the strict and narrow sense in which it had been used by Sir William Blackstone in the middle of the eighteenth century: to refer only to "those rights and capacities which the King enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects"[101]. He framed the second and third categories of permissible acts so as together to cover the wider sense in which Professor Dicey had used the same term in the late nineteenth century, after the emergence of responsible government in the United Kingdom: to refer to "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown"[102] and thereby to encompass "[e]very act which the executive government can lawfully do without the authority of [an] Act of Parliament"[103].

134 The tripartite categorisation posited by Brennan J has utility in highlighting, in relation to acts done in the exercise of a non-statutory power or capacity, the essential difference between an act done in the execution of a prerogative executive power and an act done in the execution of a non-prerogative executive capacity.

135 An act done in the execution of a prerogative executive power is an act which is capable of interfering with legal rights of others. An act done in the execution of a non-prerogative executive capacity, in contrast, involves nothing more than the utilisation of a bare capacity or permission, which can also be described as ability to act or as a "faculty"[104]. Such effects as the act might have on legal rights or juridical relations result not from the act being uniquely that of the Executive Government but from the application to the act of the same substantive law as would be applicable in respect of the act had it been done by any other actor. In this respect, the Executive Government "is affected by the

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101 *Davis v The Commonwealth* (1988) 166 CLR 79 at 108, quoting Blackstone, *Commentaries on the Laws of England*, (1765), Bk 1, Ch 7 at 232. See also *Clough v Leahy* (1904) 2 CLR 139 at 156; [1904] HCA 38; *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 155; [1982] HCA 31.

102 *Davis v The Commonwealth* (1988) 166 CLR 79 at 108, quoting Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (1959) at 424.

103 Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (1959) at 425. Eg *Johnson v Kent* (1975) 132 CLR 164 at 169; [1975] HCA 4.

104 Cf *Heiner v Scott* (1914) 19 CLR 381 at 393-394; [1914] HCA 82; *In re K L Tractors Ltd* (1961) 106 CLR 318 at 335; [1961] HCA 8.

condition of the general law"[105]. Subject to statute, and to the limited extent to which the operation of the common law accommodates to the continued existence of "those rights and capacities which the King enjoys alone" and which are therefore properly to be categorised as prerogative[106], the Executive Government must take the civil and criminal law as the Executive Government finds it, and must suffer the civil and criminal consequences of any breach[107].

136 That inherent character of non-prerogative executive capacity is given emphasis by the absence of any prerogative power to dispense with the operation of the general law: a principle which Brennan J noted in *A v Hayden*[108] "is fundamental to our law, though it seems sometimes to be forgotten when executive governments or their agencies are fettered or frustrated by laws which affect the fulfilment of their policies". In that case intelligence officers engaged in a bungled training exercise were unable to rely on the authority of the Executive Government to shield them from the investigation of the criminal consequences of their actions under State law. The comments of Deane J are instructive[109]:

> "The [officers'] trust in the Commonwealth and in those who approved the exercise or gave them their directions or instructions was completely misplaced. The 'authority or consent necessary to make any act or thing lawful' was not obtained and, in the absence of special statutory provision, was probably not within the power of any person or combination of persons to grant. The 'direction' to participate in the exercise, in the manner in which it was carried out, was a direction which the Commonwealth executive could not lawfully give. To the extent that the [officers] may themselves have been involved in criminal activities, the 'Commonwealth exercise cards' which they were 'instructed ... to show' should they be questioned were completely ineffectual to establish legal justification."

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105 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 439, quoting *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278 at 308; [1940] HCA 13.

106 Cf *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195 at 210 [30]-[32]; [2010] HCA 27.

107 *Clough v Leahy* (1904) 2 CLR 139 at 155-156.

108 (1984) 156 CLR 532 at 580; [1984] HCA 67.

109 (1984) 156 CLR 532 at 593.

Limitations on executive power

137 The tripartite categorisation posited by Brennan J also has utility in highlighting, in relation to acts done by the Executive Government in the exercise of non-statutory power or capacity, the essential similarity between an act done in the execution of a prerogative executive power or capacity and an act done in the execution of a non-prerogative executive capacity. The essential similarity lies in the identity of their provenance.

138 Non-prerogative executive capacities, no less than prerogative executive powers and capacities, are within the non-statutory executive power of the Commonwealth which is constitutionally conferred by s 61 of the Constitution and which is accordingly constitutionally limited by s 61 of the Constitution. Its constitutional limits are to be understood (as distinct from merely interpreted) in light of the purpose of Ch II being to establish the Executive Government as a national responsible government and in light of constitutional history and the tradition of the common law.

139 Limitations on the executive power of the Commonwealth, rooted in constitutional history and the tradition of the common law, were important to the reasoning of at least two members of the High Court in *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd*[110] in holding that the Executive Government of the Commonwealth lacked non-statutory power to make or ratify agreements with a company engaged in the manufacture of wool-tops under which the Commonwealth agreed to consent to the sale of wool-tops by the company in return for a share in the profits of sale.

140 Isaacs J emphasised the impossibility of understanding the executive power referred to in s 61 of the Constitution other than by reference to common law principles bearing on the operation of responsible government[111]. He referred to s 61 as describing the "constitutional domain" or "field on which Commonwealth executive action lawfully operates", adding that it was "plain that the 'constitutional domain' does not determine the existence or non-existence of the necessary power in ... a given case"[112]. He held the agreements in question to be beyond Commonwealth executive power by reference to the "vitiating

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110 (1922) 31 CLR 421; [1922] HCA 62.

111 (1922) 31 CLR 421 at 437-439.

112 (1922) 31 CLR 421 at 440.

cause" that they amounted in substance to a form of taxation forbidden to the Executive Government in the absence of parliamentary warrant[113].

141 The reasoning of Starke J was to similar effect. He said[114]:

> "The question … is whether the King – the Executive Government of the King in the Commonwealth – can, without parliamentary sanction, exact the payment of the moneys mentioned in these agreements, as a condition of or as consideration for giving consent to acts necessary to the conduct of the subject's business? So stated, the problem recalls many conflicts in the past between the King and the subject as to the right of the King to levy taxes upon, or to exact or extort money from, the subject without the consent of Parliament. But that contest has long since ended; and we may now say, with confidence, that it is illegal for the King – or the Executive Government of the King – without the authority of Parliament, to levy taxes upon the subject, or to exact, extort or raise moneys from the subject for the use of the King 'as the price of exercising his control in a particular way' or as a consideration for permitting the subject to carry on his trade or business."

142 Starke J said of s 61 of the Constitution that it "simply marks out the field of the executive power of the Commonwealth, and the validity of any particular act within that field must be determined by reference to the Constitution or the laws of the Commonwealth, or to the prerogative or inherent powers of the King", concluding that "the general principles of the constitutional law of England make it clear ... that no prerogative or inherent executive power residing in the King or his Executive Government supports the agreements"[115].

143 The analysis of the executive power of the Commonwealth to which I have referred is not, I think, affected by recent cases which have focussed on the capacity of the Executive Government of the Commonwealth to expend appropriated funds.

144 *Pape v Federal Commissioner of Taxation*[116] decided that ss 81 and 83 of the Constitution are not a source of Commonwealth legislative power to authorise executive expenditure, with the result that Executive Government

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113 (1922) 31 CLR 421 at 433, 443-445, referring to *Attorney-General v Wilts United Dairies Ltd* (1921) 37 TLR 884; (1922) 38 TLR 781.

114 (1922) 31 CLR 421 at 459-460.

115 (1922) 31 CLR 421 at 461.

116 (2009) 238 CLR 1; [2009] HCA 23.

expenditure of appropriated funds involves more than simple execution of the law which has appropriated those funds. There must be executive power to make the expenditure. There is, of course, a difference between spending and doing: "[t]he power to make a present to a man is not the power to give him orders"[117]. Even prior to *Pape*, it had never been thought that an appropriation alone provided statutory authority for the Executive Government to engage in activities in relation to which it permitted funds to be spent[118].

145 *Williams v The Commonwealth*[119] was described in *Williams v The Commonwealth [No 2]*[120] as having been characterised by the Commonwealth parties in that latter case as having held "that many, but not all, instances of executive spending and contracting require legislative authorisation". Whether that characterisation is warranted need not be explored. For present purposes, what is to be taken from the various strands of reasoning in *Williams [No 1]* is a rejection of any notion that the breadth of Commonwealth executive power is to be measured simply by reference to the reach of Commonwealth legislative power[121], and a rejection of any notion that the non-statutory and non-prerogative capacity of the Executive Government of the Commonwealth is to be equated for all purposes with the capacity of an individual[122].

146 The focus in the present case is not on the capacity of the Executive Government of the Commonwealth to spend, but on its capacity to procure or enforce a deprivation of liberty.

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117 Australia, Royal Commission on the Constitution of the Commonwealth, *Report of Proceedings and Minutes of Evidence* (Canberra), 22 September 1927 at 72 [396] (Sir Robert Garran).

118 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 396.

119 (2012) 248 CLR 156; [2012] HCA 23 ("*Williams [No 1]*").

120 (2014) 252 CLR 416 at 465 [68]; [2014] HCA 23.

121 (2012) 248 CLR 156 at 189 [30], 232-233 [134]-[137], 358 [544].

122 (2012) 248 CLR 156 at 193 [38], 237-238 [154]-[155], 253-254 [204], 352-353 [518]-[524], 373-374 [595].

Executive power and liberty

147 In *Re Bolton; Ex parte Beane*[123], a proceeding in the original jurisdiction of the High Court under s 75(v) of the Constitution for writs of habeas corpus and prohibition against officers of the Commonwealth, Brennan J observed:

> "Many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their contemporary and undiminished force."

The order of the Court in that case directed an officer of the Commonwealth to discharge from custody a citizen of another country who had been detained within Australia without statutory authority.

148 Deane J identified the informing principle in the following terms[124]:

> "The common law of Australia knows no lettre de cachet or executive warrant pursuant to which either citizen or alien can be deprived of his freedom by mere administrative decision or action. Any officer of the Commonwealth Executive who, without judicial warrant, purports to authorize or enforce the detention in custody of another person is acting lawfully only to the extent that his conduct is justified by clear statutory mandate."

149 Subsequently, in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[125], Brennan, Deane and Dawson JJ (with whom Mason CJ agreed) said:

> "Under the common law of Australia and subject to qualification in the case of an enemy alien in time of war, an alien who is within this country, whether lawfully or unlawfully, is not an outlaw. Neither public official nor private person can lawfully detain him or her or deal with his or her property except under and in accordance with some positive authority conferred by the law. Since the common law knows neither lettre de cachet nor other executive warrant authorizing arbitrary arrest or detention, any officer of the Commonwealth Executive who purports to authorize or enforce the detention in custody of such an alien without

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123 (1987) 162 CLR 514 at 520-521; [1987] HCA 12.

124 (1987) 162 CLR 514 at 528.

125 (1992) 176 CLR 1 at 19; [1992] HCA 64 (footnotes omitted).

judicial mandate will be acting lawfully only to the extent that his or her conduct is justified by valid statutory provision."

150 Those statements of principle are not disputed in the present case. There is, however, no agreement about their application.

151 The Commonwealth and the Minister are equivocal. They accept the statement in *Chu Kheng Lim* as a statement of the content of the common law of Australia. To treat the statement as bearing on the capacity of the Executive Government, they suggest, would require "some considerable extension of the language".

152 Transfield has no equivocation. Transfield argues that the statements of principle in *Re Bolton* and in *Chu Kheng Lim* should be understood as directed solely to the content of the common law of Australia, and that they do not bear on the capacity of the Executive Government of the Commonwealth.

153 Transfield's argument is that the inability of an officer of the Executive Government to authorise or enforce the detention in custody of another person is not in consequence of any incapacity on the part of the Executive Government to authorise or enforce a deprivation of liberty. It is rather in consequence of the absence of any prerogative power on the part of the Executive Government to dispense with the operation of the common law. The inability of the Executive Government to authorise or enforce a deprivation of liberty, so the argument goes, is nothing more or less than the consequence of its officers being subjected like everyone else to common law sanctions for the invasion of common law rights. The common law of Australia, it is said, imposes no impediment to an officer of the Executive Government authorising or enforcing a deprivation of liberty where the common law of Australia does not run. The common law of Australia does not run to Nauru.

154 The logic of Transfield's argument is that the ability of an officer of the Executive Government of the Commonwealth to authorise or enforce a deprivation of liberty depends on the positive law of the place in which the detention occurs. Recognising that the common law of Australia can always be modified or displaced by State legislation, Transfield is driven to argue that the Parliament of a State could confer power on an officer of the Executive Government of the Commonwealth to detain a person in that State, even to punish that person for a breach of a State law, provided only that the Parliament of the Commonwealth consented to its conferral.

155 Ingenious as it is, Transfield's argument is three centuries too late. In *Re Bolton*, Brennan J specifically identified the *Habeas Corpus Act* 1679[126], as

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126 31 Car II c 2.

extended by the *Habeas Corpus Act* 1816[127], as amongst the ancient statutes which remain of undiminished significance within our contemporary constitutional structure. Brennan J might equally have identified the *Petition of Right* 1627 (which declared in substance that orders of the monarch were not sufficient justification for the imprisonment of his subjects) and the *Habeas Corpus Act* 1640[128] (which provided that anyone imprisoned by command of the King or his Council or any of its members without cause was to have a writ of habeas corpus on demand to the judges of the King's Bench or the Common Pleas).

156 The *Habeas Corpus Act* 1640 is inadequately characterised merely as a manifestation of the general subjection of officers of the King to the common law. The writ of habeas corpus had come, by the time of its enactment, to play "a structural role in limiting executive power"[129]. The enactment of the *Habeas Corpus Act* 1640 confirmed the writ as "of the highest constitutional importance"[130]. The *Habeas Corpus Act* 1640 is properly characterised as having abolished "the capacity of the monarch to order detentions without the authorization of the law"[131] and as having resulted in a "transformation" in "what counted as lawful imprisonment for reasons of state"[132]. Thenceforth, state imprisonment would not be able to occur in the exercise of any inherent executive capacity because any such inherent capacity had been denied. Lawful state imprisonment, at least of a subject in a time of peace, would occur only if and to the extent permitted by statute[133].

157 The significance of the principles established by the *Petition of Right* 1627 and the *Habeas Corpus Act* 1640 within colonial government in nineteenth century Australia is sufficiently illustrated by the rejection by the Supreme Court of New South Wales in 1888 as a sufficient return to a writ of habeas corpus of a colonial officer's statement that "I am detaining this person in my custody ... on

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127 56 Geo III c 100.

128 16 Car I c 10.

129 Hafetz, "The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts", (1998) 107 *Yale Law Journal* 2509 at 2526.

130 *Halsbury's Laws of England*, 1st ed, vol 10 at 40 [92].

131 Clark and McCoy, *The Most Fundamental Legal Right*, (2000) at 37.

132 Halliday, *Habeas Corpus*, (2010) at 225-226.

133 Clark and McCoy, *The Most Fundamental Legal Right*, (2000) at 41.

the authority of the Government of this colony"[134]. Of that statement, Darley CJ said[135]:

> "It is nothing more than the old return, which never was submitted to, and which no Englishman ever will submit to, and that is that the prisoner is held under the 'special command of the king', and whether it be the king or the Government it is one and the same thing."

158 Those principles, which derive from the history of habeas corpus, pertain specifically to liberty. They are within the compass of what Isaacs J identified in *Ex parte Walsh and Johnson; In re Yates*[136] (a proceeding for a writ of habeas corpus removed into the High Court) as "fundamental principles" of a more general nature which "cannot be found in express terms in any written Constitution of Australia" but which "taken together form one united conception for the necessary adjustment of the individual and social rights and duties of the members of the State"[137]. Those fundamental principles, in the terms articulated by Isaacs J, were[138]:

> "(1) primarily every free man has an inherent individual right to his life, liberty, property and citizenship; (2) his individual rights must always yield to the necessities of the general welfare at the will of the State; (3) the law of the land is the only mode by which the State can so declare its will."

159 The inability of the Executive Government of the Commonwealth to authorise or enforce a deprivation of liberty is not simply the consequence of the absence of any prerogative power on the part of the Executive Government to dispense with the operation of the common law. It is the consequence of an inherent constitutional incapacity which is commensurate with the availability, long settled at the time of the establishment of the Commonwealth, of habeas corpus to compel release from any executive detention not affirmatively authorised by statute.

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134 *Ex parte Lo Pak* (1888) 9 NSWR 221 at 235.

135 (1888) 9 NSWR 221 at 240. See also at 248.

136 (1925) 37 CLR 36; [1925] HCA 53.

137 (1925) 37 CLR 36 at 79.

138 (1925) 37 CLR 36 at 79.

160 As succinctly explained by Hogg, Monahan and Wright[139]:

> "[T]here is no Crown immunity from habeas corpus, despite the fact that, like the other prerogative remedies, habeas corpus takes the form of a command by the Queen. It is obviously vital to the effectiveness of the writ that it be available against ministers and Crown servants, even when they are not persona designata."

161 The Executive Government and any officer or agent of the Executive Government acting in the ostensible exercise of his or her de facto authority is always amenable to habeas corpus under s 75(iii) of the Constitution[140]. Habeas corpus is in addition available as an incident of the exercise of the jurisdiction of the High Court under s 75(v) of the Constitution in any matter in which mandamus, prohibition or an injunction is bona fide claimed against any officer of the Commonwealth[141].

162 That inherent constitutional incapacity of the Executive Government of the Commonwealth to authorise or enforce a deprivation of liberty is a limitation on the depth of the non-prerogative non-statutory executive power of the Commonwealth conferred by s 61 of the Constitution. As such, it cannot be removed by a law enacted by the Parliament of any State: "from its very nature" it must be outside the legislative power of a State to alter[142]. Nor can the inherent constitutional incapacity be removed by a law enacted by the Commonwealth Parliament under s 51(xxxix) of the Constitution; it is not "incidental to the execution" of executive power to change an inherent characteristic of that power[143]. It need hardly be said that the inherent constitutional incapacity cannot be removed by a law of another country.

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139 Hogg, Monahan and Wright, *Liability of the Crown*, 4th ed (2011) at 62.

140 *R v Davey; Ex parte Freer* (1936) 56 CLR 381 at 384-385; [1936] HCA 58; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 20.

141 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 90-91 [14].

142 Cf *In re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 531; [1947] HCA 45; *The Commonwealth v Cigamatic Pty Ltd (In Liq)* (1962) 108 CLR 372 at 377-378; [1962] HCA 40; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 439.

143 *Davis v The Commonwealth* (1988) 166 CLR 79 at 111-112.

163 The Commonwealth Parliament can, consistently with s 61 of the Constitution, confer a statutory power or authority to detain on the Executive Government. In addition to finding an available head of Commonwealth legislative power, any Commonwealth law conferring such a power or authority must pass muster under Ch III of the Constitution.

164 The extent of the inherent constitutional incapacity of the Executive Government of the Commonwealth to authorise or enforce a deprivation of liberty can be discerned for the purposes of the present case in the extent of its amenability to habeas corpus. There is no suggestion in the present case of the applicability of any prerogative to detain (using "prerogative" in the strict and narrow sense in which it had been used by Blackstone and adopted by Brennan J), such as that which might arise in relation to enemy aliens in time of war[144], or which might be argued to arise as an incident of a prerogative power to prevent an alien from entering Australia[145].

165 The extent of that amenability to habeas corpus is sufficiently illustrated for present purposes by the decision of the English Court of Appeal in 1923 to issue a writ of habeas corpus directed to the Home Secretary in respect of a prisoner who had already been handed over to the Irish Free State[146]. In the House of Lords, in the course of dismissing an appeal from the decision of the Court of Appeal on jurisdictional grounds, it was said on the authority of *Darnel's Case*[147] to be "very old law" that[148]:

> "[T]he function of a return to a writ of habeas corpus … is to set out the facts and the grounds of the detention to enable the Court mentioned in the writ to determine two questions, first whether the person to whom the writ is addressed, either directly by himself or by his agents, detained in custody the person named in the writ? and second, if so, was that detention legal or illegal?"

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144 Cf *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 19.

145 Cf *CPCF v Minister for Immigration and Border Protection* (2015) 89 ALJR 207 at 239-240 [148]-[150], 255-258 [259]-[276], 284-286 [478]-[492]; 316 ALR 1 at 39-40, 60-64, 101-104; [2015] HCA 1.

