IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **NO M70 OF 2011**

BETWEEN:

PLAINTIFF M70/2011
Plaintiff

MINISTER FOR IMMIGRATION AND CITIZENSHIP

COMMONWEALTH OF AUSTRALIA
Defendants

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **NO M106 OF 2011**

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BETWEEN:

PLAINTIFF M106/2011
Plaintiff

MINISTER FOR IMMIGRATION AND CITIZENSHIP

COMMONWEALTH OF AUSTRALIA
Defendants

SUBMISSIONS OF THE DEFENDANTS

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PART I PUBLICATION ON THE INTERNET

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

PART II ISSUES

2. The issues are:

   2.1. Is s 198A of the *Migration Act 1958* (Cth) (**Act**) the only source of power to remove persons who have unassessed claims to be owed protection obligations under the Refugee Convention (**Convention**) either in every case; or in cases where the Minister for Immigration and Citizenship (**Minister**) has made (or has purported to make) a declaration under s 198A(3)(a)?

   2.2. Is the declaration (**Declaration**) made by the Minister on 25 July 2011 under s 198A(3)(a) in relation to Malaysia a "legislative instrument" within the meaning of the *Legislative Instruments Act 2003* (Cth) (**LI Act**)?

   2.3. Is the Minister constrained in the exercise the power to make a declaration under s 198A(3)(a) by the existence of "jurisdictional facts", being either:

      2.3.1. the existence of the circumstances described in s 198A(3)(a)(i) to (iv) as objectively determined by a court; or

      2.3.2. the Minister's subjective satisfaction as to the existence of the circumstances described in s 198A(3)(a)(i) to (iv)?

   2.4. Did the Minister err in law or "ask the wrong question" in making the Declaration?

   2.5. Is an officer constrained in the exercise of power under s 198A(1) to take an offshore entry person from Australia to Malaysia:

      2.5.1. by a requirement to consider the individual circumstances of the offshore entry person; or

      2.5.2. by reason of a legal relationship between the Minister and the Plaintiff as a minor or as a "non-citizen child" within the meaning of the *Immigration (Guardianship of Children) Act 1946* (Cth) (**Guardianship Act**)?

   2.6. Has the Minister "constructively failed to exercise jurisdiction" under ss 46A or 195A of the Act in relation to the Plaintiffs?

PART III SECTION 78B NOTICES

3. No notice is required pursuant to s 78B of the *Judiciary Act 1903* (Cth).

PART IV FACTS

4. The relevant facts are contained in the Agreed Statement of Facts (**ASOF**) and the affidavit of Christopher Eyles Guy Bowen of 14 August 2011.

PART V APPLICABLE PROVISIONS

5. The Plaintiffs' statement of the applicable statutory provisions is complete.

PART VI ARGUMENT

Issue 1 – Is s 198A of the Act the only source of power to remove an unlawful non-citizen who has made protection claims that have not been determined?

6. If, by virtue of a valid and effective declaration under s 198A(3), s 198A(1) is an available source of power to take the Plaintiffs to Malaysia, the question whether s 198(2) provides an alternative source of power to remove the Plaintiffs from Australia does not arise. Although conveniently addressed first, Issue 1 would arise only in the event that other issues were to be determined favourably to the Plaintiffs.

7. Section 198(2) simultaneously confers a power to remove, and imposes a duty to remove, an unlawful non-citizen from Australia when various preconditions are satisfied.[1] "The power to remove a non-citizen ... comes into existence only with the duty to remove. It is parasitic upon that duty and so only arises when it becomes 'reasonably practicable' to remove the non-citizen".[2]

8. In *Plaintiff M61/2010E v Commonwealth*, the High Court stated:[3]

> On an initial reading of s 198(2), it might be thought that the conditions which engaged the obligation to remove each plaintiff from Australia "as soon as reasonably practicable" were satisfied as soon as the plaintiffs entered the Territory of Christmas Island. If that were so, it would also follow that the continued detention of the plaintiffs, for so long as was necessary to undertake the RSA or the IMR, was unlawful ... Detention is required and authorised by the Migration Act until removal or grant of a visa. But if attention were confined to the words of s 198(2), there being a duty to remove each plaintiff as soon as reasonably practicable, with there being no possibility of making a valid application for a visa, prolongation of detention for so long as was necessary for the Department to conduct inquiries about the refugee status of the plaintiffs might, at first sight, appear to have been unlawful.

9. The Court went on to explain that s 198(2) "accommodates the consideration of whether to exercise the powers given by ss 46A and 195A".[4] Where, however, as in the present cases,[5] no consideration is being given to the exercise of the Minister's powers under ss 46A or 195A, the quoted passage strongly suggests that s 198(2) requires the removal of a non-citizen as soon as is "reasonably practicable", the time at which removal becomes reasonable practicable marking the point at which detention under the Act ceases to be lawful. That had earlier been recognised in *Al-Kateb v*

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1 Compare, in relation to s 198(6), *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at 165 [63]; *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 506 at 515 [42]-[44].

2 *WAJZ v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 84 ALD 655 at [74] (French J).

3 (2010) 272 ALR 14 at 20 [21].

4 *Plaintiff M61/2010E v Commonwealth* (2010) 272 ALR 14 at 23 [35] and 31 [71].

5 Agreed Facts, Attachment 35.

Godwin,[6] where Hayne J (with whom Heydon J agreed) explained, in speaking of s 196(1):[7]

> The period of detention is fixed by reference to the occurrence of any of three specified events. Detention must continue ''until'' one of those events occurs. The event described as being ''removed from Australia under section 198'' is an event the occurrence of which is affected by the imposition of a duty, by s 198, to bring about that event ''as soon as reasonably practicable''. That compound temporal expression recognises that the time by which the event is to occur is affected by considerations of what is ''[c]apable of being put into practice, carried out in action, effected, accomplished, or done''. In particular, the expression recognises that the co-operation of persons, other than the non-citizen and the officer, will often (indeed usually) be necessary before the removal can occur. The duty to remove must be performed within *that* time. And so long as the time for performance of that duty has not expired, s 196 in terms provides that the non-citizen must be detained.

10. Notwithstanding the unqualified terms of the power and duty to remove unlawful non-citizens under s 198(2) of the Act, the Plaintiffs contend that:

    10.1. s 198(2) does not authorise the removal of an offshore entry person who claims to be owed protection obligations under the Act, but in relation to whom no assessment of claims, or the determination of the existence of obligations has been undertaken; and

    10.2. s 198A is either the only source of the power to detain an offshore entry person who claims to be owed protection obligations and take that person to a third country, or alternatively is a limitation on the power in s 198(2) to remove that person to a third country.

11. For the reasons that follow, those submissions should be rejected.

12. As long ago as *Robtelmes v Brenan*,[8] it was held that s 51(xix) of the Constitution "authorised the enactment of a law permitting the deportation of an alien to a place other than the state from which the alien came." Section 198(2) is such a law. The power and duty to "remove" – which is defined in s 5 of the Act to mean "remove from Australia" – necessarily incorporates the notion of moving a person not only "from Australia", but also to another country. That must follow because as a practical matter the duty to remove from Australia can be performed only by removal to another country.[9] As Gleeson CJ said in *Al-Kateb v Godwin*,[10] "[r]emoval is not necessarily limited to removal to an unlawful non-citizen's country of nationality. However, it does not include simply ejecting a person physically from Australian territory". Similarly, Hayne J (with whom McHugh and Heydon JJ relevantly agreed) observed:[11]

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6 (2004) 219 CLR 562.

7 (2004) 219 CLR 562 at 638-639 [226].

8 (1906) 4 CLR 395 at 404. That conclusion was endorsed in *Al Kateb* (2004) 219 CLR 562 at 613 [139] (Gummow J), 632 [203] (Hayne J, with whom Heydon J agreed).