146 *R v Secretary of State for Home Affairs; Ex parte O'Brien* [1923] 2 KB 361.

147 (1627) 3 St Tr 1 at 6.

148 *Secretary of State for Home Affairs v O'Brien* [1923] AC 603 at 624.

The decision shows that the question of amenability to the writ is quite distinct from the question of the legality or illegality of the detention. Amenability to the writ is determined solely as a question of whether the person to whom the writ is addressed has de facto control over the liberty of the person who has been detained, in relation to which actual physical custody is sufficient but not essential[149].

166 That is the measure which I think is appropriate to be applied in considering whether the plaintiff's detention involved action on the part of the Commonwealth or the Minister in excess of the non-statutory executive power of the Commonwealth.

Executive deprivation of liberty

167 The agreed facts show that the plaintiff was detained at the Regional Processing Centre on Nauru under Nauruan legislation in circumstances which can be sufficiently summarised as follows.

168 By virtue of being taken to Nauru under the *Migration Act*, the plaintiff became a "protected person" under the *Asylum Seekers (Regional Processing Centre) Act* 2012 (Nauru). On an application made to the Secretary of the Department of Justice and Border Control of Nauru by an officer of the Commonwealth without her consent, the Principal Immigration Officer of Nauru granted her a Nauruan regional processing centre visa. It was a condition of that visa that she was to reside at the Centre. The visa was for a three month period and was renewed, without her consent, every three months subject to the same condition.

169 As a protected person residing at the Centre, the plaintiff was then obliged by a provision of the *Asylum Seekers (Regional Processing Centre) Act* to comply with rules made for the security, good order and management of the Regional Processing Centre by a Nauruan official appointed as the Operational Manager. The rules relevantly required that she not leave, or attempt to leave, the Regional Processing Centre without prior approval from the Operational Manager or an "authorised officer". Another provision of the same Act made it an offence for a protected person to leave, or attempt to leave, the Regional Processing Centre without prior approval from the Operational Manager or an authorised officer and specifically provided that a member of the Nauruan Police Force could arrest a person for that offence. Staff of Wilson Security held appointments by the Secretary of the Department of Justice and Border Control

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149 *R v Secretary of State for Home Affairs; Ex parte O'Brien* [1923] 2 KB 361 at 391, 398. See now *Rahmatullah v Secretary of State for Defence* [2013] 1 AC 614 at 636 [43], 653 [109].

of Nauru as authorised officers for the purpose of the *Asylum Seekers (Regional Processing Centre) Act*.

170 The Regional Processing Centre was at the time of the plaintiff's detention surrounded by a high metal fence through which entry and exit were possible only through a checkpoint. The checkpoint was permanently monitored by Wilson Security staff for the purpose of monitoring ingress and egress without permission of the Operational Manager. If the plaintiff had attempted to leave the Regional Processing Centre without permission, and Wilson Security staff had been unable to persuade her not to do so, the staff would have sought to gain the assistance of the Nauruan Police Force to deal with her unauthorised departure.

171 Those functions of Wilson Security staff – to act as authorised officers capable of giving prior approval to the plaintiff to leave the Regional Processing Centre and to seek to engage in measures designed to prevent her leaving without permission of the Operational Manager – were all within the scope of the garrison services which the Commonwealth had contracted Transfield to provide and which Transfield had subcontracted Wilson Security to perform. They were all services which, under the Transfield contract, were to be provided not only in compliance with Nauruan law but also in compliance with Commonwealth policies as notified to Transfield from time to time.

172 The conclusion to be drawn is that Wilson Security staff exercised physical control over the plaintiff so as to confine her to the Regional Processing Centre. The circumstance that any physical restraint of the plaintiff would only have occurred as a result of calling in the Nauruan Police Force does not affect that conclusion.

173 The further conclusion to be drawn is that Wilson Security staff exercised that physical control over the plaintiff in the course and for the purpose of providing services which the Executive Government of the Commonwealth had procured to be performed under the Transfield contract. They acted, in the relevant sense, as de facto agents of the Executive Government of the Commonwealth in physically detaining the plaintiff in custody.

174 The procurement of the plaintiff's detention lay beyond the non-statutory executive power of the Commonwealth. Whether or not it was lawful under the law of Nauru is for that purpose irrelevant. The Parliament of Nauru can no more overcome a limitation in the depth of Commonwealth executive power than can the Parliament of a State.

175 The procurement of the plaintiff's detention on Nauru by the Executive Government of the Commonwealth under the Transfield contract was therefore beyond the executive power of the Commonwealth unless it was authorised by valid Commonwealth law. Before 30 June 2015, there was no applicable

Commonwealth law. On that day, as has already been noted, s 198AHA was inserted with retrospective effect to 18 August 2012. It is necessary now to turn to consider the operation and validity of that section.

Statutory authority

176 Section 198AHA of the *Migration Act* is set out in the reasons for judgment of other members of the Court.

177 The precondition for the application of the section, as set by s 198AHA(1), is the Executive Government entering into an arrangement in relation to the regional processing functions of a country with any "person" or body. There is no reason not to read the word "person" in this context as extending, in accordance with s 2C of the *Acts Interpretation Act* 1901 (Cth), to include a body politic. The precondition for the application of the section set by s 198AHA(1) is therefore met by the Executive Government entering into an arrangement in relation to the regional processing functions of a country with the government of the country in question.

178 The precondition for the application of the section is met in the circumstances of the present case by the Commonwealth of Australia and the Republic of Nauru having entered into the Second Memorandum of Understanding, under which the Republic of Nauru has assured the Commonwealth that it will make an assessment, or permit an assessment to be made, of whether or not a transferee is covered by the definition in the Refugees Convention. Entering into the Second Memorandum of Understanding was not itself an act which falls within the scope of the authority retrospectively conferred by the section, but rather involved the exercise by the Executive Government of its non-statutory prerogative capacity to conduct relations with other countries.

179 The making of an assessment of whether or not a transferee is covered by the definition in the Refugees Convention fairly answers the description in s 198AHA(2)(a) of action in relation to the arrangement recorded in the Second Memorandum of Understanding. The detention of a transferee in accordance with Nauruan law or policy pending the completion of such an assessment fairly answers the further description in s 198AHA(2)(a) of action in relation to the regional processing functions of Nauru, or further action that is incidental or conducive to the taking of such action in s 198AHA(2)(c). That action taken under s 198AHA(2) can extend to the exercise of restraint over the liberty of a person on Nauru is made plain by s 198AHA(5).

180 The procurement of the plaintiff's detention on Nauru by the Executive Government of the Commonwealth under the Transfield contract therefore falls within the scope of the statutory authority retrospectively conferred on the Executive Government by s 198AHA(2). To the extent statutory authority might

be argued to be required for other aspects of the Transfield contract or its operation, including the payment of appropriated funds to Transfield, that further statutory authority has also been retrospectively conferred on the Executive Government by s 198AHA(2).

181 Section 198AHA(3) is important in clarifying that s 198AHA(2) is directed to nothing other than ensuring that the Commonwealth has capacity and authority to take action and that it does not otherwise affect the lawfulness of that action. That is to say, s 198AHA(2) is directed to nothing other than conferring statutory capacity or authority on the Executive Government to undertake action which is or might be beyond the executive power of the Commonwealth in the absence of statutory authority. The section has no effect on the civil or criminal liability of the Executive Government or its officers or agents under Australian law or under the law of a foreign country. The lawfulness or unlawfulness of Executive Government action under Australian law or under the law of a foreign country conversely does not determine whether or not that action falls within the scope of the statutory capacity or authority conferred by the section.

182 I am unable to accept that there is any substance in the plaintiff's argument that s 198AHA is unsupported by any head of Commonwealth legislative power. In so far as it authorises the Executive Government to take action or cause action to be taken outside Australia in relation to an arrangement entered into by the Executive Government and the government of a foreign country, it is a law with respect to external affairs, within the scope of s 51(xxix) of the Constitution[150]. In so far as it authorises the Executive Government to take action or cause action to be taken outside Australia that involves, or is incidental or conducive to, assessment in that country of claims to refugee status by non-citizens who have been transferred from Australia, it is also a law with respect to aliens, within the scope of s 51(xix) of the Constitution. It is sufficient for a law to answer the description of a law with respect to aliens that the substantial practical operation of the law is to discriminate in a manner which is peculiarly significant to aliens[151]. The reach of the aliens power is not subject to any territorial or purposive limitation.

183 The plaintiff's argument that s 198AHA is inconsistent with Ch III of the Constitution warrants closer consideration. The plaintiff does not argue that executive detention of a non-citizen outside Australia pending assessment of a

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150 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 644; [1936] HCA 52; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 258; [1982] HCA 27.

151 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 316; [1994] HCA 44; *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at 42-43 [22]-[25]; [2014] HCA 22.

claim by that non-citizen to refugee status is detention for a purpose that is inherently incompatible with Ch III. The plaintiff accepts the application of the holding in *Chu Kheng Lim* to the purpose of regional processing: that authority to detain an alien in custody can constitute a valid incident of executive power. What the plaintiff argues is that a legislative mandate for executive detention must be for no longer than is reasonably necessary for the administrative processes required to carry that purpose into effect. Section 198AHA, the plaintiff argues, does not have that requisite characteristic.

184 I accept the major premise of the plaintiff's Ch III argument. I have recently explained my understanding that no law conferring a power of executive detention could escape characterisation as punitive (and therefore as transgressing on the inherently judicial) unless the duration of that detention meets at least two conditions[152]. The duration of the detention must be reasonably necessary to effectuate a purpose which is identified in the statute conferring the power to detain and which is capable of fulfilment. The duration of the detention must also be capable of objective determination by a court at any time and from time to time. In that regard, I see no principled reason to distinguish between a law which confers a power of executive detention and a law which confers a capacity for executive detention so as to allow for the exercise of power from another legislative source.

185 On its proper construction, however, I am satisfied that s 198AHA meets those conditions. Notwithstanding the use of the word "includes", I would not read the definition of "regional processing functions" in s 198AHA(5) as extending beyond the implementation of a law or policy, or the taking of an action, by a regional processing country that is in connection with the role of that country specified in the arrangement which satisfies the precondition for the application of the section under s 198AHA(1). The extent to which action taken on the authority of s 198AHA(2)(a) may involve detention is, on that reading, limited to detention that is in connection with the role of the regional processing country as specified in the arrangement. The requisite connection with that role would be broken were the duration of the detention to extend beyond that reasonably necessary to effectuate that role or were that role to become incapable of fulfilment. The duration of the detention is in the meantime capable of

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152 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 90 ALJR 38 at 64 [99]; 326 ALR 16 at 43; [2015] HCA 41, citing *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 369-370 [138]-[140]; [2013] HCA 53; *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 231-232 [25]-[29]; [2014] HCA 34 and *CPCF v Minister for Immigration and Border Protection* (2015) 89 ALJR 207 at 272 [374]; 316 ALR 1 at 83; [2015] HCA 1.

objective determination by a court by reference to what remains to be done by the regional processing country to fulfil its role as specified in the arrangement.

Formal answers to questions

186 The parties have agreed in stating a number of questions for the consideration of the Full Court. The questions are quite detailed. None needs to be answered in full, and some need not be answered at all.

187 As to questions of substance, I would answer Question (1) to the effect that the plaintiff has standing to challenge whether the Commonwealth or the Minister was authorised to engage in conduct which procured and enforced her detention at the Regional Processing Centre; Question (4) to the effect that the conduct of the Commonwealth or the Minister was authorised by s 198AHA of the *Migration Act*; and Question (5) to the effect that s 198AHA of the *Migration Act* is supported by s 51(xix) and s 51(xxix) of the Constitution and is not contrary to Ch III of the Constitution. I would not formally answer any other substantive question.

188 As to questions of procedure, I would answer Question (13) to the effect that the proceeding should be dismissed; and Question (14) to the effect that the costs of the special case and of the proceeding generally should be determined in the discretion of a single Justice. It will be apparent from what I have written, and may be relevant to costs, that I consider the plaintiff's central claim (that the Commonwealth and the Minister acted beyond the executive power of the Commonwealth by procuring and enforcing her detention at the Regional Processing Centre between 24 March 2014 and 2 August 2014) to have been well-founded until 30 June 2015, when s 198AHA was inserted with retrospective effect.

189 KEANE J. The plaintiff is a citizen of Bangladesh who claims to be a refugee within the meaning of Art 1 of the Refugees Convention[153].

190 On 19 October 2013, the plaintiff was on board a vessel that was intercepted at sea by officers of the Commonwealth. On 20 October 2013, she was transferred to Christmas Island, thereby entering the "migration zone" for the purposes of the *Migration Act* 1958 (Cth) ("the Migration Act"). The plaintiff did not hold a visa for entry into the migration zone. She therefore met the definition of "unlawful non-citizen" in s 14 of the Migration Act and "unauthorised maritime arrival" in s 5AA of the Migration Act. Consequently, she was detained by officers of the Commonwealth as required by s 189 of the Migration Act.

191 On 21 January 2014, an officer of the Commonwealth applied, on behalf of the plaintiff, but without her actual consent, to the Secretary of the Department of Justice and Border Control of Nauru for a Regional Processing Centre visa ("RPC visa")[154]. On 22 January 2014, officers of the Commonwealth transferred the plaintiff to Nauru, and she arrived there on 23 January 2014. That day, the RPC visa was granted.

192 The RPC visa specified that the plaintiff "must reside at the Regional Processing Centre, Topside, in Meneng District" ("the Nauru RPC")[155]. On 23 April 2014 and 23 July 2014, the plaintiff was granted further RPC visas upon the same residential condition as the first.

193 On 2 August 2014, the plaintiff was temporarily transferred from Nauru to Australia for the purpose of undergoing obstetric and gastroenterological review. At this time, she was approximately 20 weeks pregnant. Upon arrival in Brisbane, the plaintiff entered the "migration zone" for the purposes of the Migration Act, once more met the definition of "unlawful non-citizen", and was therefore detained by officers of the Commonwealth pursuant to s 189 of the Migration Act. On 16 December 2014, the plaintiff gave birth to her daughter.

194 On 20 June 2015, the Department of Immigration and Border Protection was advised that the plaintiff had been diagnosed with a gastroenterological condition which is able to be managed at the Nauru RPC. Pursuant to a ministerial direction made under s 198AD(5) of the Migration Act on 15 July 2014, if the plaintiff is to be taken from Australia to a regional processing

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153 The Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967).

154 Immigration Regulations 2013 (Nauru), reg 9.

155 Immigration Regulations 2013 (Nauru), reg 9(6)(a).

country, she will be transferred back to the Nauru RPC. To facilitate her transfer, an officer of the Commonwealth will have to apply on her behalf to the Secretary of the Department of Justice and Border Control of Nauru for a further RPC visa.

195 Before the plaintiff's transfer back to Nauru could be effected, she commenced proceedings in the original jurisdiction of this Court, pursuant to s 75 of the Constitution, seeking, among other things, a writ of prohibition directed to the Minister to prevent the taking of steps by officers of the Commonwealth Executive to return her to Nauru. Her contention is that, pursuant to the arrangements between the Commonwealth and Nauru, she was subjected to restrictions upon her liberty at the Nauru RPC that amounted to detention in custody caused by the Commonwealth Executive without lawful authority.

196 The Minister and the Commonwealth provided a number of responses to the plaintiff's contention. Among other things, it was said that the plaintiff was detained in custody in Nauru, not by the Commonwealth, but by Nauru under the law of Nauru. It is common ground that the Republic of Nauru is a sovereign State, and the Commonwealth has no legal power to compel Nauru to make, vary or maintain the laws of Nauru or the administrative arrangements made pursuant to those laws. To the extent that the Commonwealth is said to have participated in the restraints upon the plaintiff's liberty in Nauru, the Minister and the Commonwealth contend that s 198AHA of the Migration Act affords such statutory authority as may be necessary to enable that action and to make any payments related to it.

197 The parties agreed upon the terms of a Special Case, which posed a large number of questions for determination by this Court in relation to the plaintiff's claim. Those questions included questions as to the validity of laws of Nauru under the Constitution of Nauru. The parties were agreed that, if it is unnecessary to answer any such question, that question should not be answered. Further, the Special Case also posed questions concerning the operation and validity of s 32B of the *Financial Framework (Supplementary Powers) Act* 1997 (Cth) and reg 16 and items 417.021, 417.027, 417.029 and 417.042 of Sched 1AA to the Financial Framework (Supplementary Powers) Regulations 1997 (Cth) (together "the Financial Framework Provisions"). The parties agreed that any question concerning the Financial Framework Provisions is unnecessary to answer if it is concluded that the conduct of the Commonwealth to which that question is directed was authorised by s 198AHA of the Migration Act and that provision is not invalid.

198 As will be seen from the reasons which follow, it is unnecessary or inappropriate to answer many of the questions posed in the Special Case. A statement of those questions is attached at the end of the Court's reasons for judgment. The issues which were agitated by the parties in the course of

argument in this Court are summarised in the reasons of French CJ, Kiefel and Nettle JJ.

199 The plaintiff's contention that the Commonwealth Executive has unlawfully caused her detention in custody in Nauru must be rejected because the plaintiff was detained in custody in Nauru by the Republic of Nauru. And to the extent that the Commonwealth Executive procured, funded or participated in the restraint upon the plaintiff's liberty which occurred in Nauru, that restraint was authorised by s 198AHA because it related to the processing by Nauru of the plaintiff's claim to refugee status; and s 198AHA is a valid law of the Commonwealth.

200 Section 198AHA of the Migration Act provides as follows:

"(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."

The Commonwealth's arrangement with the executive government of the Republic of Nauru in relation to the regional processing functions of Nauru

201 For the purposes of s 198AHA(1) of the Migration Act, and pursuant to the non-statutory executive power of the Commonwealth under s 61 of the Constitution, on 3 August 2013 the Commonwealth and Nauru signed the "Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues" ("the MOU"). The MOU superseded a previous memorandum of understanding between the governments of the two countries which had been signed on 29 August 2012.

202 The MOU recorded an arrangement between the President of Nauru and the Prime Minister of Australia involving the acceptance by Nauru of transferees (being persons who have sought to travel to Australia irregularly by sea) from Australia at one or more RPCs in Nauru, and the provision to transferees of settlement opportunities if the Republic of Nauru determines that they are in need of international protection.

203 The MOU contemplated that detailed administrative measures would be settled between the parties to give effect to the arrangement. These measures are recorded in a document entitled "Administrative Arrangements for Regional Processing and Settlement Arrangements in Nauru", signed on 11 April 2014 by the Secretary of the Commonwealth Department of Immigration and Border Protection and the Minister for Justice of Nauru ("the Administrative Arrangements").

204 Under the Administrative Arrangements, Nauru agreed to accommodate transferees at an RPC while their claims to refugee status under Nauruan law are processed, and the Commonwealth agreed to bear all costs incurred under and incidental to the MOU. The Government of Nauru is required to appoint an Operational Manager, who is responsible for the day-to-day running of the Nauru RPC, and who is to be supported by service providers and staff members engaged by the Commonwealth. The Commonwealth is required to appoint a Programme Coordinator, who is responsible for managing all Australian officers and services contracts in relation to the Nauru RPC.

205 The Commonwealth has agreed to engage and fund contractors to assist with the refugee status assessment process. The relevant determinations are to be made pursuant to Nauruan law, and Nauru is required to provide access to merits review. The merits review process is to be funded by the Commonwealth.

206 The MOU and the Administrative Arrangements also provide for the establishment of a Joint Committee, to be co-chaired by representatives from the Commonwealth Department of Immigration and Border Protection and Nauru, which is responsible for overseeing the practical arrangements required to implement the MOU. The Administrative Arrangements provide for a Joint Working Group, which meets weekly to confer on technical, operational and legal aspects of the running of the Nauru RPC.

The Commonwealth's contractual arrangements with Transfield

207 The third defendant, Transfield Services (Australia) Pty Ltd ("Transfield"), is a company incorporated in Australia. On 24 March 2014, the Commonwealth and Transfield entered into a contract entitled "Contract in relation to the Provision of Garrison and Welfare Services at Regional Processing Countries" ("the Transfield Contract"). The "site", as defined in the Transfield Contract, notified by the Commonwealth to Transfield in Nauru, in respect of which the Commonwealth contracted to obtain Transfield's services, is and was at all material times the Nauru RPC.

208 On 2 September 2013, Transfield entered into a contract with Wilson Parking Australia 1992 Pty Ltd entitled "Subcontract Agreement General Terms and Conditions in relation to the Provision of Services on the Republic of Nauru". On 28 March 2014, that contract was replaced by a contract between Transfield and Wilson Security Pty Ltd ("Wilson Security") with the same title. Clause 6.1 of the Transfield Contract requires the Commonwealth to approve subcontracting arrangements; that approval was given on 26 July 2013 and 28 March 2014 in respect of each of the subcontracts.

209 The Commonwealth has also contracted for the provision of services at the Nauru RPC with several other providers, such as Save the Children Australia, International Health and Medical Services Pty Ltd, Craddock Murray Neumann Lawyers Pty Ltd, Adult Multicultural Education Services, and the Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane, trading as Brisbane Catholic Education.

The circumstances of the plaintiff's accommodation in Nauru

210 The circumstances of the plaintiff's accommodation in Nauru were governed by the *Asylum Seekers (Regional Processing Centre) Act* 2012 (Nauru) ("the RPC Act"). The plaintiff was, by reason of having been brought to Nauru

under s 198AD of the Migration Act, a "protected person" for the purposes of the RPC Act.

211 On 21 May 2014, the *Asylum Seekers (Regional Processing Centre) (Amendment) Act* 2014 (Nauru) inserted s 18C into the RPC Act. Section 18C(1) provides that "protected persons" are prohibited from leaving or attempting to leave an RPC in Nauru without the prior approval of an authorised officer, an Operational Manager, or another authorised person. Section 18C(2) provides that any protected person found to be in breach of the prohibition is liable upon conviction to imprisonment of a maximum period of six months.

212 Pursuant to s 7 of the RPC Act, in July 2014 rules were made for the Nauru RPC ("the Centre Rules"). Rule 3.1.3 of the Centre Rules provides that:

> "At all times, asylum seekers residing at the Centre must ... not leave, or attempt to leave, the Centre without prior approval from an authorised officer, an Operational Manager or other authorised persons, except in the case of emergency or other extraordinary circumstance".

213 Pursuant to s 17(1) of the RPC Act, the Secretary of the Department of Justice and Border Control of Nauru can appoint as an "authorised officer" a staff member who is employed by a service provider who has been contracted to provide services for the Nauru RPC. As at 7 October 2015, 138 staff of Wilson Security were "authorised officers" for the purposes of the RPC Act. No staff of Transfield or officers of the Commonwealth have been appointed authorised officers for the purposes of the RPC Act.

214 Under the Administrative Arrangements, the Commonwealth is required to lodge an application for an RPC visa in respect of each transferee pursuant to reg 9(3) of the Immigration Regulations 2013 (Nauru) ("the 2013 Immigration Regulations"). Regulation 9(3) provided that an application for an RPC visa could only be made by an officer of the Commonwealth. Pursuant to reg 5(7) of the 2013 Immigration Regulations, the Commonwealth was required to pay to Nauru the associated visa fee of $3,000. As at 30 March 2015, the total of the RPC visa fees paid to Nauru by the Commonwealth was $27,893,633.

215 On 21 January 2014, an officer of the Commonwealth made an RPC visa application on behalf of the plaintiff. On 30 January 2014, shortly after the plaintiff's transfer to the Nauru RPC, the Immigration Regulations 2014 (Nauru) ("the 2014 Immigration Regulations") came into effect, providing for the issuing of RPC visas in relevantly identical terms to those in the 2013 Immigration Regulations. Pursuant to reg 9(5) of the 2014 Immigration Regulations, an RPC visa has a maximum duration of three months. Further RPC visas were granted to the plaintiff by the Secretary of the Department of Justice and Border Control of Nauru pursuant to reg 9(5A) of the 2014 Immigration Regulations, on 23 April 2014 and 23 July 2014.

216 According to the Special Case, all of the plaintiff's RPC visas required that she reside at the Nauru RPC. Regulation 9(6)(a) of both the 2013 and 2014 Immigration Regulations required compliance with that condition. The plaintiff's 23 July 2014 visa was subject to the conditions that she was only permitted to leave the Nauru RPC in an "emergency or other extraordinary circumstances" or "in circumstances where the absence [was] organized or permitted by a service provider and the [visa] holder [was] in the company of a service provider". These conditions replicate the requirements in reg 9(6)(b) and (c) of the 2013 and 2014 Immigration Regulations.

217 The visas granted to the plaintiff were conditional upon her refraining from behaving in a manner prejudicial to peace or good order in Nauru. If the plaintiff breached the conditions of her visa, the Secretary of the Department of Justice and Border Control of Nauru was empowered by reg 20(1)(a)(iii) of the 2013 Immigration Regulations and reg 19(1)(a)(iii) of the 2014 Immigration Regulations to cancel the plaintiff's visa. If the plaintiff's visa were cancelled and she were to remain in Nauru, she would be liable to pay a penalty of up to $10,000, pursuant to s 9(1) of the *Immigration Act* 1999 (Nauru) or s 10(1) of the *Immigration Act* 2014 (Nauru). She would also be exposed to a removal order under s 11(1) of the *Immigration Act* 1999 (Nauru) or s 11(1) of the *Immigration Act* 2014 (Nauru).

218 The 2014 Immigration Regulations were amended in 2015 to provide, under reg 9(6)(c)(ii), that a visa holder must remain at the specified premises except "in circumstances where the absence is organised or permitted by a service provider". This change reflected the implementation in 2015 of "open centre" arrangements, whereby residents at the Nauru RPC could leave the centre unsupervised on certain days during specified hours. On 2 October 2015, shortly before the hearing of this case, the Department of Justice and Border Control of Nauru announced the expansion of the "open centre" arrangements. As of 5 October 2015, all residents at the Nauru RPC have total freedom of movement at all times.

The plaintiff's submissions

219 The plaintiff argued that her detention in custody at the Nauru RPC under the regional processing arrangement between the Commonwealth and Nauru was caused by the Commonwealth Executive acting without the necessary support of a valid statutory authority. She submitted that the possible application of the "open centre" arrangements would not alter that conclusion in respect of her detention in the past.

220 The plaintiff submitted that her detention in custody in Nauru was contrary to the principle stated in *Chu Kheng Lim v Minister for Immigration,*

Local Government and Ethnic Affairs[156], that "any officer of the Commonwealth Executive who purports to authorize or enforce the detention in custody of ... an alien without judicial mandate will be acting lawfully only to the extent that his or her conduct is justified by valid statutory provision."

221 The plaintiff submitted that the notion of "authorising or enforcing" the executive detention of an alien extends to situations in which the detention is not actually implemented by a particular officer of the Commonwealth, and even though the conduct amounting to authorisation or enforcement takes place outside Australian territory[157].

222 It was said that the Commonwealth "procured or caused" the creation of the Nauru RPC and the plaintiff's detention there by requesting that Nauru host an RPC and entering into the MOU. The plaintiff emphasised the "general control" by the Commonwealth Executive over the practical management of the Transfield Contract, and argued that employees of Transfield and Wilson Security had effective control over various aspects of the plaintiff's movement. It was said that, but for the Commonwealth's involvement in Nauru's regional processing functions, the plaintiff would not have been detained, and Nauru would have had no occasion to detain her. Further, the plaintiff would not have been detained in Nauru but for the Commonwealth making a visa application on her behalf, paying the visa fee, and taking her to Nauru under s 198AD(2).

223 The plaintiff submitted that s 198AHA(2) of the Migration Act does not authorise the Commonwealth Executive to cause the plaintiff's liberty to be restricted by the arrangements applicable in Nauru. The plaintiff argued that s 198AHA, which operates when the Commonwealth has entered into an "arrangement with a person or body in relation to ... regional processing functions", does not authorise entry into arrangements with "countries". This was said to be so notwithstanding s 2C of the *Acts Interpretation Act* 1901 (Cth), which provides that words used to denote persons generally, such as "person", include a body politic.

224 The plaintiff also argued that ss 198AD and 198AHA of the Migration Act activate a process under Nauruan law whereby persons are detained in a manner contrary to Art 5(1) of the Constitution of Nauru, and that their operation is constrained to the extent of that unlawfulness. Article 5(1) of the Constitution of Nauru relevantly provides:

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156 (1992) 176 CLR 1 at 19; [1992] HCA 64.

157 *CPCF v Minister for Immigration and Border Protection* (2015) 89 ALJR 207 at 239-240 [148]-[150]; 316 ALR 1 at 39-40; [2015] HCA 1.

> "No person shall be deprived of his personal liberty, except as authorised by law in any of the following cases:
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> …
>
> (h) for the purpose of preventing his unlawful entry into Nauru, or for the purpose of effecting his expulsion, extradition or other lawful removal from Nauru."

225 The plaintiff invited this Court to hold that detention at the Nauru RPC does not fall within the exception to the general guarantee of liberty in Art 5(1)(h) of the Constitution of Nauru. This was said to be so because the detention is not "for the purpose of effecting ... expulsion ... or other lawful removal from Nauru." It was said that when s 198AHA(5) refers to the "implementation of any law … in connection with the role of [a] country as a regional processing country", it must be taken to refer to *all* the law of the regional processing country including its constitutional law, so that if a law promulgated by that country is invalid by reason of its constitutional law, s 198AHA has no relevant operation. In this regard, the plaintiff relied upon observations in *Moti v The Queen*[158] which suggest that an Australian court may make a finding in relation to the lawfulness of conduct under the law of a foreign country in which the conduct occurs as a step along the way to making a determination about the operation of an Australian law.

226 Alternatively, the plaintiff submitted that, to the extent that s 198AHA purports to authorise the restraints upon the plaintiff's liberty in Nauru, it is not a valid law of the Commonwealth. In this regard, the plaintiff submitted that s 198AHA of the Migration Act is not supported by a head of legislative power in s 51 of the Constitution, and secondly, that if it is a law with respect to aliens within s 51(xix) of the Constitution it authorises detention of an alien for other than a permitted purpose. It was said that a law will only be a valid law with respect to the detention of aliens if it is limited to one of three purposes: removal from Australia; receiving and determining an application for a visa for entry into Australia; or determining whether to permit such an application to be made[159].

227 The plaintiff relied upon the observations of Brennan, Deane and Dawson JJ in *Lim* that laws effecting the detention of aliens will be valid only if[160]:

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158 (2011) 245 CLR 456 at 476 [52]; [2011] HCA 50.

159 *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 231 [26]; [2014] HCA 34.

160 (1992) 176 CLR 1 at 33.

> "the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered. On the other hand, if the detention which those sections require and authorize is not so limited, the authority which they purportedly confer upon the Executive cannot properly be seen as an incident of the executive powers to exclude, admit and deport an alien. In that event, they will be of a punitive nature and contravene Ch III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates."

228 The plaintiff submitted that the purpose of s 198AHA was not the removal of persons in the position of the plaintiff from Australia because "removal" requires the relinquishment of control over a person, and in this case s 198AHA enables the ongoing control of that person's detention. Further, it was said not to be directed to the purpose of allowing the Commonwealth to determine whether to permit an application for a visa to enter Australia, or to receive, investigate or determine the outcome of that application, because refugee status determinations in Nauru are directed to the possible grant of a visa to remain in Nauru, not Australia.

229 It was also said that the MOU has a clear deterrent and punitive purpose. The plaintiff cited the observation of McHugh J in *Re Woolley; Ex parte Applicants M276/2003*[161] that a law will not be punitive in nature unless "deterrence is one of [its] principal objects". Consequently, it was said, the agreements in the MOU to "create disincentives ... through possible transfer" purport to allow the Executive to inflict punishment, which cannot be valid under any head of legislative power.

The defendants' submissions

230 The Minister and the Commonwealth submitted that the plaintiff lacked standing to bring the proceedings. It was said that to determine whether the Commonwealth's past conduct facilitated the detention of the plaintiff would have no foreseeable practical consequences for the plaintiff. A declaration that the plaintiff's past detention in Nauru was not authorised under Australian law could not found a claim for damages for false imprisonment because the law applicable to that claim would be the law of the place of the tort, namely, the law of Nauru.

231 All the defendants argued that, even if it could be said that s 198AHA(2) authorises the Commonwealth to procure or fund the detention of the plaintiff in

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161 (2004) 225 CLR 1 at 26 [61]; [2004] HCA 49.

Nauru, it does not cause the detention of the plaintiff in the custody of the Commonwealth and so does not purport to confer the judicial power of the Commonwealth on the Commonwealth Executive.

232 It was also said that the detention at the Nauru RPC is incidental to arrangements directed to the regional processing functions of a foreign country, and can readily be seen not to have any punitive purpose.

233 Transfield submitted that the plaintiff's case involves the assertion of a level of Commonwealth responsibility for her detention that is inconsistent with the agreed facts, in that the Special Case records that the combined effect of the 2013 Immigration Regulations, the 2014 Immigration Regulations and s 18C of the RPC Act – assuming those laws are valid – was to impose legal restrictions on the plaintiff's freedom of movement. It was said that it is not to the point that the Commonwealth was instrumental in causing regional processing to occur in Nauru; the point is that regional processing in Nauru involves detention in custody only because of Nauruan law. In respect of the performance by Transfield of its contractual obligations, Transfield submitted that it is fallacious to treat contractual provisions specifying services to be provided to people detained in Nauru as if they create the detention in custody itself.

234 The defendants submitted that s 198AHA of the Migration Act is supported by the aliens power in s 51(xix), the external affairs power in s 51(xxix) and the Pacific islands power in s 51(xxx).

Standing

235 A party who has been detained in custody has standing to question the lawfulness of that detention even though that party has not chosen to pursue a claim for damages for false imprisonment. The interference with the liberty of that person is sufficient to confer standing to seek a declaration of the legal position from a court even though no other legal consequences are said to attend the case[162]. And even though it may be unlikely, as a practical matter, that the arrangements under which the detention was effected will be applied in the future, it is difficult not to be "impressed with the view that really what is at issue is whether what has been done can be repeated."[163]

236 Accordingly, the plaintiff has standing to the extent necessary for the determination of the matter as to the lawfulness of any restriction on her liberty

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162 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582, 596-597; [1992] HCA 10.

163 *Wragg v State of New South Wales* (1953) 88 CLR 353 at 371; [1953] HCA 34.

procured or funded by the Commonwealth[164]. That having been said, it is not necessary to determine whether the plaintiff has standing to challenge the validity of the Commonwealth's contractual arrangements with Transfield or the validity of Nauruan laws said to be contrary to the Constitution of Nauru.

Detention in custody

237 It is common ground between the parties that by reason of the combined effect of the requirement in the RPC visas that the plaintiff must reside in the Nauru RPC, s 18C of the RPC Act and r 3.1.3 of the Centre Rules (assuming that those laws are not rendered invalid by Art 5(1) of the Constitution of Nauru), it was unlawful in Nauru for the plaintiff to leave or to attempt to leave the Nauru RPC without the permission of an Operational Manager or an authorised officer under the RPC Act, or some other authorised person. The plaintiff did not consent to these restrictions on her movements.

238 It is important to appreciate that the statement of constitutional principle from *Lim* on which the plaintiff's argument rests is concerned with "detention in custody" by the Commonwealth. That statement elaborates one consequence of the separation of judicial power from the other governmental powers of the Commonwealth effected by Ch III of the Constitution. This principle is engaged by the statutory conferral upon the Commonwealth Executive of the power to detain a person in custody for the purpose of punishment, that power being essentially judicial in character. It may be noted at this point that the actual decision in *Lim* recognised that laws for the detention by the Executive of aliens necessary to enable their deportation are not punitive in character; but the point of central importance is that the relevant limitation on Commonwealth legislative power is concerned with detention of an alien in the custody of the Commonwealth; that is, with the legal authority of the Commonwealth to hold an alien in detention.

239 The plaintiff's detention in Nauru was not detention in the custody of the Commonwealth. The very purpose of her removal from Australia to Nauru was to deliver her from detention in the custody of the Commonwealth otherwise required by s 189 of the Migration Act. The plaintiff's detention in Nauru was in the custody of the Republic of Nauru. That is because the legal authority by which she was held in custody in Nauru, an independent sovereign nation, was that of Nauru and not that of the Commonwealth. While it might be said that the Commonwealth's arrangements with Nauru procured or funded or caused

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164 *The Real Estate Institute of New South Wales v Blair* (1946) 73 CLR 213 at 227; [1946] HCA 43; *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 401-402; [1975] HCA 52; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 34-35 [49], 69 [156], 99 [272]-[273]; [2009] HCA 23.

restraints over the plaintiff's liberty, the plaintiff's detention in custody was a consequence of the exercise of governmental power, being that of Nauru, an independent sovereign State.

240 There was no suggestion in the Special Case that the Commonwealth requested or required that the Nauruan regime of detention in custody be put in place. Indeed, to the contrary, the parties agreed that it was the fact that, if Nauru had not sought to impose these restrictions on the plaintiff, none of the Commonwealth, the Minister, Transfield or its subcontractors would have sought to impose such restraints over the plaintiff's liberty in Nauru or asserted any right to impose such restraints.

241 Accordingly, the limitation on Commonwealth executive power discussed in *Lim* is not engaged in the circumstances of this case.

Section 198AHA – operation

242 To the extent that statutory authority was necessary to enable the Commonwealth lawfully to procure or fund or participate in the restraints over the plaintiff's liberty which occurred in Nauru, that authority was provided by s 198AHA(2) of the Migration Act.

243 Section 198AHA must be understood in its context as part of the statutory scheme for the regulation of the detention in, and removal from, Australia of unlawful non-citizens[165]. On 10 September 2012, the Minister designated the Republic of Nauru a "regional processing country" under s 198AB(1) of the Migration Act. Section 198AD(2) of the Migration Act provides that persons meeting the definition of "unauthorised maritime arrival" who have been detained pursuant to s 189 of the Migration Act must be taken, as soon as reasonably practicable, from Australia to a regional processing country.

244 Within this scheme, s 198AHA is enlivened if the Commonwealth enters into "an arrangement with a person or body in relation to the regional processing functions of a country."[166] It contemplates an arrangement to which the Commonwealth is a party in relation to the regional processing functions of a country other than Australia.

245 In accordance with s 198AHA(5), Nauru's regional processing functions include the implementation of the RPC Act, the 2013 and 2014 Immigration Regulations and the Administrative Arrangements. The MOU is an arrangement with the executive government of Nauru in relation to the regional processing

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165 *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 363-364 [115]-[119]; [2013] HCA 53.

166 Section 198AHA(1).

functions of Nauru. As a result, s 198AHA(2) authorises the Commonwealth to "take, or cause to be taken, any action in relation to the [MOU] or the regional processing functions of [Nauru]", and to "make payments, or cause payments to be made, in relation to the [MOU] or the regional processing functions of [Nauru]".

246 At this point, it is convenient to note that the expression "a person or body" is apt to encompass a person or body who constitutes or represents the executive government of that other country. The MOU was executed by a person representing the executive government of Nauru. Accordingly, the plaintiff's contention that s 198AHA has no application because Nauru itself is not "a person or body" must be rejected.

247 By reason of the definition of "action" in s 198AHA(5), the Commonwealth is authorised to cause restraint to be exercised over the liberty of a person where that exercise of restraint relates to the MOU or Nauru's regional processing functions. The degree of restraint over the liberty of any person that the Commonwealth is authorised to cause depends on whether such restraint can be said to relate to the MOU or the regional processing functions of Nauru.

248 Contrary to the plaintiff's argument, the authority conferred on the Commonwealth by s 198AHA(2) is not conditional upon a judgment by the domestic courts of this country as to the validity of the laws of Nauru. While it may be said that a statute which authorises conduct by officers of the Commonwealth in another country authorises only conduct which is lawful in that country, one cannot discern in the language of s 198AHA an intention that Australian courts should pass judgment upon the validity of the laws of a foreign State in order to determine whether s 198AHA(2) and (5) apply in the circumstances.