9 *WAIS v Minister for Immigration & Multicultural and Indigenous Affairs* [2002] FCA 1625 at [58] (French J); *M38/2002 v Minister for Immigration & Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at [68].

10 (2004) 219 CLR 562 at [9].

11 (2004) 219 CLR 562 at [218].

> Detention comes to an end upon removal ... But ... removal *to* a country requires the co-operation of the receiving country, and of any countries through which the person concerned must pass to arrive at that destination. That co-operation is not always freely made available ... Australia can seek that co-operation; it cannot demand it. Detention will continue until that co-operation is provided.

13. Removal from Australia will be "reasonably practicable" as soon as removal can be effected to <u>any</u> country that is prepared to accept an unlawful non-citizen. As Hayne J has said "Removal is the purpose of the provisions, not repatriation or removal to a place. It follows, therefore, that ... absent some other restriction on the power to remove, a non-citizen may be removed to any place willing to receive that person."[12] It follows that if a third country such as Malaysia is prepared to accept a non-citizen, removal to that country is "reasonably practicable", and s 198(2) therefore requires the non-citizen to be removed to that country.

14. Australia was one of the first States to ratify or accede to the Convention.[13] Its obligations under that Convention are owed to the other State Parties.[14] The most important[15] of those obligations is found in Article 33(1), which provides:

> No Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

15. The Convention does not impose on State parties an obligation to "assess" protection claims.[16] In *Al-Rahal v Minister for Immigration and Multicultural Affairs*, Lee J said "Of course, Australia, by Executive act, or by legislation enacted by Parliament, may provide for persons to be expelled, or returned, without determining whether they are refugees."[17] The primary obligation under the Convention is simply to ensure that a person who is a refugee not be sent to a country where his or her life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. The removal of a person who claims to be a refugee to a third country is entirely consistent with that obligation, even if that third country is not

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12 (2004) 219 CLR 562 at 639 [227] (original emphasis).

13 Meaning the Convention relating to the Status of Refugees done at Geneva on 28 July 1951. The Refugees Protocol means the Protocol relating to the Status of Refugees done at New York on 31 January 1967. Australia was the sixth state to sign the Convention, doing so on 22 January 1954 with effect from 22 April 1954. It acceded to the Protocol Relating to the Status of Refugees on 13 December 1973, with effect from that date. Reservations by Australia to Arts 28(1) and 32 were withdrawn in 1971 and 1967 respectively

14 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 169 [16] and 181 [67]; *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 294.

15 *R v Secretary of State for Home Department; Ex parte Onibiyo* [1996] QB 768 at 781 (Sir Thomas Bingham MR); *Minister for Immigration and Multicultural Affairs v Al-Sallal* (1994) 94 FCR 549 at 559 [43]-[46]. In cases where it applies, Article 32 may also constitute a protection obligation because it prohibits expulsion of "refugees lawfully in their territory", save in limited circumstances. However, Article 32 has limited significance because of its limited ambit of operation, see Goodwin-Gill, *The Refugee in International Law* (2nd ed, OUP, 1996) at 308.5.

16 See Goodwin Gill, *The Refugee in International Law* (2nd edn, 1996) 333-338; *SZ v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 342 at 345 [14]; *Patto v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 119 at 129-131 [30]-[37] (French J, surveying state practice).

17 (2001) 110 FCR 73 at 79 [27].

a party to the Convention.[18] As French J put it in *Patto v Minister for Immigration and Multicultural Affairs*:[19]

> Return of the person to a third country will not contravene Art 33 notwithstanding that the person has no right of residence in that country and that the country is not a party to the Convention, provided that it can be expected, nevertheless, to afford the person claiming asylum effective protection against threats to his life or freedom for a Convention reason.

16. As Sir Elihu Lauterpacht has explained, in terms quoted by the High Court without disapproval:[20]

> Article 33(1) cannot ... be read as precluding removal to a 'safe' third country, ie one in which there is no danger [that he or she might be sent from there to a territory where he or she would be at risk]. The prohibition on refoulement applies only in respect of territories where the refugee or asylum seeker would be at risk, not more generally. It does, however, require that a State proposing to remove a refugee or asylum seeker undertake a proper assessment as to whether the third country concerned is indeed safe.[21]

17. Consistently with that understanding of the Convention, there are a number of provisions in the Act that contemplate that, where a non-citizen is able to reside in a third country where he or she will not be persecuted, that the non-citizen must go to that third country, and that any claims the person makes to need protection under the Convention will not be assessed in Australia.[22] Accordingly, the terms of the Convention do not support the Plaintiff's argument that s 198(2) should be construed as being subject to some unexpressed limitation that would prevent the power and duty to remove under that subsection from being available in a case where a non-citizen has made protection claims that have not been assessed.

18. Further, even if the Convention did impose an obligation on Australia to assess protection claims as a matter of international law, that would not alter the proper construction of s 198(2) of the Act. The plain language of that subsection requires an unlawful non-citizen to whom the subsection applies to be removed from Australia as soon as that removal is reasonably practicable. There is no principle of statutory interpretation that would allow the plain meaning of the subsection to be read so that it is subject to a qualification that the power and duty to remove does not apply to a non-citizen who has made a claim for protection that has not been assessed by Australia. Indeed, such a construction would run directly counter to s 46A(1) of the Act, by in effect requiring Australia to undertake the assessment of protection claims made by non-citizens even though Parliament has explicitly prevented non-citizens from applying for protection visas unless the Minister chooses to permit such an application to be made.

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18 *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at 159 [39]; *Minister for Immigration and Multicultural Affairs v Al-Sallal* (1999) 94 FCR 549 at 559.

19 (2000) 106 FCR 119 at 131 [37]. See also *Minister for Immigration and Multicultural Affairs v Al-Sallal* (1999) 94 FCR 549 at 558-559.

20 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 172 [25].

21 Lauterpacht and Bethlehem, "The scope and content of the principle of non-refoulement: Opinion", in Feller, Türk and Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) 87, at p 122.

22 See, e.g., ss 36(3), 91D, 91N of the Act.

19. The operation of the Act should not be distorted in an attempt to introduce a requirement to give effect to the Convention in domestic law. As Callinan, Heydon and Crennan JJ (with whom Gummow ACJ agreed) said in *NBGM v Minister for Immigration and Multicultural Affairs,* "the Convention does not apply directly and in an unqualified way in Australia, and ... the fundamental question [is] the proper construction of the Act".[23] Their Honours continued:[24]

> The first step is to ascertain, with precision, what the Australian law is, that is to say what and how much of an international instrument Australian law requires to be implemented, a process which will involve the ascertainment of the extent to which Australian law by constitutionally valid enactment adopts, qualifies or modifies the instrument. The subsequent step is the construction of so much only of the instrument, and any qualifications or modifications of it, as Australian law requires.

20. Their Honours concluded:[25]

> The Convention does not provide any of the framework for the operation of the Act. The contrary is the case. That does not mean that the Convention in and to the extent of its application to Australia should be narrowly construed. It simply means that Australian law is determinative, and it is that which should be clearly ascertained before attention is turned to the Convention

21. Similar statements were made in in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004*.[26] The same approach was also adopted in *NAGV v Minister for Immigration and Multicultural Affairs*, where the Court accepted that the Convention was important "only in so far as it or its particular provisions are drawn into municipal law by adoption as a criterion of operation of s 36(2) of the Act".[27] The Convention is not drawn into the operation of s 198(2) of the Act. It cannot govern the proper construction of that subsection.

22. The observations in *NBGM* and *NAGV* provide the context in which some observations in *Plaintiff M61* must be understood. In *M61*, the Court stated:[28]

> [T]he Migration Act contains an elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugees Convention and the Refugees Protocol. In some respects, as was explained in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*, the provisions of the Migration Act may, at times, have gone beyond what would be required to respond to those obligations. It is not necessary to explore those issues here. Rather, what is presently significant is that the Migration Act proceeds, in important respects, from the assumption that Australia has protection obligations to individuals. Consistent with that assumption, the text and structure of the Act proceed on the footing that the Act provides power to respond to Australia's international obligations by granting a protection visa in an appropriate case and by not returning that person, directly or indirectly, to a country where he or she has a well-founded fear of persecution for a Convention reason.