249 Section 198AHA contains textual indications that the operation of s 198AHA(2) does not depend upon the constitutional validity of a Nauruan law. Section 198AHA(5) includes within the concept of "regional processing functions" the "implementation of any law or policy … by a country". This text does not support the plaintiff's argument that because s 198AHA(5) refers to the law of a regional processing country, it must be taken to refer to *all* the law of that country (and so necessarily requires consideration of whether any particular law propounded for the purposes of s 198AHA(5) is a valid law under the Constitution of Nauru). The text of s 198AHA(5) refers, not to *the* law of a regional processing country, but to *any* law. The reference is thus to a particular law as promulgated by Nauru. Further in this regard, s 198AHA(5) refers to "any … policy": that reference is necessarily to a policy as that policy is promulgated by the processing country. The collocation of "any law" with "any policy" suggests that the reference to "any law" is to be regarded in the same way. Further, s 198AHA(3) is an indication that s 198AHA(2) is, in its operation,

indifferent as to whether or not a restraint over the liberty of a person in the processing country is, for any reason, unlawful in that country.

250 In addition, considerations 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[167].

251 In *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd*[168], Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ acknowledged:

> "[the] principle of international law, which has long been recognized, namely that, in general, courts will not adjudicate upon the validity of acts and transactions of a foreign sovereign State within that sovereign's own territory. The statement of Fuller CJ in *Underhill v Hernandez*[169] that 'the courts of one country will not sit in judgment on the acts of the government of another done within its own territory' has been repeated with approval in the House of Lords (*Buttes Gas v Hammer*[170]) and the Supreme Court of the United States: *Banco Nacional de Cuba v Sabbatino*[171]. The principle rests partly on international comity and expediency. So, in *Oetjen v Central Leather Co*[172] the Supreme Court said:
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> > 'To permit the validity of the acts of one sovereign State to be re-examined and perhaps condemned by the courts of another

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167 *Underhill v Hernandez* 168 US 250 at 252 (1897); *Potter v Broken Hill Proprietary Co Ltd* (1906) 3 CLR 479 at 495, 506, 511; [1906] HCA 88; *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 40-41; [1988] HCA 25. See also *Aksionairnoye Obschestvo A M Luther v James Sagor & Co* [1921] 3 KB 532 at 546, 548, 558-559; *Banco de Espana v Federal Reserve Bank of New York* 114 F 2d 438 (1940); *Banco Nacional de Cuba v Sabbatino* 376 US 398 at 416 (1964); *Buttes Gas and Oil Co v Hammer* [1982] AC 888 at 931-934.

168 (1988) 165 CLR 30 at 40-41.

169 168 US 250 at 252 (1897).

170 [1982] AC 888 at 933.

171 376 US 398 at 416 (1964).

172 246 US 297 at 304 (1918).

> would very certainly "imperil the amicable relations between governments and vex the peace of nations".'
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> As Lord Wilberforce observed in *Buttes Gas v Hammer*[173], in the context of considering the United States decisions, the principle is one of 'judicial restraint or abstention' and is 'inherent in the very nature of the judicial process'."

252 These well-established principles of international comity and judicial restraint are inconsistent with the impertinence and paternalism involved in a presumption that a reference in an Australian statute to the law of a foreign sovereign State is only to a law which, in the view of an Australian court, conforms to the constitution of the foreign State. Accordingly, it is not to be presumed that s 198AHA(5) should be read exegetically as if it speaks of "any law of another country held valid by a court of this country".

253 It may be said that s 198AHA(5) could be read as if it referred simply to "a valid law of another country". But, in truth, the second exegetical reading implicitly involves the proposition which is explicit in the first. That is because any question as to the validity of a law of another country for the purposes of the municipal law of the Commonwealth can be resolved only by a decision of an Australian court: under our system of the separation of powers at the federal level, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[174]

254 There may be exceptions to the operation of the principles of judicial restraint and international comity established by the authorities. In *The Conflict of Laws*[175] by Dicey, Morris and Collins, it is said that:

> "[T]here may be circumstances in which foreign legislation may be held by the English court to be unconstitutional under the foreign law. But the court will not entertain an action the object of which is to obtain a determination of the constitutionality of the foreign legislation."

255 To similar effect, in *Moti*[176], this Court noted that there "will be occasions" when an Australian court must state "conclusions about the legality of the

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173 [1982] AC 888 at 931-932.

174 *Marbury v Madison* 5 US 137 at 177 (1803); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35; [1990] HCA 21.

175 15th ed (2012), vol 1 at 123-124.

176 (2011) 245 CLR 456 at 475 [51].

conduct of a foreign government or persons through whom such a government has acted." It may be said immediately that implicit in this observation is the recognition that the statement of conclusions about the legality of conduct under the law of a foreign sovereign State may be justified as an exception to the settled principles of judicial restraint and international comity but not as being subversive of them.

256 This Court's decision in *Moti* certainly does not carry the plaintiff's argument as far as it needs to go. In that case, the accused had been brought to Australia from the Solomon Islands without his consent. While the deportation had been effected by officials of the government of the Solomon Islands, officials of the Commonwealth government had supplied the necessary travel documents relating to the accused, knowing that these documents would be used to deport him in circumstances that made the deportation unlawful under the law of the Solomon Islands. The unlawfulness of the accused's removal from the Solomon Islands, in which officials of the Commonwealth government had knowingly assisted, was an issue to be resolved in deciding whether a stay of the proceedings brought against the accused in Australia by the Commonwealth Executive should be granted. As was said by French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ[177]:

> "In considering whether prosecution of the charges laid in the indictment preferred against the appellant would be an abuse of process of the Supreme Court of Queensland, the focus of the inquiry must fall upon what Australian officials had done or not done in connection with the appellant's deportation from Solomon Islands. To conclude that the deportation was not effected lawfully was a necessary but not a sufficient step towards a decision about abuse of process."

257 The issue of present concern is not whether conduct of officers of a foreign government involving officers of the Commonwealth, which was indisputably contrary to the law of the foreign sovereign State, led to an abuse of the process of an Australian court. The question here is whether the operation of s 198AHA, a statute of the Commonwealth Parliament, is to be understood as conditional upon the opinion of an Australian court as to the validity or invalidity of a law of a foreign country under the municipal law of that country.

258 In summary on this point, there is no good reason to read s 198AHA(5) as if it were conditional upon the determination by an Australian court of the constitutionality of a law of a foreign country. And in any event, the terms of s 198AHA(5) confirm that the operation of s 198AHA(2) does not depend upon such a determination.

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177 (2011) 245 CLR 456 at 477 [53].

Section 198AHA – validity

259 Unauthorised maritime arrivals are aliens within the meaning of s 51(xix) of the Constitution. Section 198AHA, in its operation in relation to the MOU and the implementation by Nauru of its regional processing functions, facilitates the removal of aliens from Australia and their removal to Nauru pursuant to ss 198AB and 198AD of the Migration Act. In this regard, as Hayne J observed in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*[178], "[r]emoval means removal *to* a place" (emphasis in original). Two points may be made here. First, because the place to which an unauthorised maritime arrival is to be removed will be outside Australia, these provisions necessarily have an extraterritorial operation. Secondly, unless a sovereign country to which the unauthorised maritime arrival is removed is willing and able to receive such persons, the removal of that person from Australia is not reasonably practicable. Accordingly, within the statutory scheme, s 198AHA seeks to ensure the reasonable practicability of removal to a country willing and able to receive these aliens. This operation is sufficient to enable s 198AHA to be characterised as a law with respect to aliens within s 51(xix) of the Constitution[179]. In this regard, and contrary to the plaintiff's submission, it is well settled that s 51(xix) does not require that a law made thereunder operate *only* on aliens[180].

260 It must be accepted that the Commonwealth is authorised by s 198AHA(2) to cause a restriction upon the liberty of an alien in the country to which the alien is removed only if that restriction is reasonably capable of being seen as a necessary condition of the willingness and ability of that country to receive the alien for regional processing. In *Plaintiff M76*[181], Crennan, Bell and Gageler JJ said:

> "The constitutional holding in *Lim* ... was that laws authorising or requiring the detention in custody by the executive of non-citizens, being laws with respect to aliens within s 51(xix) of the Constitution, will not contravene Ch III of the Constitution, and will therefore be valid, only if[182]: 'the detention which they require and authorize is limited to what is

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178 (2013) 251 CLR 322 at 364 [119].

179 *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at 43 [25]-[26]; [2014] HCA 22.

180 *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at 42-43 [24]-[25].

181 (2013) 251 CLR 322 at 369 [138].

182 (1992) 176 CLR 1 at 33.

reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered.'"

261 The authority to cause the restriction on liberty conferred by s 198AHA(2) may be seen to be incidental to s 198AD(2), which requires the removal of aliens from Australia, and hence to be necessary for the purposes of the plaintiff's deportation from Australia. As noted above, the facts agreed in the Special Case establish that the detention in custody of the plaintiff was effected by the Republic of Nauru, not by the Commonwealth. Even if these facts do not prevent the conclusion that the Commonwealth caused the liberty of the plaintiff to be restricted in Nauru, they do establish that any restraint on liberty which the Commonwealth caused served to facilitate the removal of the plaintiff from Australia to Nauru because the plaintiff's detention in custody in Nauru by Nauru was a condition of Nauru's readiness and willingness to receive the plaintiff.

262 It may also be noted here that the authority which s 198AHA(2) confers to cause detention in custody and to make payments is confined to causing detention or making payments related to the implementation of the MOU or the regional processing functions of Nauru. As a result, as the Solicitor-General of the Commonwealth rightly accepted, the authority conferred on the executive government of the Commonwealth by s 198AHA(2) expires when the regional processing functions of Nauru come to an end.

263 Finally, the plaintiff's submission that regional processing is punitive because it is designed to have a deterrent effect on the movement of asylum seekers must be rejected. A deterrent effect may be an intended consequence of the operation of regional processing arrangements, but the immediate purpose of s 198AHA is the facilitation of the removal of unauthorised maritime arrivals from Australia.

264 In summary as to the validity of s 198AHA, the authority conferred by s 198AHA(2)(a) to cause the plaintiff's liberty to be restrained is "reasonably capable of being seen as necessary for the purposes of deportation" of aliens. Accordingly, it does not "contravene Ch III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates."[183]

The determination of the questions

265 Given these conclusions, the questions posed in the Special Case for determination by this Court should be answered only to the extent necessary for

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183 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 33; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 369 [138].

the resolution of the matter concerning the defendants' participation in the plaintiff's detention in custody in Nauru. I would answer as follows:

(1) The plaintiff has standing to seek a declaration that the conduct of the Commonwealth or the Minister in procuring, funding and participating in the plaintiff's detention in Nauru was not authorised by a valid law of the Commonwealth or was not part of the executive power of the Commonwealth.

(2) The conduct of the Commonwealth was authorised by s 198AHA of the Migration Act. Section 198AHA is a valid law of the Commonwealth. It is unnecessary to answer whether it was also authorised by s 61 of the Constitution or other legislation.

(3) The plaintiff is not entitled to the declaration sought. The proceedings should be dismissed.

(4) The plaintiff should pay the defendants' costs.

GORDON J.

Introduction

266 The Plaintiff, a Bangladeshi national, was on board a vessel intercepted at sea by officers of the Second Defendant ("the Commonwealth") and was then transferred to a Commonwealth vessel and taken to Christmas Island. Upon entering the migration zone[184] at Christmas Island, the Plaintiff did not hold any visa to enter or remain in Australia and became an "unlawful non-citizen"[185] and an "unauthorised maritime arrival"[186] under the *Migration Act* 1958 (Cth) ("the Migration Act"). The Plaintiff was detained by officers of the Commonwealth under s 189 of the Migration Act.

267 On 22 January 2014, officers of the Commonwealth took the Plaintiff to the Republic of Nauru ("Nauru"), a regional processing country[187], pursuant to s 198AD(2) of the Migration Act. The Plaintiff arrived on Nauru on 23 January 2014. For the purposes of effecting that taking of the Plaintiff to Nauru, officers of the Commonwealth exercised powers in s 198AD(3) of the Migration Act, and upon the commencement of the exercise of those powers, the Plaintiff ceased to be detained pursuant to s 189 of the Migration Act. Any detention of the Plaintiff that occurred while she was being taken to Nauru pursuant to s 198AD(2) of the Migration Act was for the purpose of taking the Plaintiff to Nauru.

268 On 21 January 2014, an officer of the Commonwealth, without seeking the Plaintiff's consent, had applied on behalf of the Plaintiff to the Secretary of the Department of Justice and Border Control of Nauru ("the Nauruan Justice Secretary") for a "regional processing centre visa" ("RPC Visa")[188]. On 23 January 2014, the Principal Immigration Officer of Nauru granted a RPC Visa to the Plaintiff[189]. On the expiry of that visa (and a subsequent visa), the Principal Immigration Officer of Nauru granted[190] the Plaintiff a further RPC

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184 As defined in s 5(1) of the *Migration Act* 1958 (Cth) ("the Migration Act").

185 As defined in s 14 of the Migration Act.

186 As defined in s 5AA of the Migration Act.

187 As defined in s 198AB of the Migration Act.

188 Pursuant to reg 9 of the Immigration Regulations 2013 (Nauru).

189 Pursuant to reg 9 of the Immigration Regulations 2013 (Nauru).

190 Pursuant to reg 9 of the Immigration Regulations 2014 (Nauru).

Visa. Each RPC Visa specified that the Plaintiff had to reside at the regional processing centre on Nauru ("the Nauru RPC")[191]. The Plaintiff resided at a compound within the Nauru RPC known as "RPC3".

269 In March 2014, the Commonwealth made a contract with Transfield Services (Australia) Pty Ltd ("Transfield"), the Third Defendant, to operate the Nauru RPC ("the Transfield Contract"). Under that contract, Transfield was required to and did restrict the Plaintiff's liberty. Transfield could engage, and has engaged, subcontractors to perform the Transfield Contract. But under the Transfield Contract the Commonwealth can, at any time and at its discretion, take over the operation of the Nauru RPC from Transfield and its subcontractors.

270 The Plaintiff is unwilling to return to Bangladesh because the Plaintiff claims to be a refugee[192]. The Plaintiff applied to the Nauruan Justice Secretary to be recognised by Nauru as a refugee under s 5 of the *Refugees Convention Act* 2012 (Nauru) ("the Refugees Convention Act"). That application has not been determined.

271 On 2 August 2014, the Plaintiff was brought to Australia for the temporary purpose of undergoing review in a centre of medical excellence. The Plaintiff remains in Australia.

272 In the proceedings in this Court, the Plaintiff seeks an injunction against the First Defendant ("the Minister") and other officers of the Commonwealth and a writ of prohibition prohibiting them from taking steps to remove her to Nauru if she is to be detained at the Nauru RPC. The Plaintiff also seeks orders prohibiting and restraining the Commonwealth from making any further payments to Transfield and a declaration to the effect that her detention on Nauru was unlawful under Australian law.

273 Questions were stated for the opinion of the Full Court by way of a Special Case and concern two time periods – the period when the Plaintiff was detained on Nauru ("the past conduct") and the future period if the Plaintiff were to be returned to Nauru ("future arrangements").

274 In relation to the past conduct, the questions stated for the opinion of the Full Court (Questions 1-5) ask, in substance, whether the Commonwealth detained the Plaintiff on Nauru and, if so, whether the Commonwealth

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191 Pursuant to reg 9(6)(a) of the Immigration Regulations 2013 (Nauru) and reg 9(6)(a) of the Immigration Regulations 2014 (Nauru).

192 Within the meaning of the Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967) ("the Refugees Convention").

Parliament has power to pass a law authorising the detention of an alien by the Commonwealth, outside Australia, and after the Commonwealth has exercised its undoubted power to expel that alien from Australia or prevent entry by that alien into Australia.

275 The Commonwealth denies that it detained the Plaintiff on Nauru at any time between January and August 2014 but it says that in any event s 198AHA of the Migration Act gave the Executive the power to detain her on Nauru after the Executive had prevented her from entering Australia and her removal from Australia was complete.

276 These proceedings are concerned only with the powers of the Commonwealth. These proceedings must focus upon what the Commonwealth has done, or what it would propose to do if the Plaintiff were again to be taken to Nauru. It is neither relevant nor appropriate for this Court to pass any judgment upon what the Government of Nauru has done or proposes to do. In particular, it is neither relevant nor appropriate for this Court to ask whether or to what extent Nauru has detained or could detain the Plaintiff. To answer the questions about the past conduct, it is necessary to address the nature, and extent, of the acts and conduct of the Commonwealth in relation to the Plaintiff and her detention on Nauru. That analysis will explain that the Plaintiff was detained by the Commonwealth on Nauru.

277 And it is that detention which raises the fundamental question of the power of the Commonwealth Parliament to pass a law authorising the detention of an alien by the Commonwealth outside Australia and after the Commonwealth has exercised its undoubted power to expel that alien from Australia or prevent entry by that alien into Australia. The established and unchallenged doctrine[193] of this Court requires the conclusion that in the circumstances set out in the Special Case, to the extent that s 198AHA purported to authorise the Executive to effect that detention, s 198AHA of the Migration Act is invalid and no other power supports that detention.

278 In relation to any future arrangements, these reasons will explain that it is not appropriate to answer the stated questions (Questions 6-12) because they are hypothetical. Questions 13 and 14 are directed to the form of relief and costs and are addressed below.

Facts

279 This section of the reasons will address the arrangements the Commonwealth made in relation to Nauru and the nature and extent of its involvement on Nauru. The facts were stated in the Special Case.

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193 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; [1992] HCA 64.

280 The facts primarily concern the past conduct as it involved the detention of the Plaintiff on Nauru. Any future arrangements if the Plaintiff were returned to Nauru are addressed in Part (6) of this section of the reasons.

(1) Steps taken by the Minister under the Migration Act

281 Nauru was designated a "regional processing country" under s 198AB(1) of the Migration Act in September 2012. On 29 July 2013 and 15 July 2014, the Minister made directions[194] with respect to the regional processing countries to which particular classes of unauthorised maritime arrivals must be taken. Nauru was listed in each direction.

(2) International arrangements

(a) MOU

282 The Commonwealth and Nauru signed a "Memorandum of Understanding … relating to the transfer to and assessment of persons in Nauru, and related issues" ("the MOU") on 3 August 2013. The MOU remains in effect.

283 The Preamble to the MOU records that the Commonwealth and Nauru are State parties to the Refugees Convention and acknowledge the importance of inter-country co-operation to undermine the "People Smuggling"[195] industry; that the Commonwealth and Nauru share a longstanding bilateral relationship of co-operation on migration and in combating transnational crime; that "Irregular Migration"[196] is a continuing challenge for the Asia-Pacific region; and that the Commonwealth "appreciates the acceptance by [Nauru] to host Transferees in Nauru, including at one or more Regional Processing Centres or under community-based arrangements, and to provide Transferees who [Nauru] determines to be in need of international protection with settlement opportunities". A "Transferee" is a person transferred to Nauru pursuant to the MOU. The Plaintiff was and remains a Transferee.

284 The Preamble also refers to the Fourth Ministerial Conference of the Bali Process on People Smuggling, Trafficking and Related Transnational Crime[197].

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194 Pursuant to s 198AD(5) of the Migration Act.

195 Defined to mean "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the unauthorised entry of a person into a country of which [the person] is not a national or permanent resident".

196 Defined to mean "the phenomenon of people moving without proper authorisation to a country including for the purpose of seeking asylum".

197 Held in Indonesia on 29 and 30 March 2011.

The Preamble records that, having regard to those and other matters, the Commonwealth and Nauru had reached a "common understanding regarding the transfer, assessment and settlement arrangements, whereby [the Commonwealth] would Transfer persons to Nauru for processing of any asylum claims that Transferees may raise and [Nauru] would settle an agreed number of those who it determines are in need of international protection".

285 Three objectives are listed in the MOU[198]. First, combating People Smuggling and Irregular Migration in the Asia-Pacific region is stated as a shared objective. That objective goes on to record that transfer arrangements and the establishment of regional processing centres ("RPCs") are a visible deterrent to people smugglers. The second stated objective is enabling "joint cooperation, including the development of enhanced capacity in Nauru, to address these issues". The third stated objective is that because the Commonwealth and Nauru understand the importance of regional co-operation, they have determined to continue discussions as to how these transfer, assessment and settlement arrangements might over time be broadened under the regional co-operation framework.

286 The MOU records that the Commonwealth and Nauru are to conduct all activities in respect of the MOU in accordance with their own Constitutions and "all relevant domestic laws"[199].