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23 (2005) 231 CLR 52 at 69 [55].

24 (2005) 231 CLR 52 at 71-72 [61].

25 (2005) 231 CLR 52 at 73 [69].

26 (2006) 231 CLR 1 at 14 [33], 16 [34], [37], [39]. See also *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 16 [45].

27 *NAGV* at 172 [26].

28 *Plaintiff M61/2010E v Commonwealth* (2010) 272 ALR 14 at 21 [27]-[28] (emphasis added).

23. That passage should not be understood as suggesting that the Act is properly interpreted as guaranteeing, as a matter of domestic law, that the Executive give effect to Australia's obligations under the Convention. The Act simply does no such thing, as is discussed in detail below. Instead, this passage emphasises that the Act confers "power to respond to Australia's international obligations",[29] by providing mechanisms by which the Executive "can"[30] facilitate the assessment of protection claims if it chooses to do so. Within the statutory regime that applies with respect to an "offshore entry person", the Executive can respond to Australia's international obligations either through a decision to consider the exercise of the power conferred by s 46A or s195A,[31] or through the exercise of the power conferred by s 198A to take the non-citizen to a third country where protection claims may be assessed. But as a matter of domestic law, the Act does not impose a duty on the Executive to exercise any of those powers.

24. The Plaintiff's construction of s 198(2) raises a conundrum. If the Executive chooses not to exercise the above powers (all of which are expressed to be discretionary), an offshore entry person would on that construction be left in limbo: he or she could neither be granted a visa nor removed from Australia, but would be required by s 196 to be kept in detention. That result, if not inconsistent with the principle established in *Chu Kheng Lim v Commonwealth*,[32] leaves "the period of an individual's detention ... wholly within the control of the executive" and is to be avoided for that reason.[33] But to avoid that result, it is necessary either to imply into s 46A, 195A or s 198A some obligation to take action (which is contrary to their plain language), or to read into s 196(1) an additional circumstance in which detention is to come to an end. A construction which requires violence to be done to the language of other provisions is clearly to be avoided, if any alternative construction is reasonably open.

25. Here, an alternative construction is reasonably open. It is the construction that appears from the plain words of the Act. On that construction, s198(2) authorises and requires the removal of an unlawful non-citizen as soon as removal to any country is reasonably practicable, whether or not the non-citizen has made a claim for protection that have not been determined. While s 198A provides one possible mechanism by which effect may be given to the obligation to remove such a non-citizen, it is not the only mechanism. If that mechanism is either not available, or not used, removal must occur pursuant to s 198(2) as soon as that removal is reasonably practicable.

26. To the extent the Plaintiffs submit that s 198(2) should be construed so as not to authorise the removal of non-citizens who have made protection claims that have not been assessed because the Act requires the Executive to give effect to Australia's obligations under the Convention, that submission should be rejected. The history of the Act[34] demonstrates that it does not, and never has, required the Executive to

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29 *Plaintiff M61/2010E v Commonwealth* (2010) 272 ALR 14 at [27]

30 *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642 at 650 [8] (French CJ and Bell J).

31 *Plaintiff M61/2010E v Commonwealth* (2010) 272 ALR 14 at [70].

32 (1992) 176 CLR 1, 32 per Brennan, Deane and Dawson JJ, 71 per McHugh J.

33 *Plaintiff M61/2010E v Commonwealth* (2010) 272 ALR 14 at 29 [65].