287 The Commonwealth bears "all costs incurred under and incidental to" the MOU. The MOU acknowledges that this may require the additional development of infrastructure or services on Nauru but goes on to state that it is envisaged that there will be a broader benefit for communities in which those settled are initially placed[200].

288 Operation of the MOU is then addressed[201]. The Commonwealth *may* transfer but Nauru *will* accept Transferees from Australia[202]. "Administrative measures" giving effect to the MOU were to be settled between the Commonwealth and Nauru. Further specific arrangements could be made, as

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198 cll 1-3 of the MOU.

199 cll 4 and 5 of the MOU.

200 cl 6 of the MOU.

201 cll 7-24 of the MOU.

202 cl 7 of the MOU.

jointly determined to be necessary, on more particular aspects of the MOU for the purpose of giving effect to its objectives[203].

289 After identifying the persons who were to be transferred to Nauru[204], the MOU records that Nauru will *host* one or more RPCs for the purposes of the MOU and may also *host* Transferees under other arrangements[205]. The "[o]utcomes" for the Transferees are identified as follows:

> "12. [Nauru] undertakes to enable Transferees who it determines are in need of international protection to settle in Nauru, subject to agreement between [the Commonwealth and Nauru] on arrangements and numbers. This agreement between [the Commonwealth and Nauru] on arrangements and numbers will be subject to review on a 12 monthly basis through the Australia-Nauru Ministerial Forum.
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> 13. [The Commonwealth] will assist [Nauru] to settle in a third safe country all Transferees who [Nauru] determines are in need of international protection, other than those who are permitted to settle in Nauru pursuant to Clause 12.
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> 14. [The Commonwealth] will assist [Nauru] to remove Transferees who are found not to be in need of international protection to their countries of origin or to third countries in respect of which they have a right to enter and reside."

290 On the question of timing, and subject to cl 12, the MOU records that the Commonwealth is to make all efforts to ensure that all Transferees depart Nauru within as short a time as is reasonably necessary for the implementation of the MOU, bearing in mind the objectives set out in the Preamble and cl 1[206].

291 In relation to "[c]o-operation", the MOU records that "[c]ommunications concerning the day-to-day operation of activities undertaken in accordance with this MOU will be between the [Nauruan Justice Secretary] and the Australian Department of Immigration and Citizenship"[207]. A Joint Committee was to be

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203 cl 8 of the MOU.

204 cl 9 of the MOU.

205 cll 10 and 11 of the MOU.

206 cl 15 of the MOU.

207 cl 21 of the MOU.

established with responsibility for the oversight of the practical arrangements required to implement the MOU[208]. The Joint Committee was required to meet regularly and was to be co-chaired by mutually agreed representatives of the Australian Department of Immigration and Citizenship and Nauru. Relevant non-government organisations and service providers could participate in the Joint Committee, where appropriate.

292 It is evident from the terms of the MOU that it was intended that the Commonwealth would maintain a significant involvement in the outcome for each Transferee after their removal to Nauru, in the day-to-day operation of processing activities and in overseeing the practical arrangements to implement the MOU.

(b) Administrative Arrangements

293 On 11 April 2014, the Secretary of the Department of Immigration and Border Protection of the Commonwealth and the Nauruan Minister for Justice signed a document on behalf of their respective governments entitled "Administrative Arrangements for Regional Processing and Settlement Arrangements in Nauru: Supporting the [MOU]" ("the Administrative Arrangements"). The Administrative Arrangements remain in effect. They form part of the "Administrative measures" referred to in cl 8 of the MOU.

294 Clause 1.1 of the Administrative Arrangements confirms that, consistent with cl 6 of the MOU, the Commonwealth will "bear all costs incurred under and incidental to the MOU, including any reasonable costs associated with legal claims arising from activities under the MOU", but "excluding costs resulting from actions by employees or agents of [Nauru] that are malicious, fraudulent, illegal or reckless".

295 The Administrative Arrangements deal with the transfer process from Australia to Nauru[209]. After identifying that a Transferee is a person who is able to be transferred to Nauru under Australian law[210], amongst other requirements, cl 2.2.6 of the Administrative Arrangements records that:

> "Australian officials will lodge applications with [Nauru] for [RPC Visas] for Transferees pursuant to subsection 9(3) of the Nauru *Immigration Regulations 2013* as soon as reasonably practicable prior to the scheduled departure of a flight or arrival of a sea vessel."

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208 cl 22 of the MOU.

209 cl 2 of the Administrative Arrangements.

210 cl 2.1(c) of the Administrative Arrangements.

296 Nauru is to process those visas "as soon as reasonably practicable"[211]. When the Transferees arrive on Nauru, "Service Providers"[212] with assistance from Nauruan officials are to escort the Transferees to transport and take them to a RPC[213]. There is currently one RPC on Nauru, the Nauru RPC, comprising three sites known as RPC1, RPC2 and RPC3. On arrival at the Nauru RPC, it is the Australian officials who provide all relevant documentation to "Staff Members"[214]. That documentation may include Transferee files and identity documents[215].

297 The arrangements at the Nauru RPC are then addressed. Nauru appoints an Operational Manager responsible for the day-to-day management of the Nauru RPC[216]. That Operational Manager is declared to hold that position under s 3(2) of the *Asylum Seekers (Regional Processing Centre) Act* 2012 (Nauru) ("the RPC Act"). The Operational Manager is supported by contracted Service Providers and Staff Members[217]. It is the Operational Manager, with assistance from Service Providers, who monitors the welfare, conduct and safety of Transferees[218]. The Commonwealth appoints a Programme Coordinator, who is responsible for managing all Australian officers and services contracts in relation to the Nauru RPC, including by ensuring that all contractors deliver the contracted services. This is done "in close liaison with the Operational Manager"[219]. The role of the Programme Coordinator under the Administrative

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211 cl 2.2.9 of the Administrative Arrangements.

212 Defined as a "company or organisation/entity contracted to provide a service at [the Nauru RPC] or in relation to Transferees".

213 cl 3.4 of the Administrative Arrangements.

214 Defined as a "person who is involved in providing services at [the Nauru RPC], including a person employed by a Service Provider".

215 cl 3.6.1 of the Administrative Arrangements.

216 cl 4.1.2 of the Administrative Arrangements. As will become evident, under the *Asylum Seekers (Regional Processing Centre) Act* 2012 (Nauru) ("the RPC Act"), the appointer of the Operational Manager is altered to be the person (however described) who has been given responsibility by the Commonwealth *or* by the Nauruan Minister (s 3(1)). There is one Operational Manager for each of RPC1, RPC2 and RPC3.

217 cl 4.1.3 of the Administrative Arrangements.

218 cl 4.1.6 of the Administrative Arrangements.

219 cl 4.1.4 of the Administrative Arrangements.

Arrangements has at all times been filled by an officer of the Department of Immigration and Border Protection of the Commonwealth.

298 Security at the Nauru RPC is provided by a Service Provider[220]. As will become apparent, that Service Provider is contracted by the Commonwealth and is Transfield. It will be necessary to return to consider the terms of Transfield's engagement by the Commonwealth in Part (4) of this section of the reasons below.

299 The duration and purpose of a Transferee's stay at the Nauru RPC are addressed in cl 4.2 of the Administrative Arrangements. Nauru is to accommodate Transferees at the Nauru RPC "while their claim to be recognised as a Refugee under Nauruan law and/or claims for the purposes of Clause 19(c) of the MOU are assessed"[221]. Clause 19(c) of the MOU is an assurance by Nauru that it will "not send a Transferee to another country where there is a real risk that the Transferees [sic] will be subjected to torture, cruel, inhumane or degrading treatment or punishment, arbitrary deprivation of life or the imposition of the death penalty".

300 The Administrative Arrangements record that the refugee status determination is to be made under Nauruan law[222]. However, the Commonwealth is to engage and fund contractors to assist in that refugee status determination process[223] and to assist Nauru to develop arrangements for the administration of those determinations[224]. Nauru is to provide access to a merits review process for a Transferee determined not to be a refugee after preliminary determination[225]. The Commonwealth funds the costs of that review[226].

301 Outcomes for Transferees are addressed in cl 6 of the Administrative Arrangements. The arrangements record that the Commonwealth and Nauru will agree to arrangements to cover "their respective responsibilities relating to the settlement of Refugees and other persons in need of international protection in

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220 cl 4.3.1 of the Administrative Arrangements.

221 cl 4.2.1 of the Administrative Arrangements.

222 cl 5.2.1 of the Administrative Arrangements.

223 cl 5.2.2 of the Administrative Arrangements.

224 cl 5.2.5 of the Administrative Arrangements.

225 cl 5.3.1 of the Administrative Arrangements.

226 cl 5.3.2 of the Administrative Arrangements.

Nauru under Clause 12 of the MOU"[227] and that the Commonwealth will meet agreed settlement support costs for those settled on Nauru[228].

302 Where it is determined that a Transferee does not engage international protection obligations, the Administrative Arrangements record two important matters: first, that the Commonwealth and Nauru accept that voluntary return to the Transferee's home country or a third country that they have a right to enter and reside in is the preferred option[229]; and second, that in the case of involuntary removal, Nauru may order the removal of a Transferee and the Commonwealth will assist Nauru in accordance with cl 14 of the MOU[230].

303 Governance of the Nauru RPC is addressed in cl 8 of the Administrative Arrangements. Two principal methods are set out – a Joint Committee (being that identified in cl 22 of the MOU) to provide advice on practical arrangements to implement the MOU including issues relating to the stay of Transferees[231]; and a Joint Working Group to liaise on the technical, operational and legal aspects of the operation and management of the Nauru RPC[232].

304 The Commonwealth has a significant role in relation to the Joint Committee and the Joint Working Group. The work of the Joint Committee relates to the implementation and operation of the Nauru RPC. It convenes on a regular basis and its membership includes representatives from the Nauruan and Commonwealth Governments, including subject matter experts from the Minister's Council on Asylum Seekers and Detention. The Deputy Commonwealth Ombudsman is an observer. It is co-chaired by mutually agreed representatives of the Nauruan Government and the Department of Immigration and Border Protection of the Commonwealth.

305 The Joint Working Group meets weekly to discuss matters relating to the Nauru RPC, including construction, general updates on regional processing issues, visas, legal challenges, staffing statistics and training, activities for Transferees and refugees, and events occurring inside and outside the Nauru RPC. The Joint Working Group is chaired by the Nauruan Minister for Justice

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227 cl 6.2.1 of the Administrative Arrangements.

228 cl 6.2.2 of the Administrative Arrangements.

229 cl 6.3.1 of the Administrative Arrangements.

230 cll 6.5.2-6.5.4 of the Administrative Arrangements.

231 cl 8.1.1 of the Administrative Arrangements.

232 cl 8.2.1 of the Administrative Arrangements.

and Border Control ("the Nauruan Justice Minister"), and members include the Australian High Commissioner for Nauru and officers of the Department of Immigration and Border Protection of the Commonwealth. Each Operational Manager is a standing member of the Joint Working Group.

306 Unsurprisingly, the Commonwealth occupies an office at the Nauru RPC, at which officers of the Australian Border Force of the Commonwealth carry out functions in relation to Transferees or the Nauru RPC. Those functions include managing Service Provider contracts, managing and monitoring Commonwealth-funded projects, including construction projects, and managing relationships and communication between the Commonwealth, Service Providers, and the Government of Nauru. The officers wear official clothing bearing the insignia of the Australian Border Force of the Commonwealth and the Australian coat of arms.

307 What is described as "Regional Cooperation Framework and Processing" is then dealt with as follows:

> "9.1 In support of a Regional Cooperation Framework, the MOU between [the Commonwealth] and Nauru enable [sic] joint cooperation, including the development of enhanced capacity in Nauru, to address people smuggling and irregular migration issues in the Asia-Pacific region.
>
> 9.2 Both countries will undertake a broad range of functions under the Regional Cooperation Framework. Including:
>
> (a) processing protection claims for persons seeking asylum;
>
> (b) providing learning and training opportunities for officials in the region to undertake refugee status determinations;
>
> (c) administering capacity building activities to develop practical skills in asylum processes (such as registration and reception practices);
>
> (d) assisting with the development of international protection frameworks, including the development of domestic legislative frameworks as a complement to other capacity building activities in Nauru (and/or other countries in the region); and
>
> (e) using [RPC] facilities to provide short-term, temporary facilities to assist in the response to emergency situations.
>
> 9.3 [The Commonwealth] will provide skills development and training opportunities to the local Nauruan workforce employed in a [RPC]

> to build their skills and knowledge in relation to their employment."

(3) Nauruan law

(a) Immigration Act *2014 (Nauru) and Immigration Regulations 2014 (Nauru)*

308 As seen earlier, a RPC Visa is one of the visas that may be granted[233] under the Immigration Regulations 2014 (Nauru)[234]. The fee for a RPC Visa, $3,000[235], is payable by the Commonwealth when a demand for its payment is made on behalf of Nauru[236]. Such a visa may *only* be granted to an offshore entry person within the meaning of the Migration Act who is to be, or has been, brought to Nauru under s 198AD of the Migration Act or a person who is to be, or has been, brought to Nauru under s 199 of the Migration Act[237]. An application for such a visa must be made before the entry into Nauru of the Transferee and can only be made by an officer of the Commonwealth[238].

309 A RPC Visa may only be granted for one of the following purposes[239]:

> "(a) the making by the [Nauruan Justice] Secretary of a determination in respect of the person under section 6 of the [Refugees Convention Act];
>
> (b) enabling a person in respect of whom the [Nauruan Justice] Secretary has made a determination that he or she is not recognised as a refugee, or a decision to decline to make a determination on his or her application for recognition as a refugee, to remain in Nauru until all avenues for review and appeal are exhausted and arrangements are made for his or her removal from Nauru;

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233 reg 4(1)(d) of the Immigration Regulations 2014 (Nauru).

234 These regulations were made under s 33 of the *Immigration Act* 2014 (Nauru).

235 reg 5(7) and Sched 2 to the Immigration Regulations 2014 (Nauru).

236 reg 5(7) of the Immigration Regulations 2014 (Nauru).

237 reg 9(1) of the Immigration Regulations 2014 (Nauru).

238 reg 9(2) and (3) of the Immigration Regulations 2014 (Nauru).

239 reg 9(4) of the Immigration Regulations 2014 (Nauru).

> (c) enabling a person whose recognition as a refugee has been cancelled to remain in Nauru until all avenues for review and appeal are exhausted and arrangements are made for his or her removal from Nauru;
>
> (d) enabling a person in respect of whom the [Nauruan Justice] Secretary has made a determination that he or she is recognised as a refugee to remain in Nauru pending the making of arrangements for his or her settlement in another country;
>
> (e) enabling a person [who is to be, or has been, brought to Nauru under s 199 of the Migration Act] to reside, as a dependant, with the holder of a [RPC Visa] issued for a purpose mentioned in paragraph (a), (b), (c) or (d)."

310 Conditions attaching to a RPC Visa include that the holder must reside in premises specified in the visa[240].

311 If a holder of a RPC Visa is notified in writing that a determination has been made that the holder is recognised as a refugee, is granted derivative status or is in need of complementary protection, the RPC Visa automatically becomes a temporary settlement visa[241]. The fee for that visa is $3,000 a month and paid by the Commonwealth[242].

312 A Commonwealth officer has made application to the Nauruan Justice Secretary for a RPC Visa[243] in respect of each Transferee taken to Nauru since its designation as a regional processing country. Each application has been granted.

313 In making an application for a RPC Visa on behalf of a Transferee, Commonwealth officers did not as a matter of practice, and were not required by the law of Nauru to, seek the consent of the Transferee. On the expiry of a RPC Visa held by a Transferee, which occurs not more than three months after the RPC Visa is granted[244], it has been the general practice of the Nauruan Justice

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240 reg 9(6)(a) of the Immigration Regulations 2014 (Nauru).

241 reg 9A(1) of the Immigration Regulations 2014 (Nauru).

242 reg 5(7) and Sched 2 to the Immigration Regulations 2014 (Nauru).

243 Pursuant to reg 9A of the Immigration Regulations 2000 (Nauru) or, subsequently, pursuant to reg 9 of the Immigration Regulations 2013 (Nauru) or reg 9 of the Immigration Regulations 2014 (Nauru).

244 In accordance with reg 9(5) of the Immigration Regulations 2013 (Nauru) and subsequently reg 9(5) of the Immigration Regulations 2014 (Nauru).

Secretary to grant a further RPC Visa to the Transferee[245] without requiring a further application by a Commonwealth officer for a further RPC Visa for that Transferee and without seeking the consent of that Transferee. It has been the invariable practice on Nauru for the form of the RPC Visa issued in respect of Transferees to specify the Nauru RPC as the place at which the Transferees must reside. The Commonwealth has paid all RPC Visa fees payable, which, as at 30 March 2015, totalled $27,893,633. Following arrival on Nauru, all Transferees have resided at the Nauru RPC.

(b) RPC Act

314 The RPC Act is stated to be "[a]n Act to regulate the operation of centres at which asylum seekers and certain other persons brought to Nauru under the *Migration Act 1958* of the Commonwealth of Australia are required to reside; to establish certain protections for those persons and set out their obligations; to impose duties on the person managing operations at a centre and confer powers on certain persons in relation to a centre or persons residing there; to appoint the Minister as guardian of certain children and for related purposes".

315 The RPC Act prescribes the duties of the "Operational Manager"[246]. In s 3(1) of the RPC Act, "Operational Manager", in relation to a RPC, is defined to mean "the person (however described) who has been given responsibility by the Commonwealth of Australia or by the Minister for managing operations at the centre and who is declared under subsection (2)". A careful reader will notice that under the RPC Act a person can be given this responsibility by the Commonwealth *or* by a Nauruan Minister. That is not consistent with the definition of Operational Manager in the Administrative Arrangements[247]. The duties of an Operational Manager are set out in ss 5, 6 and 7 of the RPC Act. It is unnecessary to list each of them. It is sufficient for present purposes to record that the Operational Manager is to ensure that each Transferee residing at the Nauru RPC is treated in a fair and humane manner consistent with the law of Nauru[248] and is provided with certain facilities and protections[249]. A particular duty imposed on the Operational Manager is to ensure that restrictions on the

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245 Pursuant to reg 9(5A) of the Immigration Regulations 2014 (Nauru).

246 Pt 2 of the RPC Act.

247 See [297] above.

248 s 5 of the RPC Act.

249 s 6 of the RPC Act.

movement of those at the Nauru RPC are "limited to the minimum necessary to maintain the security and good order" of the Nauru RPC[250].

316 An important duty of the Operational Manager is to make rules ("the RPC Rules") for the "security, good order and management" of the Nauru RPC and the "care and welfare" of the Transferees residing there[251]. A Transferee residing at the Nauru RPC has to comply with those rules[252]. It will be necessary to return to consider some aspects of the RPC Rules in the next part of this section of the reasons.

317 In addition to the Operational Manager, the RPC Act provides for the appointment, by the Nauruan Justice Secretary, of an "authorised officer", being a staff member employed by a Service Provider contracted to provide services for the Nauru RPC[253]. A "staff member" is defined in the RPC Act to mean a person employed or engaged to provide services at the Nauru RPC "or to assist in any way in its management or operation" and extends to include any officer of Nauru *or the Commonwealth* who has been assigned duties at the Nauru RPC and any person working as a volunteer at the Nauru RPC[254].

318 Transferees residing at the Nauru RPC were detained at the Nauru RPC. They were not to leave, or attempt to leave, the Nauru RPC without prior approval from an authorised officer, an Operational Manager or other authorised persons[255]. Any Transferee found to have left or be attempting to leave the Nauru RPC without prior approval commits an offence, which could result in up to six months imprisonment[256]. Police are given the power to arrest absentees from the Nauru RPC[257] and are authorised to use reasonable

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250 s 6(3) of the RPC Act.

251 s 7(1) of the RPC Act.

252 s 9(a) of the RPC Act; r 3.1.1 of the RPC Rules.

253 s 17(1) of the RPC Act.

254 s 3(1) of the RPC Act.

255 By reason of the specification in the RPC Visa that a Transferee must reside at the Nauru RPC: s 18C of the RPC Act; r 3.1.3 of the RPC Rules. Rule 3.1.3 of the RPC Rules provided that a person may leave without prior approval in the case of emergency or other extraordinary circumstance. That qualification is not found in s 18C of the RPC Act.

256 s 18C of the RPC Act.

257 s 23 of the RPC Act.

force[258]. The RPC Act provides for Transferees, in certain circumstances, to be required to submit to a frisk search[259], a strip search[260] or a scanning search[261].

(c) RPC Rules

319 As noted above, the RPC Rules stated that "[a]t all times, asylum seekers residing" at the Nauru RPC had to:

> "3.1.1 comply with these [RPC] Rules;
>
> …
>
> 3.1.3 not leave, or attempt to leave, the [Nauru RPC] without prior approval from an authorised officer, an Operational Manager or other authorised persons, except in the case of emergency or other extraordinary circumstance;
>
> …"

320 The RPC Rules noted that, as explained above, a breach of r 3.1.3 was a criminal offence which could result in up to six months imprisonment[262]. Breaches of other RPC Rules (except rr 3.1.3 and 3.1.11) by asylum seekers could result in the withdrawal of privileges. The extent and type of penalty was to be agreed between the Operational Managers and senior representatives of the health, welfare and security Service Providers[263].

(4) Transfield Contract

321 Service Providers for the provision of services at the Nauru RPC had to be engaged. Those contracts with Service Providers were entered into by the Commonwealth, not Nauru.

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258 s 24 of the RPC Act.

259 ss 19(2), 19B and 21 of the RPC Act.

260 ss 19(2), 19B and 19D of the RPC Act.

261 ss 19(2) and 19E of the RPC Act.

262 r 11.2 of the RPC Rules; s 18C of the RPC Act.

263 r 11.4 of the RPC Rules.

322 On 24 March 2014, the Commonwealth[264] and Transfield entered into the Transfield Contract, which was entitled "Contract in relation to the Provision of Garrison and Welfare Services at Regional Processing Countries". The Transfield Contract remains in effect. The site notified by the Commonwealth to Transfield on Nauru, for the purposes of the Transfield Contract, was and remains the Nauru RPC.

323 What is presently important is that Transfield and the Commonwealth were the contracting parties. Transfield owed obligations to the Commonwealth and the Commonwealth took the benefit of those obligations. The Transfield Contract provided that Transfield was not the agent for the Commonwealth[265]. That provision may have some relevance to tortious or contractual liabilities incurred by Transfield but the provision does not deny the fact that the Commonwealth, by contract, procured and obliged Transfield to detain the Plaintiff. This section of the reasons will explain why that is so.

324 The primary objectives of the Transfield Contract are to provide "Services" to Transferees and personnel at RPCs[266]. The Services are set out in a Statement of Work attached as a schedule to the contract[267]. The Services are divided into three Parts.

325 Part 1, entitled "Nature of the Services", is instructive. It relevantly provides that the "Department" requires garrison and welfare services for Transferees and personnel at "Offshore Processing Countries"[268]. "Department" is defined as "the Commonwealth of Australia as represented by any department, agency or authority of the Commonwealth which is from time to time responsible for administering this Contract"[269]. Significantly, cl 1.1.2 of Pt 1 of Sched 1 to the Transfield Contract records that "[t]he focus is on an end to end process, encompassing transfers, coordination and logistical services, governance, Offshore Processing Centre (OPC) services, refugee determination assessment and review and outcomes, removals and returns and settlement in host countries".

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264 In fact, the contract is recorded as being entered into by the Commonwealth of Australia represented by the Department of Immigration and Border Protection.

265 cl 17.7.1 of the Transfield Contract.

266 cl 2.1.1 of the Transfield Contract.

267 cll 2.1.1 and 3.1.1 of the Transfield Contract.

268 cl 1.1 of Pt 1 of Sched 1 to the Transfield Contract.

269 cl 1 of the Transfield Contract.

326 Clause 1.1.2 goes on to provide that "[h]ost governments are responsible for in-country arrangements and operations with support being provided by the Australian government". The fact and significance of the Commonwealth's involvement is recognised in cl 1.1.6, which identifies the *longer*-term objective as being "to support Regional Processing Countries to manage and administer the suite of Offshore Processing activities with a view to them becoming increasingly independent in this regard".

327 The parameters within which "Offshore Processing" will operate are stated to include "Australian and Host country legislation, Ministerial directions, Joint Agency Task Force (JATF) arrangements, Regional Resettlement Arrangement Memoranda of Understanding and Regional Resettlement Arrangement Administrative Arrangements [and] Australia's international obligations, such as the United Nations Refugee Convention and Convention on the Rights of a [sic] Child"[270].

328 Offshore Processing Guidelines ("OPC Guidelines") are provided for in cl 1.5 of Pt 1 of Sched 1. Transfield is required to contribute to the OPC Guidelines, limited to matters relevant to the scope of works provided by it[271]. The OPC Guidelines must be submitted to the Department for review and approval[272]. Moreover, Transfield must amend its draft section of the draft OPC Guidelines as directed by the Department and then provide the amended updated draft to the Department for review and approval[273]. Indeed, the OPC Guidelines could not be implemented until Transfield received prior written approval from the Department[274].

329 Part 2 of the Statement of Work identifies the "Transferee Welfare Services" that are to be provided by Transfield. Significantly, Transfield co-ordinates the reception, transfer and discharge processes at the Nauru RPC[275].

330 Part 3 of the Statement of Work identifies the "Garrison Services" that are to be provided by Transfield. One of the Garrison Services is security. For present purposes, it is sufficient to note that the Department provides "security

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270 cl 1.1.5 of Pt 1 of Sched 1 to the Transfield Contract.

271 cl 1.5.1 of Pt 1 of Sched 1 to the Transfield Contract.

272 cl 1.5.2 of Pt 1 of Sched 1 to the Transfield Contract.

273 cl 1.5.3 of Pt 1 of Sched 1 to the Transfield Contract.

274 cl 1.5.4 of Pt 1 of Sched 1 to the Transfield Contract.

275 cl 4.1.1 of Pt 2 of Sched 1 to the Transfield Contract.

infrastructure" at the Nauru RPC, which may include "perimeter fencing, lighting towers and an entry gate"[276]. Transfield "must ensure that the security of the perimeter of the [Nauru RPC] is maintained at all times in accordance with *departmental* policies and procedures as notified from time to time by the Department"[277] (emphasis added). Transfield is required to, in conjunction with other Service Providers, verify that all Transferees are present and safe in the Nauru RPC at least twice a day[278] and Transfield is "required" to "exercise use of force" within the Nauru RPC only in certain circumstances[279].

331 Transfield reports any complaints about the conduct of any of its staff or contractors, and any other person working at the Nauru RPC, to the Department of Immigration and Border Protection of the Commonwealth.

332 Finally, reference should be made to cl 17.13 of the Transfield Contract, which contains the Department's "Step in Rights". It provides that if, at any time, the Secretary of the Department "considers that circumstances exist which require the Department's intervention, the Department may, in its absolute discretion, suspend the performance of any service by [Transfield], arrange for the Department or a third party to perform such suspended service or otherwise intervene in the provision of the Services by giving written notice to [Transfield] (Step-in Right)".

(5) Other contracts

333 On 2 September 2013, Transfield and Wilson Parking Australia 1992 Pty Ltd ("Wilson Security"[280]) entered into a contract entitled "Subcontract Agreement General Terms and Conditions in relation to the Provision of Services on the Republic of Nauru" ("the 2013 Wilson Security Subcontract"). The 2013 Wilson Security Subcontract was in effect from 2 September 2013 to 28 March 2014.

334 On 28 March 2014, Transfield and Wilson Security entered into a second contract, also entitled "Subcontract Agreement General Terms and Conditions in relation to the Provision of Services on the Republic of Nauru" ("the 2014

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276 cl 4.1.3 of Pt 3 of Sched 1 to the Transfield Contract.

277 cl 4.18.1 of Pt 3 of Sched 1 to the Transfield Contract.

278 cl 4.14.1 of Pt 3 of Sched 1 to the Transfield Contract.

279 cl 4.16.1 of Pt 3 of Sched 1 to the Transfield Contract.

280 References to "Wilson Security" include Wilson Security Pty Ltd, a subsidiary of Wilson Parking Australia 1992 Pty Ltd.

Wilson Security Subcontract"). The 2014 Wilson Security Subcontract was in effect from 28 March 2014 and remains in effect. Approval for entry into the 2013 Wilson Security Subcontract and the 2014 Wilson Security Subcontract, as required by cl 6.1 of the Transfield Contract, was given by the Commonwealth on 26 July 2013 and 28 March 2014, respectively.

335 Representatives of Transfield and Wilson Security meet daily, and Wilson Security provides Transfield with reports concerning, among other things, conditions at the Nauru RPC and the persons resident there on a daily, weekly and monthly basis. Transfield and Wilson Security attend regular meetings with, and provide reports to, the Department of Immigration and Border Protection of the Commonwealth and Nauru.

336 Wilson Security reports any security incident that occurs at the Nauru RPC to the Department of Immigration and Border Protection of the Commonwealth and to Nauru.

337 The Commonwealth also has contracts with other Service Providers for the provision of services to Transferees including Transferees who reside at the Nauru RPC[281]. These Service Providers do not have contracts with, and are not remunerated for their services by, Nauru.

(6) Changes in arrangements including future arrangements

338 The facts set out in Parts (1)-(5) above were directed to the arrangements in place when the Plaintiff resided at the Nauru RPC. Most of the formal arrangements – the legislation, the regulations and the contractual arrangements – have not been relevantly amended or modified. This part of the reasons addresses some of the changes to the arrangements in relation to Transferees on Nauru that occurred in February and March 2015 and announcements made in October 2015.

339 Since 25 February 2015 at RPC3, and since 21 March 2015 at RPC2, the Operational Managers of the Nauru RPC have exercised their discretion under s 18C of the RPC Act and r 3.1.3 of the RPC Rules to implement, as a matter of policy and practice, but not at the date of this Special Case reduced to writing in a document issued by the Operational Managers, what they refer to as "open centre arrangements".

340 Pursuant to those arrangements (which were able to be amended or terminated at any time without any obligation to give reasons), Transferees

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281 These include Save the Children Australia, International Health and Medical Services Pty Ltd, and a law firm to assist Transferees in making protection claims on Nauru.

residing at the Nauru RPC could be granted permission to leave the Nauru RPC each Monday, Wednesday, Friday, Saturday and Sunday, unescorted, between 9am and 9pm ("the OCA Days"), subject to stated conditions.

341 A Transferee was eligible to participate in the open centre arrangements if they completed an orientation programme, received a medical clearance, were not the subject of a behaviour management plan (because, for example, they had breached the RPC Rules), had signed a code of conduct and had received a health and security clearance certificate.

342 If a Transferee satisfied these criteria, the Operational Manager of the site of the Nauru RPC in which the Transferee was resident could approve the Transferee to participate in the open centre arrangements. Once approved, the Transferee was permitted to leave the Nauru RPC through a designated exit point each OCA Day between 9am and 9pm, unless the permission was revoked. All Transferees so approved were required to return to the Nauru RPC no later than 9pm on each OCA Day.

343 From the start of the open centre arrangements in February 2015 until 24 August 2015, an average of 69 Transferees residing in RPC3 (and 85 Transferees residing in RPC2) participated in those arrangements each day (although the number of Transferees who were eligible to participate was greater). There was no cap on the number of approved Transferees who could participate in the arrangements each OCA Day. During each OCA Day, approved Transferees could come and go as they wished (including by returning to the Nauru RPC for meals if they chose to do so). A shuttle bus service facilitated the movement around Nauru of Transferees who chose to leave the Nauru RPC under the open centre arrangements.

344 In early October 2015, it was decided that the open centre arrangements would be "expanded" to "allow for freedom of movement of asylum seekers 24 hours per day, seven days per week". On 2 October 2015, the following notice was published in the Nauruan Government Gazette by the Acting Nauruan Justice Minister:

> "REGIONAL PROCESSING – OPEN CENTRE
>
> It is notified for general information that from Monday 05th October 2015, Open Centre arrangements of the [Nauru RPC] will be expanded to allow for freedom of movement of asylum seekers 24 hours per day, seven days per week.
>
> It is the intent of the Government of Nauru that these arrangements are enshrined in legislation at the next sitting of Parliament.
>
> The Operational Managers … hereby approve all asylum seekers residing therein to be eligible to participate in Open Centre arrangements."

345 On 4 October 2015, the Immigration (Amendment) Regulations No 3 2015 (Nauru), which repealed reg 9(6)(b) and (c) of the Immigration Regulations 2014 (Nauru), were made under s 33 of the *Immigration Act* 2014 (Nauru). The repeal of those regulations removed two conditions from a RPC Visa, namely, the need for a health and security clearance certificate to be granted before a Transferee could leave the Nauru RPC and the further condition that once a Transferee obtained such a certificate, they were required to remain at the Nauru RPC. It is to be noted that reg 9(6)(a), which imposes the condition that a holder of a RPC Visa reside at the Nauru RPC, was not repealed.

346 As the summary of these developments makes plain, most of the formal arrangements addressed earlier – the legislation, the regulations and the contractual arrangements – have not been relevantly amended or modified.

Analysis

347 This section of the reasons will consider (1) the Plaintiff's standing to challenge whether the Commonwealth was authorised in the *past* to engage in the conduct which the Plaintiff contends constituted detention of her by the Commonwealth on Nauru (Question 1 of the Special Case), (2) whether the Commonwealth in fact detained the Plaintiff on Nauru, (3) whether the Commonwealth was authorised to detain the Plaintiff on Nauru (Questions 2 and 4 of the Special Case) and, (4) if so, whether that authorisation was beyond power (Question 5 of the Special Case). It will be explained that Question 3, concerning lawfulness of conduct under, and the validity of, Nauruan law, does not need to be addressed[282].

(1) Standing – Question 1

348 The Commonwealth contended[283] that the Plaintiff lacked standing to challenge whether the Commonwealth was authorised to engage in the acts or conduct in the past which the Plaintiff contends constituted detention of her by the Commonwealth on Nauru. The Commonwealth's contention should be rejected.

349 The Plaintiff has standing to challenge the Commonwealth's past conduct. The Plaintiff seeks a declaration that the acts or conduct of the Minister or the Commonwealth were or would be unlawful because they were or are neither authorised or supported by a valid law of the Commonwealth nor supported by or

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282 See [413]-[414] below.

283 Throughout these reasons, references to submissions by the Commonwealth include the First Defendant (the Minister for Immigration and Border Protection).

based on a valid exercise of the executive power of the Commonwealth under s 61 of the Constitution.

350 The declaratory relief sought by the Plaintiff is directed to a live legal question[284] – was her detention at the Nauru RPC unlawful under Australian law – which, if answered in her favour, has foreseeable consequences for the Plaintiff. A declaration of that nature may provide the Plaintiff with a possible entitlement to damages against the Commonwealth for false imprisonment because the Commonwealth was not authorised to detain her on Nauru, if that is what it was doing. Question 1 should be answered "yes".

351 That last issue – was the Plaintiff detained on Nauru by the Commonwealth – will be addressed next.

(2) Was the Plaintiff detained on Nauru by the Commonwealth?

352 A premise of many of the questions in the Special Case is that the conduct of the Commonwealth "facilitated, organised, caused, imposed, procured, or resulted in the detention of the plaintiff at RPC3". In argument, the Plaintiff contended that the detention had been "funded, authorised, caused, procured and effectively controlled by, and was at the will of, the Commonwealth". The effect of this, according to the Plaintiff, was that as a matter of substance the Commonwealth detained the Plaintiff. That contention should be accepted. The Commonwealth detained the Plaintiff on Nauru. This part of the reasons will explain why that is so.

353 The Commonwealth, by its acts and conduct, detained the Plaintiff outside Australia, and after the Commonwealth had exercised its undoubted power to expel the Plaintiff (an alien) from Australia or prevent entry by the Plaintiff into Australia. Those acts and conduct were or at the least included:

(1) making the directions on 29 July 2013 and 15 July 2014, pursuant to s 198AD(5) of the Migration Act, with respect to regional processing countries to which particular classes of unauthorised maritime arrivals must be taken and stipulating that Nauru was such a country;

(2) signing the MOU with Nauru, whereby the Commonwealth could decide to transfer unauthorised maritime arrivals to Nauru, would bear all costs incurred under or incidental to the MOU, would put in place and participate in the Administrative Arrangements and the day-to-day practical arrangements for the implementation of the

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284 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582; [1992] HCA 10.

MOU on Nauru and would assist Nauru in removing Transferees not found to be in need of international protection;

(3) removing the Plaintiff from Christmas Island to Nauru pursuant to s 198AD(2) of the Migration Act on 22 January 2014 and, for the purposes of effecting that removal, exercising powers in s 198AD(3) of the Migration Act;

(4) applying to the Nauruan Justice Secretary, without the consent of the Plaintiff, for the grant of a RPC Visa to the Plaintiff and paying to Nauru the fee payable for the grant of the RPC Visa to the Plaintiff, whilst knowing that the RPC Visa specified that the Plaintiff had to reside at the Nauru RPC and that the RPC Act also required the Plaintiff to reside at the Nauru RPC;

(5) on the Plaintiff's arrival on Nauru, first the Service Providers contracted by the Commonwealth (with the assistance of Nauruan officials) escorting the Plaintiff to transport and taking her to the Nauru RPC and, then, the Commonwealth officials providing all the relevant documentation relating to the Plaintiff to Staff Members at the Nauru RPC;

(6) having the power to contract with, contracting with, and paying for, Transfield to provide the Nauru RPC;

(7) providing the "security infrastructure" at the Nauru RPC, which includes "perimeter fencing, lighting towers and an entry gate";

(8) having the power to contract with, contracting with, and paying for, Transfield to ensure that the security of the perimeter of the Nauru RPC is maintained at all times in accordance with policies and procedures as notified from time to time by the Commonwealth[285];

(9) "requiring" Transfield to "exercise use of force" within the Nauru RPC in certain circumstances;

(10) having significant governance responsibilities and control at the Nauru RPC, including participation in the Joint Committee, participation in the Joint Working Group, the power to appoint the Operational Manager responsible for the day-to-day operation of the Nauru RPC, the power to appoint the Programme Coordinator responsible for managing all Australian officers and services

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285 cl 4.18.1 of Pt 3 of Sched 1 to the Transfield Contract read with the definition of "Department" in cl 1 of the Transfield Contract.

contracts in relation to the Nauru RPC and the power to appoint the provider of the Nauru RPC;

(11) having contracted for, and having, the power to terminate (at its own discretion) the contract for the provision of the Nauru RPC and to "Step In" and take over the Nauru RPC; and

(12) having contracted for, and having, the power to control the content of and compliance with the OPC Guidelines.

354 The Plaintiff could not leave Nauru. The Plaintiff was confined to the Nauru RPC. The acts and conduct of the Commonwealth just set out demonstrate that her detention in the Nauru RPC was "facilitated, organised, caused, imposed [or] procured" by the Commonwealth. The Commonwealth asserted the right by its servants (or Transfield as its agent[286]) to apply force to persons detained in the Nauru RPC for the purpose of confining those persons within the bounds of the place identified as the place of detention, the Nauru RPC[287]. To that end, the Commonwealth asserted the right by its servants or agents to assault detainees and physically restrain them.

355 Put another way, there could be no dispute that the Commonwealth took the Plaintiff to a place outside Australia (namely Nauru). But, on Nauru, the Commonwealth did not discharge the Plaintiff from its detention[288]. Despite having removed the Plaintiff to a place outside Australia[289], the Commonwealth intended to and did exercise restraint over the Plaintiff's liberty on Nauru, if needs be by applying force to her. Notwithstanding that there is no explicit mention of detention in the MOU or the Administrative Arrangements, the Commonwealth detained the Plaintiff on Nauru by its acts and conduct.

356 It was agreed in the Special Case that, if Nauru had not sought to impose the restrictions on the Plaintiff, none of the Commonwealth, the Minister or Transfield would have sought, or asserted any right, to impose such restrictions. But that statement does not address the acts or conduct which the Commonwealth *in fact* engaged in. And to focus on the exercise of the sovereign power by *Nauru*, or on the words "in custody" in the phrase "detention in

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286 See [323] above.

287 See [330] above.

288 cf *CPCF v Minister for Immigration and Border Protection* (2015) 89 ALJR 207 at 230 [85]; 316 ALR 1 at 26; [2015] HCA 1.