34 In *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 174-176 [34]-[41], this Court traced some of the history of the mechanisms by which Australia has given effect to the Convention.

implement in Australian domestic law the obligations that arise under the Convention as a matter of international law.[35]

27. Prior to 1975, Australia had no formal system for determining refugee status for onshore applicants. The determination of whether a person had the status of a refugee was a matter within the discretion of the Executive. By administrative arrangements, responsibility was allotted to the Minister for Immigration and Ethnic Affairs. The Minister dealt with such requests in reliance on his or her broad discretion to grant an entry permit.

28. In 1977, the government set up an interdepartmental committee, the Determination of Refugee Status (DORS) Committee, to assist the Minister in the exercise of this discretion. The establishment of this first (non-statutory) refugee status determination regime was followed in 1979 with amendments to the Act that provided for the apprehension and detention of persons arriving at the border without authorisation.[36]

29. Prior to January 1981, there were no provisions in the Act specifically concerning refugee claims. It was accepted that the Convention had no effect upon the rights and duties of individuals and the Commonwealth under Australian municipal law.[37]

30. From 14 January 1981 until 19 December 1989, the grant of permission to remain in Australia under the Convention was governed by s 6A of the Act.[38] Section 6A(1) provided that one of the bases upon which an entry permit could be granted was that the Minister had determined, by instrument in writing, that the holder of a temporary entry permit "has the status of refugee within the meaning of [the Convention]". That section was held impliedly to confer on the Minister the function of determining whether an applicant had the status of "refugee".[39] There was therefore a two-step process, the first step involving the determination of status, and the second involving the grant of a visa or entry permit.[40] At that time, the Act did not contain any equivalent to the present s 65 of the Act. Thus, while there was a power to grant an entry permit or visa to a person who was assessed as meeting the criteria for the grant of such a permit or visa, there was no duty to do so.

31. With effect from 19 December 1989, s 6A was repealed,[41] but the new s 11ZD (which was subsequently renumbered s 47) was drawn in similar terms to s 6A. Relevantly, eligibility for an entry permit depended upon whether the Minister had determined "that the non-citizen has the status of a refugee within the meaning of the Convention… or the Protocol". The Act defined "refugee" (s 4) as having "the same meaning as it has in Article 1 of [the Convention]".

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35 *SZ v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 342 at 348 [28], 349 [32].

36 See *Migration Amendment Act 1979,* which amended s 36 and inserted s 36A into the Migration Act, see also Crock M and Berg L, *Immigration Refugees and Forced Migration: Law, Policy and Practice in Australia.*

37 *Simsek v Macphee* (1982) 148 CLR 636 at 641-642 (Stephen J).

38 Inserted by the *Migration Amendment Act (No. 2) 1980* (Cth).

39 *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290. This was also the form of the legislation at the time of *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.

40 *NAGV* (2005) 222 CLR 161at 175 [37] and 176 [40].

41 By the *Migration Legislation Amendment Act 1989* (Cth).

32. From 26 December 1991 until 30 June 1992, s 47 of the Act, as amended by the *Migration Amendment Act 1991* (Cth), did not refer to refugee status. During this period, refugee claims were governed principally by the *Migration Regulations*, which required a determination by the Minister that the person had "refugee status" (a phrase that was not defined in the Act or the Regulations).[42]

33. With effect from 30 June 1992, s 22AA was inserted in the Act.[43] That section authorised the Minister, if satisfied that a person was a "refugee" (a term then defined as having "the same meaning as it has in Article 1 of the Refugees Convention or in that Article as amended by the Refugees Protocol"), to declare that person to be a refugee.

34. The *Migration Reform Act 1992* (Cth) repealed s 22AA and replaced it with a provision substantially similar to the present s 36(2).[44] At the same time, the predecessor of the present s 65 (then s 26ZF) was enacted, and the definition of "refugee" was repealed. The Explanatory Memorandum described the amendments as a "technical change" in the way applications for protection were dealt with.[45] It did not suggest that the effect of the amendments was to introduce into the Act a regime that ensured as a matter of domestic law that Australia gave effect to its obligations under the Convention. The protection visa was "intended to be the mechanism by which Australia offers protection to persons who fall under [the Convention]."[46]

35. At present, the class of visa created by s 36 of the Act is the primary statutory mechanism by which Australia gives effect in domestic law to the Convention.[47] (Of course, that provision only addresses a small subset of Australia's Convention obligations in relation to a refugee.) A criterion of eligibility for a protection visa is that Minister is satisfied[48] that the applicant "is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol".[49] However, this section does not give an entitlement to a protection visa to every non-citizen in Australia to whom Australia has obligations under the Convention.[50]

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42 *Migration Regulations*, s 117A(1)(b), in Reprint 2 as at 1 October 1991.