289 cf *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 364 [118]; [2013] HCA 53.

custody" in *Chu Kheng Lim v Minister for Immigration*[290] (addressed in detail below at [397]-[400]), is to distract attention from the fundamental point to which *Lim* is directed and which this Court is here asked to consider – the power of the Commonwealth Executive to detain an alien and thereby deprive her of her liberty.

357 That raises the next question – was that detention of the Plaintiff by the Commonwealth on Nauru authorised?

(3) Was the Plaintiff's detention by the Commonwealth on Nauru authorised? – Questions 2 and 4

358 Questions 2 and 4 of the Special Case ask, in substance, the same question – whether the detention of the Plaintiff by the Commonwealth on Nauru was authorised by s 61 of the Constitution, s 198AHA of the Migration Act or s 32B of the *Financial Framework (Supplementary Powers) Act* 1997 (Cth), read with reg 16 and items 417.021, 417.027, 417.029 and 417.042 of Sched 1AA to the Financial Framework (Supplementary Powers) Regulations 1997 (Cth) ("the FFSP Act"). Both questions assume the validity of those provisions. Question 2, however, further assumes that certain restrictions imposed on the Plaintiff were lawful under the law of Nauru and that the specification in the RPC Visa that the Plaintiff had to reside at the Nauru RPC, s 18C of the RPC Act and r 3.1.3 of the RPC Rules were lawful and valid under the law of Nauru.

359 Both questions can be answered together. They can be answered together because, as these reasons will explain when dealing with Question 3 of the Special Case[291], whether the Plaintiff's detention on Nauru was lawful and valid under the law of Nauru does not and cannot affect the lawfulness of the *Commonwealth's* detention of the Plaintiff on Nauru.

360 The Commonwealth contended that it was authorised by the Commonwealth Parliament or by s 61 of the Constitution to detain the Plaintiff on Nauru. That contention should be accepted insofar as it concerns s 198AHA of the Migration Act. This part of the reasons will consider the Migration Act, and in particular s 198AHA, the FFSP Act and the executive power of the Commonwealth. The validity of s 198AHA is addressed in Part (4) below.

(a) Migration Act

361 The "framework" for the Plaintiff's transfer to Nauru has been set out above. On 22 January 2014, officers of the Commonwealth took the Plaintiff to

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290 (1992) 176 CLR 1 at 19.

291 See [413]-[414] below.

Nauru pursuant to s 198AD(2) of the Migration Act. The Plaintiff arrived on Nauru on 23 January 2014. For the purposes of effecting that taking of the Plaintiff to Nauru, officers of the Commonwealth exercised powers in s 198AD(3) of the Migration Act, at which time the Plaintiff ceased to be detained pursuant to s 189 of the Migration Act. Any detention of the Plaintiff that occurred while she was being taken to Nauru pursuant to s 198AD(2) of the Migration Act was for the purpose of that taking and that taking alone. The detention of the Plaintiff to that point was lawful[292]. The detention of the Plaintiff to that point was necessary for the purposes of making her removal to Nauru complete[293]. If the acts or conduct of the Commonwealth stopped then, it could not be said that the detention of the Plaintiff by the Commonwealth effected to *that* point was not authorised. However, as seen earlier, the acts or conduct of the Commonwealth were far more extensive and extended to detaining the Plaintiff on Nauru.

362 Section 198AHA provides:

"(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.

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292 cf *CPCF* (2015) 89 ALJR 207; 316 ALR 1.

293 cf *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at 42-43 [23]-[25], 44 [31], 46 [38]; [2014] HCA 22.

(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."

363 Section 198AHA(1) of the Migration Act provides that the section applies "if the Commonwealth enters into an arrangement with a person or body in relation to the regional processing functions of a country". The Commonwealth accepts that it does not refer in terms to entry into an arrangement with a "country". However, the word "person" engages s 2C(1) of the *Acts Interpretation Act* 1901 (Cth), which provides that:

> "In any Act, expressions used to denote persons generally (such as 'person', 'party', 'someone', 'anyone', 'no-one', 'one', 'another' and 'whoever'), include a body politic or corporate as well as an individual."

364 There is no dispute that Nauru is a "body politic". Section 198AHA extends to arrangements the Commonwealth has with a body politic in relation to regional processing functions of a country.

365 What then is the "arrangement" to which s 198AHA(1) applies? The arrangement is the arrangement entered into between the Commonwealth and Nauru as evidenced by the MOU. Entry into that arrangement by the Executive was authorised as an act within the non-statutory power of the Executive or as an act in execution of the statutory power given in s 198AHA.

366 Did s 198AHA authorise the detention of the Plaintiff by the Commonwealth on Nauru? In its terms, s 198AHA authorises what the Commonwealth did – restrain the Plaintiff's liberty on Nauru[294]. It authorises the

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294 Although s 198AHA was inserted into the Migration Act by the *Migration Amendment (Regional Processing Arrangements) Act* 2015 (Cth), it commenced on 18 August 2012.

Commonwealth to "take, or cause to be taken, any *action* in relation to the arrangement" (in this case the MOU) or the "regional processing functions of the country"[295]. "Action" is defined in s 198AHA(5) to include exercising restraint over the liberty of a person in a regional processing country or another country. Moreover, "regional processing functions" is defined in s 198AHA(5) to include "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". As the Commonwealth submitted, those provisions, in their terms, extend to authorise the detention of the Plaintiff by the Commonwealth on Nauru in the Nauru RPC. The next question in relation to s 198AHA is whether it is beyond power. That question is addressed in Part (4) below.

(b) The FFSP Act

367 The Commonwealth only relied on the FFSP Act if the Court did not accept that the impugned conduct was supported by s 198AHA of the Migration Act. The impugned conduct was supported by s 198AHA but, as will be seen below, that section is invalid. However, it is unnecessary to address the provisions of the FFSP Act because those provisions cannot and do not repair the more fundamental deficiency that will be identified in Part (4) below.

(c) Executive power of the Commonwealth

368 The Commonwealth submitted that the impugned conduct was supported by its executive power. However, no separate question arises about executive power because if s 198AHA is valid, the question of executive power is not reached, and if s 198AHA is not valid, the following analysis demonstrates that the executive power of the Commonwealth cannot fill the gap[296].

369 That last statement requires elaboration. The limits of the executive power in s 61 of the Constitution have not been defined and there are "undoubtedly significant fields of executive action which do not require express statutory authority"[297]. But the executive power in s 61 is not unlimited.

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295 s 198AHA(2)(a) of the Migration Act (emphasis added).

296 *Williams v The Commonwealth [No 2]* (2014) 252 CLR 416 at 454 [24], 457 [36], 467-469 [78]-[83]; [2014] HCA 23.

297 *Williams v The Commonwealth* (2012) 248 CLR 156 at 191 [34]; see also at 184-185 [22], 226-227 [121], 342 [483], 362 [560]; [2012] HCA 23.

370 As seen earlier, the entry into the MOU, an arrangement by the Executive, was authorised as an act within the non-statutory power of the Executive or as an act in execution of the statutory power given in s 198AHA.

371 But the MOU says nothing about detention. It does not and cannot provide *the* basis for the right to detain in s 198AHA of the Migration Act or for the Plaintiff's detention on Nauru otherwise.

372 The executive power of the Commonwealth does not itself provide legal authority for an officer of the Commonwealth to detain a person and commit a trespass[298]. Absent statutory authority, the Executive does not have power to detain[299].

373 Or, to put the matter another way, the Executive "cannot change or add to the law; it can only execute it"[300]. That is what the Commonwealth sought to do by s 198AHA of the Migration Act – to permit the Commonwealth to detain certain aliens, in a foreign state, after those persons have been removed from (or denied entry into) Australian territory. That was seeking to change or add to the law, not execute the MOU. That conclusion is not surprising. It must be recalled that when the Executive wishes to translate arrangements like the MOU into the domestic legal order, the Executive must procure the passage of legislation to implement those arrangements "if it wishes to create individual rights and obligations or change existing rights and obligations under that legal order"[301]. The executive power of the Commonwealth cannot fill the gap[302].

374 The question, then, is whether s 198AHA is beyond power or contrary to Ch III of the Constitution.

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298 cf *CPCF* (2015) 89 ALJR 207 at 239-240 [147]-[150], 255-258 [258]-[276]; 316 ALR 1 at 39-40, 60-64.

299 *Lim* (1992) 176 CLR 1 at 19, 63; *CPCF* (2015) 89 ALJR 207 at 239-240 [147]-[150], 255-258 [258]-[276]; 316 ALR 1 at 39-40, 60-64.

300 *R v Kidman* (1915) 20 CLR 425 at 441; [1915] HCA 58.

301 *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 481; [1996] HCA 56.

302 *Williams v The Commonwealth [No 2]* (2014) 252 CLR 416 at 454 [24], 457 [36], 467-469 [78]-[84].

(4) Is s 198AHA beyond power? – Question 5

375 The Commonwealth relied on a number of heads of power to support s 198AHA – the aliens power, the immigration power, the external affairs power and the Pacific Islands power. Each will be considered in turn.

(a) Aliens power – s 51(xix) of the Constitution

(i) Introduction

376 Sections 198AB and 198AD of the Migration Act are laws with respect to aliens within s 51(xix) of the Constitution[303]. The scheme established by ss 198AB and 198AD regulates the entry of aliens into, or provides for their removal from, Australia. That is consistent with the object of the Migration Act[304]. But more importantly, a law regulating entry of aliens into or providing for removal of aliens from Australia is a law with respect to aliens.

377 The relevant operation of the law now in issue (s 198AHA) goes *beyond* regulation of entry of aliens and goes *beyond* providing for removal of aliens. It goes beyond those subjects by providing (in the operation now relied upon by the Commonwealth) for the Commonwealth to detain certain aliens, in a foreign state, after those persons have been removed from (or denied entry into) Australian territory. *That* operation of s 198AHA presents a fundamental question about the power of the Parliament to provide for detention by the Commonwealth outside Australia. That is, it presents a fundamental question about the powers (or more specifically, the limit of the powers) of the Commonwealth beyond its borders. Those powers are not unlimited.

(ii) Principles

378 The legislative powers conferred by s 51 are bounded by Ch III of the Constitution. That is, the grants of legislative power contained in s 51 (which are expressly "subject to this Constitution") do not permit the conferral upon any organ of the Executive Government of any part of the judicial power of the Commonwealth[305].

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303 *Plaintiff S156/2013* (2014) 254 CLR 28 at 43 [25], 46 [38].

304 s 4 of the Migration Act; see also *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 230 [22]-[23]; [2014] HCA 34.

305 *Lim* (1992) 176 CLR 1 at 26-27. See also *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 606-607; [1991] HCA 32.

379 The principle identified in *Lim*[306] gives effect to the fundamental proposition that the Parliament's legislative power to provide for the Executive to be able to effect compulsory detention, and associated trespass to the person, without judicial order is limited. That principle is no less applicable here, where detention by the Commonwealth was effected by the Commonwealth's acts and conduct[307].

380 Laws will be valid if "the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered"[308].

381 Therefore, the validity of the provisions upheld in *Lim* depended upon identifying an *exceptional* reason permitting a law authorising executive detention. The exceptions recognised[309] (and long since recognised) are the power to detain for expulsion or deportation and the power to exclude admission or to deport. That is, the legislative power conferred by s 51(xix) extends to conferring upon the Executive authority to detain an alien in custody to the extent necessary to make that expulsion or deportation effective[310]. That authority, when conferred in the context and for the purposes of executive powers to receive, investigate and determine an application by an alien for an entry permit to Australia and (after determination) to admit or deport that alien, is an incident of those executive powers and to that limited extent does not impermissibly restrict or infringe the judicial power of the Commonwealth vested in Ch III courts[311]. That authority is reflected in the object of the Migration Act – "to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens"[312] – and the statement that, to advance *that* object, the Migration Act is to provide "for the taking of unauthorised maritime arrivals from Australia to a regional processing country"[313]. That statement is not expressed to be an

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306 (1992) 176 CLR 1.

307 See Part (2) of the Analysis section above.

308 *Lim* (1992) 176 CLR 1 at 33.

309 *Lim* (1992) 176 CLR 1 at 32.

310 *Lim* (1992) 176 CLR 1 at 30-31.

311 *Lim* (1992) 176 CLR 1 at 10, 32.

312 s 4(1) of the Migration Act.

313 s 4(5) of the Migration Act. See also s 198AA(c) of the Migration Act.

independent object. It is explicitly stated in s 4(5) of the Migration Act as being to *advance* the only object – "to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens".

382 The list of permissible purposes for executive detention under the aliens power may not be closed[314]. And this Court has said that the authority to detain an alien in custody extends to a power to detain outside Australia's borders for the purposes of repelling entry and for the purposes of making removal from Australia complete[315]. But whether that is the outer limit of the aliens power is not the question here. The question is whether the detention of the Plaintiff by the Commonwealth after her removal to Nauru by the Commonwealth was complete is validly authorised.

383 Section 198AHA is part of a statutory scheme[316]. Is s 198AHA a law with respect to aliens? The people s 198AHA deals with may be aliens. But observing that they may be aliens ignores the fundamental question of the power of the Commonwealth Parliament to pass a law requiring the detention of an alien outside Australia and after the Commonwealth has exercised its undoubted power to expel that alien from Australia, or prevent entry by that alien into Australia.

384 Observing that the law relates to persons who are aliens may establish that it prima facie falls within the scope of the legislative power with respect to aliens conferred by s 51(xix)[317]. But it does not say anything about whether the law nevertheless is beyond power because the law goes beyond the limits identified in *Lim*[318]. Saying that the aliens power is "plenary" obscures the need to consider those limits.

385 As was said in *Lim*, "any officer of the Commonwealth Executive who purports to *authorize or enforce the detention in custody* of … an alien without

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314 *Lim* (1992) 176 CLR 1 at 55; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 648 [258]; [2004] HCA 37; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 12 [16]-[17], 26-27 [62], 85 [264]; [2004] HCA 49; *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614 at 648 [108]; [2006] HCA 40.

315 *CPCF* (2015) 89 ALJR 207 at 240 [149]-[150]; 316 ALR 1 at 39-40.

316 See *Plaintiff M76/2013* (2013) 251 CLR 322 at 363-364 [115]-[119].

317 *Lim* (1992) 176 CLR 1 at 25-26.

318 (1992) 176 CLR 1.

judicial mandate will be acting lawfully only to the extent that his or her conduct is justified by valid statutory provision" (emphasis added)[319].

386 The "constitutional" holding in *Lim* was described in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* in the following terms[320]:

> "[T]hat laws authorising or requiring the detention in custody by the executive of non-citizens, being laws with respect to aliens within s 51(xix) of the Constitution, will not contravene Ch III of the Constitution, and will therefore be valid, *only* if: 'the detention which they require and authorise is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered.'" (emphasis added, footnote omitted)

387 It is the application of those principles to s 198AHA that is considered next.

(iii) Application of principles

388 Section 198AHA is invalid because it "contravene[s] Ch III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates"[321]. It does that because it restricts liberty otherwise than by judicial order and beyond the limits of those few and confined exceptional cases where the Executive, without judicial process, can detain a person.

389 Section 198AHA does not deal with the power to exclude admission or to deport. Exclusion and deportation are complete and finally effective on landing on Nauru. Section 198AHA is relied upon as authorising the Executive to detain persons on Nauru. But there is a fundamental problem. The aliens power does not authorise a law which permits or requires detention in those circumstances. It does not authorise that kind of law because the involuntary detention of persons at the behest of the Executive is permitted in only exceptional circumstances. Detention under s 198AHA does not fall within either of the

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319 (1992) 176 CLR 1 at 19.

320 (2013) 251 CLR 322 at 369 [138], citing *Lim* (1992) 176 CLR 1 at 33. See also *Plaintiff S4/2014* (2014) 253 CLR 219 at 231-232 [25]-[29]; *CPCF* (2015) 89 ALJR 207 at 272 [374]; 316 ALR 1 at 83.

321 *Lim* (1992) 176 CLR 1 at 33; *Plaintiff M76/2013* (2013) 251 CLR 322 at 369 [138].

recognised exceptions in *Lim*. And a new exception should not be created for this kind of detention. This section of the reasons will explain these conclusions.

390 First, a preliminary point should be made. The fact that the place of detention is outside Australia does not mean that legislative power is relevantly unconstrained. The Parliament's legislative powers are not larger outside the territorial borders than they are within the borders. Put another way, what the Commonwealth contends amounts, in effect, to an argument that s 51(xix) permits Parliament to enact a law allowing the Executive Government to do *anything* to the person or property of any person who is an alien so long as the conduct occurs outside the territorial borders of Australia. Why is the "aliens" power to be read as circumscribed by Ch III in the case of laws dealing with conduct in Australia but not affected by Ch III so long as the conduct occurs outside Australia?

391 The detention of the Plaintiff by the Commonwealth on Nauru, which the Commonwealth asserts s 198AHA both requires and authorises, is not limited to what was reasonably capable of being seen as necessary for the purposes of removal of the Plaintiff from Australia (or the prevention of the Plaintiff's entry into Australia). Removal from Australia was complete when the Plaintiff arrived on Nauru. Moreover, the detention by the Commonwealth on Nauru was not necessary to enable an application for an entry permit to Australia to be made and considered. The Plaintiff is unable to make such an application[322]. Further, the Plaintiff's detention by the Commonwealth on Nauru could not have been for the purpose of completing Australia's obligation to consider her application for refugee status, because that obligation rested on Nauru.

392 It is to be noted that the detention of the Plaintiff (either at all or in its duration) was not reasonably necessary to effect a purpose identified in the Migration Act which was capable of fulfilment. As seen earlier, the object of the Migration Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens[323]. The Plaintiff's detention was not reasonably necessary for that stated object or any of the other stated purposes which are set out in s 4 of the Migration Act to "advance" that stated object. But the determinative point is more than one of statutory construction. It is a point about legislative power.

393 Put simply, the aliens power does not provide the power to detain *after* removal is completed.

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322 s 46A of the Migration Act.

323 s 4(1) of the Migration Act.

394 The Commonwealth submitted that detention under s 198AHA is limited to detention which can be related to the regional processing functions of another country, and that s 198AHA simply "completes" the process of removal required by s 198AD. But those submissions are no answer. First, s 198AHA does not remove aliens from Australia to Nauru. That is addressed in ss 198AB and 198AD. Second, s 198AHA does not "facilitate" or "complete" that removal. The removal is complete when the alien is taken to Nauru, consistent with the stated object of the Migration Act[324]. Third, the Commonwealth's submission does not engage with, and treats as irrelevant, the fact that the Commonwealth detained the Plaintiff. It is the detention by the Commonwealth of the Plaintiff outside Australia and after the Commonwealth exercised its undoubted power to expel her from Australia, or prevent entry by her into Australia, that cannot be lawfully justified.

395 In short, the effect of the Commonwealth's submission is that it can do outside Australia what it cannot do inside Australia – detain an alien in custody for a purpose other than one of the two relevant purposes stated in *Lim*[325] (leaving aside, for the moment, the prospect of the creation of a new category of permissible detention). It is no answer for the Commonwealth to say that it can do so because it does this outside Australia. Why? Because the subject matter of the power is an alien, which prima facie engages the aliens power. And the aliens power is subject to the limitation on power identified in *Lim*. It is that limitation on power that the Commonwealth cannot address.

396 The further contention that the Commonwealth is authorised by s 198AHA to detain the Plaintiff in custody on Nauru if that detention is a condition of the willingness and ability of Nauru to receive the Plaintiff for processing, and that the authority to cause detention in custody conferred by s 198AHA(2) is therefore incidental to ss 198AB and 198AD of the Migration Act (which validly, under the aliens power, regulate the entry of aliens into or the removal of aliens from Australia), should be rejected. The Executive Government of Australia cannot, by entering into an agreement with a foreign state, agree the Parliament of Australia into power. The removal of an alien to a foreign country cannot sensibly be said to continue once that alien has been removed to that foreign country. Upon the Plaintiff's arrival on Nauru, the Commonwealth's process of removal was complete and the purpose for which removal was undertaken had been carried out. Removal was not ongoing.

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324 s 4(5) of the Migration Act. See also s 198AA(c) of the Migration Act.

325 As explained in *Plaintiff S4/2014* (2014) 253 CLR 219 at 231 [26], there is a third permissible purpose – determining whether to permit a valid application for a visa which was peculiar to the statutory framework then in issue.

Australia can provide assistance to Nauru. But Australia cannot detain the Plaintiff on Nauru.

397 It was suggested in argument, in effect, that whether the *Commonwealth* was found to detain the Plaintiff was irrelevant and, further, that because the Commonwealth could validly provide foreign aid to Nauru to detain the Plaintiff, whether the *Commonwealth* detained the Plaintiff was a matter of form over substance – the Plaintiff would have been detained anyway, by Nauru alone, with the benefit of funding provided by Australia. Neither point is right. First, and fundamentally, questions of constitutional validity are not to be determined by reference to hypothetical assumptions about what steps might have been taken to achieve some desired objective. Especially is that so when the steps that are assumed are steps that would have to be taken by a foreign state.

398 Second, the error is revealed by consideration of the "Step In" provision in the Transfield Contract. Under that provision the Commonwealth may at any time and from time to time take over the contractor's functions at the Nauru RPC. That is, the Commonwealth may by its servants (leave aside the contractor as its agent) itself apply force to persons detained in the Nauru RPC for the purpose of confining those persons within the bounds of the place identified as the place of detention, the Nauru RPC (recalling that we are dealing here with the past conduct). To that end, the Commonwealth may by its servants assault detainees and physically restrain them. That it is the *Commonwealth* that may do this is no mere matter of form. The argument which describes the relationships established as mere matters of form, to be ignored by observing that the Commonwealth could validly provide funding to Nauru for Nauru alone to effect the detention, stands principle on its head. It does so because it treats the Commonwealth's detention of the Plaintiff as irrelevant.

399 The fact that if Nauru had not sought to impose restrictions on the Plaintiff, none of the Commonwealth, the Minister, Transfield or its subcontractors would have sought to impose such restrictions on Nauru or asserted any right to impose such restrictions may be put to one side. The fact that a foreign *state* requests the Commonwealth to detain the Plaintiff in that foreign *state* does not and cannot authorise the Commonwealth to detain the Plaintiff in that foreign state.

400 All of this makes clear that if, apart from Ch III considerations, s 198AHA would be a law with respect to aliens, it falls foul of the rule that the Commonwealth Parliament cannot give to the Executive a power to detain an alien for purposes outside the *Lim* exceptions (of which this is not one).

401 And the same reasons make it clear that there is no basis (as a matter of fundamental principle, necessity or otherwise) to craft any new exception to the *Lim* rule just stated. As a matter of fundamental principle, the detention function, by its nature and because of historical considerations, is essentially and

exclusively judicial in character[326]. Section 198AHA vests part of that function in the Executive. That is not permitted. As a matter of necessity, the Plaintiff's removal from Australia by the Commonwealth was complete when she arrived on Nauru. The Commonwealth had no need to and had no right to detain the Plaintiff in a foreign state. No other basis has been identified that would justify, let alone authorise, the crafting of a new exception which would allow the detention of an alien by the Commonwealth, in a foreign state, after the Commonwealth has exercised its undoubted power to expel that alien from Australia or prevent entry by that alien into Australia. The matter may be tested this way – what would be the content of any exception? What would be the basis for any exception? No answers have been provided to those questions.

402 And, in any event, there may be much to be said for the view[327] that the aliens power is not engaged at all. Section 198AHA imposes special disabilities on aliens which are unconnected with their entitlement to remain in Australia (they have been excluded and their removal is complete) and which are in no way connected with regulation of past or future entry into Australia, or with facilitating or requiring their removal or departure from Australia. However, it is not necessary to decide whether this is so because it is sufficient for present purposes that s 51(xix) is confined by Ch III.

(b) Immigration power – s 51(xxvii) of the Constitution

403 For the same reasons that s 198AHA is not a valid law under the aliens power, it is not supported by the immigration power in s 51(xxvii) of the Constitution. The removal of the Plaintiff to Nauru was complete on her arrival on Nauru. The Commonwealth had exercised its undoubted power to expel her from Australia or prevent her entry into Australia. That power was spent at the time of the Plaintiff's arrival on Nauru.

(c) External affairs power – s 51(xxix) of the Constitution

404 Section 51(xxix) of the Constitution authorises the Commonwealth Parliament to legislate with respect to external affairs. One aspect of that power is the power to enact laws of domestic application that implement international agreements to which Australia is a party.

405 Section 51(xxix) can be relied upon to support legislation which implements an international agreement, regardless of the subject matter of the

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326 *Lim* (1992) 176 CLR 1 at 27.

327 *Lim* (1992) 176 CLR 1 at 57.

agreement, but subject to certain limits[328]. The relevant limits on the external affairs power are that it cannot be used indirectly to amend the Constitution and, importantly, like the other powers in s 51, it is subject to the limitations and prohibitions in the Constitution[329].

406 What then is the scope of the obligation in the MOU? That is a question of fact which the Court must decide[330]. The objectives and scope of the MOU have been addressed. The stated objectives include regional processing and the establishment of RPCs. As seen earlier, neither the MOU nor the Administrative Arrangements refer to detention.

407 That raises the next question – can s 198AHA be described as implementing the MOU? Section 198AHA applies if an arrangement has been entered into by the Commonwealth in relation to the regional processing functions of another country. The MOU between the Commonwealth and Nauru is necessarily a matter which concerns Australia's external relations[331]. Section 198AHA is directed at implementing arrangements such as the MOU. Section 198AHA is therefore a law with respect to external relations. It deals with a subject directly within the subject matter of s 51(xxix).

408 However, to the extent that s 198AHA authorises the Commonwealth to restrain the liberty of an alien in a regional processing country where removal of that alien from Australia is complete, that authorisation is not valid. As has been explained, the power in s 51(xxix) is subject to the limitations and prohibitions in the Constitution[332]. It is bounded by Ch III. That includes the *Lim* limitation, which has already been addressed and which has been contravened.

409 In particular, the external affairs power does not authorise the Commonwealth to make a law permitting the Executive to make an agreement with a foreign state that would permit or require the *Commonwealth* Executive to

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328 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 640-641, 681-682, 687; [1936] HCA 52; *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 127, 170, 218-219, 258; [1983] HCA 21; *Industrial Relations Act Case* (1996) 187 CLR 416 at 478, 483-485.

329 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 642.

330 *Queensland v The Commonwealth* (1989) 167 CLR 232 at 239; [1989] HCA 36.

331 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 201-202, 220-221, 237, 257-258; [1982] HCA 27.

332 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 642.

detain persons other than for purposes constituting some exception to Ch III requirements about judicial power. The legislative power with respect to external affairs does not extend to authorising the Executive to detain persons contrary to Ch III. That the detention may be associated with, even facilitate, some action by a foreign government (in this case determination of refugee status) does not deny the conclusion that the law purports to authorise the Executive to detain persons contrary to Ch III.

410 Unwarrantable interference with an individual's liberty is not authorised and is to be prevented[333]. Here, the interference with an individual's liberty *by the Commonwealth* was no longer warranted once the person's removal to Nauru was complete. To the extent that the detention by *the Commonwealth* of the Plaintiff on Nauru was no longer warranted, it may be, at least in Australian law, a tortious act[334]. The Commonwealth does not and cannot rely on the defence power in s 51(vi) of the Constitution, which, in times of war or conflict, may warrant the detention of a person[335]. Section 198AHA was not (and could not be) said to be a law supported as a law with respect to the naval and military defence of the Commonwealth and the several States[336].

411 For those reasons, although the external affairs power in s 51(xxix) can be relied upon to support s 198AHA to implement the MOU, s 198AHA is invalid because it impermissibly restricts or infringes Ch III.

(d) Relations with the Islands of the Pacific – s 51(xxx) of the Constitution

412 For the same reasons that s 198AHA is not a valid law under the external affairs power, it is not supported by the Pacific Islands power in s 51(xxx) of the Constitution. It is not in dispute that, in respect of the acts and conduct of the Commonwealth at issue in the Special Case, the Commonwealth's power under s 51(xxx) does not extend further than the external affairs power. As with the external affairs power, s 51(xxx) is bounded by Ch III of the Constitution. Section 198AHA is invalid because it impermissibly restricts or infringes Ch III.

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333 cf *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614 at 618 [6].

334 cf *Barton v The Commonwealth* (1974) 131 CLR 477 at 483; [1974] HCA 20.

335 *Ferrando v Pearce* (1918) 25 CLR 241 at 253, 261, 270, 274; [1918] HCA 47; *Jerger v Pearce* (1920) 28 CLR 588 at 592, 594; [1920] HCA 42; *Lim* (1992) 176 CLR 1 at 57.

336 s 51(vi) of the Constitution.

(5) Lawfulness of conduct under, and validity of, Nauruan laws – Question 3

413 We are concerned with the lawfulness under Australian law of the conduct of the Commonwealth and its officers in detaining the Plaintiff on Nauru. That is a question about the validity of the Commonwealth legislation on which the Commonwealth relies as authorising that conduct. We are not concerned with the lawfulness of that conduct under Nauruan law. As already stated, the Executive cannot, by entering into an agreement with a foreign state, agree the Parliament of Australia into power. Likewise, the Executive cannot obtain power from the Parliament of a foreign state.

414 The Commonwealth accepted that no question of its authority to detain the Plaintiff on Nauru turned on whether the detention of the Plaintiff on Nauru was lawful under the law of Nauru. That is unsurprising. Australia is bound to respect the independence of another sovereign state, and the courts of one country will not, except in limited and presently irrelevant circumstances, sit in judgment on the acts of the government of another state done in the territory of that other state[337]. The question of the lawfulness of the detention by the Commonwealth of the Plaintiff does not require this Court to "sit in judgment" on the conduct of or the laws of Nauru. The lawfulness of that conduct is judged according to Australian law and, for the reasons stated, it is not validly authorised under Australian law.

Future arrangements – Questions 6-12

415 The relevant facts, as far as they are able to be ascertained, were addressed in Part (6) of the Facts section of these reasons.

416 There is insufficient material before this Court to identify with precision what arrangements are currently in place and, no less importantly, what arrangements would be in place if the Plaintiff was returned to Nauru. This Court does not answer hypothetical questions or provide advisory opinions[338]. It

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337 *Underhill v Hernandez* 168 US 250 at 252 (1897), approved in *Potter v Broken Hill Proprietary Co Ltd* (1906) 3 CLR 479 at 495, 506-507, 511; [1906] HCA 88; *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 40-41; [1988] HCA 25; *Moti v The Queen* (2011) 245 CLR 456 at 475 [51]; [2011] HCA 50.

338 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265; [1921] HCA 20; *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 303; [1991] HCA 53; *Croome v Tasmania* (1997) 191 CLR 119 at 124-126, 136; [1997] HCA 5; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 262 [37]; [1998] HCA 49; *Kuczborski v Queensland* (2014) 254 CLR 51 at 87-88 [98]-[99]; [2014] HCA 46.

is therefore not appropriate for this Court to answer Questions 6-12 of the Special Case, which are directed at arrangements which *might* be in place if the Plaintiff were to be returned to Nauru.

Relief and costs – Questions 13 and 14

417 The question of the form and content of the relief should be remitted to a single judge of the Federal Court. The Defendants should pay the costs of the Special Case and of the proceedings generally.

Conclusion

418 For those reasons, I would answer the questions of law which the parties agreed in stating in the form of a Special Case for the opinion of the Full Court under r 27.08.1 of the High Court Rules 2004 (Cth) as follows:

Question 1:	Yes.
Question 2:	(a) No; (b) Yes; (c) Unnecessary to answer.
Question 3:	Unnecessary to answer.
Question 4:	(a) No; (b) Yes; (c) Unnecessary to answer.
Question 5:	Yes. Section 198AHA is beyond power and therefore invalid.
Questions 6-12:	Not appropriate to answer.
Question 13:	Remit to a single judge of the Federal Court.
Question 14:	The Defendants should pay the costs of the Special Case and of the proceedings generally.

SPECIAL CASE QUESTIONS[1]

The parties agree in stating the following questions of law for the opinion of the Full Court:

Standing

(1) Does the plaintiff have standing to challenge whether the Commonwealth or the Minister was authorised, in the past, to engage in one or more of the following acts or conduct:

(i) make the direction referred to at paragraph 6 [of the special case];

(ii) sign the Memorandum of Understanding;

(iii) sign the Administrative Arrangements;

(iv) give approval for Transfield to enter into the 2013 Wilson Security Subcontract and the 2014 Wilson Security Subcontract;

(v) contract for the construction and maintenance of, and fund, security infrastructure at the Nauru RPC, including a perimeter fence, as required by the Memorandum of Understanding;

(vi) fund all costs of the Nauru RPC, as required by the Memorandum of Understanding;

(vii) enter into the Transfield Contract;

(viii) exercise rights and discharge obligations under the Transfield Contract;

(ix) establish and participate in the bilateral committees referred to at paragraphs 31−34 [of the special case];

(x) discharge the role of Programme Coordinator under the Administrative Arrangements;

(xi) attending meetings with, and receive reports from, Transfield and Wilson Security;

(xii) occupy an office on site at the Nauru RPC and carry out the functions referred to at paragraph 37 [of the special case];

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1 See [21] and [198] above.

(xiii) take the plaintiff to Nauru pursuant to s 198AD(2) of the Migration Act on 22 January 2014;

(xiv) for the purposes of effecting that taking, exercise powers contained in s 198AD(3) of the Migration Act;

(xv) apply to the Secretary of the Department of Justice and Border Control of Nauru, without the consent of the plaintiff, for the grant of an RPC visa to the plaintiff;

(xvi) pay to Nauru the fees payable for the grant of RPC visas to the plaintiff;

in so far as those acts or that conduct facilitated, organised, caused, imposed, procured, or resulted in the detention of the plaintiff at RPC3?

Authority for the Commonwealth's past conduct

(2) Assuming that:

(A) the restrictions imposed on the plaintiff set out at paragraphs 66–72 of the special case were lawful under the law of Nauru; and

(B) the specification in the RPC visas referred to at paragraphs 53–55 [of the special case] that the plaintiff must reside at the Nauru RPC, s 18C of the RPC Act and rule 3.1.3 of the Centre Rules were lawful and valid under the law of Nauru,

to the extent that the answer to question (1) is "yes" in respect of any acts or conduct, was the Commonwealth or the Minister authorised, in the past, to engage in those acts or that conduct by:

(a) s 61 of the Constitution?

(b) s 198AHA of the Migration Act (assuming it is valid)?

(c) s 32B of the *Financial Framework (Supplementary Powers) Act 1997* (Cth), read with reg 16 and items 417.021, 417.027, 417.029 and 417.042 of sched 1AA to the *Financial Framework (Supplementary Powers) Regulations 1997* (Cth) (together, **the Financial Framework Provisions**) (assuming each is valid)?

(3) If the answer to question (2)(a), (b) or (c) is "yes":

(a) were the restrictions imposed on the plaintiff set out at paragraphs 66–72 [of the special case] contrary to Art 5(1) of the *Constitution of Nauru*?

(b) was the specification in the RPC visas referred to at paragraphs 53–55 [of the special case] that the plaintiff must reside at the Nauru RPC, s 18C of the RPC Act and/or rule 3.1.3 of the Centre Rules invalid by reason of s 5(1) of the *Constitution of Nauru*?

(4) To the extent that the answer to question (1) is "yes" in respect of any acts or conduct, was the Commonwealth or the Minister authorised, in the past, to engage in those acts or that conduct by:

(a) s 61 of the Constitution?

(b) s 198AHA of the Migration Act (assuming it is valid)?

(c) the Financial Framework Provisions (assuming each is valid)?

(5) If the answer to question (4)(b) or (c) is "yes", is the statutory provision referred to therein invalid because it is not supported by any head of Commonwealth legislative power or is contrary to Ch III of the Constitution?

Authority for the Commonwealth's future conduct

(6) Assuming that, if the plaintiff were returned to Nauru:

(A) the restrictions imposed on the plaintiff set out at paragraphs 66–72 and 88–89 [of the special case] would be lawful under the law of Nauru; and

(B) the specification in any RPC visa referred to at paragraph 87 [of the special case] that the plaintiff must reside at the Nauru RPC, s 18C of the RPC Act and rule 3.1.3 of the Centre Rules would be lawful and valid under the law of Nauru,

would the Commonwealth or the Minister be authorised to engage in one or more of the following acts or conduct:

(i) give effect to or rely upon the direction referred to at paragraph 6 [of the special case];

(ii) continue to perform the Memorandum of Understanding;

(iii) continue to perform the Administrative Arrangements;

(iv) continue to perform any contract for the construction and maintenance of, and continue to fund, security infrastructure at the Nauru RPC, including a perimeter fence, as required by the Memorandum of Understanding;

(v) continue to fund all costs of the Nauru RPC, as required by the Memorandum of Understanding;

(vi) continue to exercise rights and discharge obligations under the Transfield Contract;

(vii) continue to participate in the bilateral committees referred to at paragraphs 31−34 [of the special case];

(viii) continue to discharge the role of Programme Coordinator under the Administrative Arrangements;

(ix) continue to attend meetings with, and receive reports from, Transfield and Wilson Security;

(x) continue to occupy an office on site at the Nauru RPC and carry out the functions referred to at paragraph 37 [of the special case];

(xi) apply, if required to do so, to the Secretary of the Department of Justice and Border Control of Nauru, without the consent of the plaintiff, for the grant of an RPC visa to the plaintiff; and

(xii) pay, if required to do so, to Nauru the fees payable for the grant of RPC visas to the plaintiff,

in so far as those acts or that conduct facilitated, organised, caused, imposed, procured, or resulted in the detention of the plaintiff at RPC3, by:

(a) s 61 of the Constitution?

(b) s 198AHA of the Migration Act (assuming it is valid)?

(c) the Financial Framework Provisions (assuming each is valid)?

(7) If the answer to question (6)(a), (b) or (c) is "yes", if the plaintiff were returned to Nauru:

(a) would the restrictions imposed on the plaintiff set out at paragraphs 66−72 and 88−89 [of the special case] be contrary to Art 5(1) of the *Constitution of Nauru*?

(b) would the specification in any RPC visa referred to at paragraph 87 [of the special case] that the plaintiff must reside at the Nauru RPC, s 18C of the RPC Act and/or rule 3.1.3 of the Centre Rules be invalid by reason of Art 5(1) of the *Constitution of Nauru*?

(8) If the plaintiff were returned to Nauru, would the Commonwealth or the Minister be authorised to engage in one or more of the acts or conduct specified in question (6) by:

(a) s 61 of the Constitution?

(b) s 198AHA of the Migration Act (assuming it is valid)?

(c) the Financial Framework Provisions (assuming each is valid)?

(9) If the answer to question (8)(b) or (c) is "yes", is the statutory provision referred to therein invalid because it is not supported by any head of Commonwealth legislative power or is contrary to Ch III of the Constitution?

Section 198AD(2) of the Migration Act

(10) Assuming that, if the plaintiff were returned to Nauru:

(A) the restrictions imposed on the plaintiff set out at paragraphs 66−72 and 88−89 [of the special case] would be lawful under the law of Nauru; and

(B) the specification in any RPC visa referred to at paragraph 87 [of the special case] that the plaintiff must reside at the Nauru RPC, s 18C of the RPC Act and rule 3.1.3 of the Centre Rules would be lawful and valid under the law of Nauru,

does s 198AD(2) of the Migration Act authorise and require that the plaintiff be taken as soon as reasonably practicable to Nauru?

(11) If the answer to question (10) is "yes", if the plaintiff were returned to Nauru:

(a) would the restrictions imposed on the plaintiff set out at paragraphs 66–72 and 88–89 [of the special case] be contrary to Art 5(1) of the *Constitution of Nauru*?

(b) would the specification in any RPC visa referred to at paragraph 87 [of the special case] that the plaintiff must reside at the Nauru RPC, s 18C of the RPC Act and/or rule 3.1.3 of the Centre Rules be invalid by reason of Art 5(1) of the *Constitution of Nauru*?

(12) Does s 198AD(2) of the Migration Act authorise and require that the plaintiff be taken as soon as reasonably practicable to Nauru?

Relief

(13) What, if any, relief should be granted to the plaintiff?

Costs

(14) Who should pay the costs of the special case and of the proceedings generally?