43 By the *Migration Amendment Act (No. 2) 1992* (Cth). That section commenced on 30 June 1992, less than six months before the *Migration Reform Act* 1992 (which repealed it and substituted s 36) was passed. However, the *Migration Reform Act* 1992 did not commence until 1 September 1994.

44 The provision was introduced as s 26B by the *Migration Reform Act 1992* (Cth), s 10. It commenced on 1 September 1994.

45 See *NAGV* (2005) 222 CLR 161at 176 [41], endorsing that description.

46 *NAGV* (2005) 222 CLR 161 at 176 [40].

47 Explanatory Memorandum to the Migration Reform Bill 1992, paragraph 26. See also Taylor, "Australia's 'Safe Third Country' Provisions, Their Impact on Australia's Fulfilment of Its Non-Refoulement Obligations" (1996) 15 *University of Tasmania Law Review* 196 at 209.

48 It was not until the enactment of the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) that the satisfaction of the Minister was introduced as a requirement in s 36(2) of the Act.

49 The Migration Regulations specified other criteria, in cl 866 of Schedule 2 (set out in Reprint 2 as in force on 1 September 1999). Subsections 36(3)-(7), added by the *Border Protection Legislation Amendment Act* 1999 s 3 Schedule 1 item 65, apply to visa applications made after 16 December 1999. Subsection 36(2) was amended by the *Migration Legislation Amendment Act (No 6)* 2001 Schedule 1 item 2.

50 *SZ v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 342 at 349 [32].

36. The *Migration Legislation Amendment Act (No 4) 1994* (Cth) introduced Subdivision AI of Division 3 of Part 2, which still forms part of the Act.[51] That subdivision, which is headed "Safe third countries" and comprises ss 91A to 91G, was the first legislation to prevent persons who may be owed "protection obligations" under the Convention from applying for protection visas.[52] The provisions of Subdivision AI envisage agreements relating to persons seeking asylum between Australia and another "safe third country".[53] Where such an agreement is made, the Minister can prescribe a country as a safe third country (s 91D), which has the consequence that a person with a right to enter and reside in that country (however that right arose or was expressed) cannot validly apply for a protection visa (ss 91C(1)(b)(ii) and 91E), unless the Minister determines in the public interest to allow such an application (s 91F). The clear effect of this regime is that, where it applies, a person cannot insist that claims for protection be assessed by Australia, whether or not that person is a refugee within the meaning of the Convention.[54] Such a person is subject to removal under Division 8 (i.e. s 198) of the Act, if he or she does not hold a valid visa (see s 91A).[55]

37. The *Border Protection Legislation Amendment Act 1999*[56] introduced several further limitations on eligibility for protection visas, which also remain part of the Act.

37.1. Section 36(3) deems Australia not to have protection obligations to "a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently ... any country apart from Australia".[57]

37.2. Subdivision AK of Division 3 provides that certain non-citizens cannot make valid application for visas. By reason of s 91N, those non-citizens include those who have "a right to re-enter and reside in, whether temporarily or permanently and however that right arose or is expressed", any country where that non citizen had resided for a continuous period of at least 7 days, and where "a declaration by the Minister is in effect under subsection (3) in relation to the available country". The circumstances in which such a declaration can be made are specified in s 91N(3), and are closely analogous to those in s 198A(3).

37.3. Section 198(9) provides that an officer must remove as soon as reasonably practicable a detainee to whom Subdivision AK applies.

38. The *Migration Amendment Legislation Act (No 6) 2001* inserted Subdivision AL (comprising ss 91R to 91Y) into Division 3 of Part 2 of the Act. These provisions also remain part of the Act. The purpose of that Amendment was stated, in the Explanatory Memorandum to the Bill for the Amending Act to include "restor[ing] the application of

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51 Commencing on 15 November 1994.

52 *NAGV* (2005) 222 CLR 161 at 187 [86].

53 *NAGV* (2005) 222 CLR 161 at 187-188 [86].

54 *Al-Rahal v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 73 at 79-80 [27]-[28]

55 See *Lu Ru Wei v Minister for Immigration and Ethnic Affairs* (1996) 68 FCR 30; *Wu v Minister for Immigration and Ethnic Affairs* (1996) 64 FCR 245.

56 Act No 160 of 1999.

57 See the discussion of s 36(3) in *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52; *SZMWQ v Minister for Immigration and Citizenship* (2010) 187 FCR 109.

the Convention relating to the Status or Refugees ... in Australia to its proper interpretation". However, the effect of provisions such as ss 91R and 91T is to impose a particular meaning on aspects of the definition of a refugee, for the purposes of its application by the Act, and thus to deny protection visas to some persons who might be found as a matter of international law to be refugees.[58]

39. The *Migration Amendment (Excision from the Migration Zone) Act 2001*[59] had the effect of excising from the migration zone, from 8 September 2001, a number of Australia's external territories, including Christmas Island. That Act also inserted s 46A. The effect of s 46A is to deny an "offshore entry person" the ability to make a valid visa application, including a protection visa application, and hence the right under s 47 of the Act to have a visa application considered. While the Minister has the power to lift the bar imposed by s 46A(1), s 46A(7) makes it clear that the Minister has no duty to consider whether to exercise that power. Accordingly, while s 46A ensures that the Minister has power to respond to Australia's international obligations under the Convention, the section denies the existence of any obligation to so comply.

40. Having regard to all of those provisions, the Plaintiffs' submission that the Act operates to "ensure" that Australia's obligations under the Convention are met, including by "ensuring" that they are met offshore by any country to which asylum-seekers are taken, must be rejected.[60] As the Court recognised in *M61*, the Act empowers the Executive government to act so that Australia meets its international obligations; but it does not impose, and has never previously imposed, any comprehensive obligation so to act. The submission to the contrary gives the Convention a role in Australia law that this Court has consistently denied.

41. There is even less foundation for the Plaintiffs' contention that the power under s 198A exists only where a third country meets standards "comparable to Australia in terms of what protection its laws oblige it to give to refugees",[61] or where protection claims and human rights will be respected "to the same extent as Australia".[62] Even if the Convention was fully incorporated into Australia's domestic law, which plainly it is not, the Convention obviously would not operate to impose such a requirement. There is no foundation at all in law or international practice for that submission.

42. The Plaintiffs' contention that s 198A(1) provides the exclusive means of removing a unlawful non-citizen from Australia if that non-citizen has made protection claims that have not been assessed (apparently whether or not a valid declaration has been made in relation to any country under s 198A(3)(a), and whether or not the country that is the subject of such a declaration is prepared to accept the unlawful non-citizen) appears to

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58 Section 91R was examined by this Court in *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642.

59 Enacted as part of a package of legislation including the the Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001, which inserted s 198A into the Act, and the Border Protection (Validation and Enforcement Powers) Bill 2001.

60 Plaintiff's submissions at [7],[25], [41].

61 Plaintiff's submissions, [25].

62 Plaintiff's submissions, [84].

depend on the principle identified in *Anthony Hordern & Sons Ltd v Amalgamated Clothing & Allied Trades Union of Australia*: [63]

> When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.

43. The circumstances in which the principle in *Anthony Hordern* is properly applied were examined in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom*.[64] The issue was whether the power to cancel a visa in s 501(2) was restricted by the powers to deport in ss 200 and 201 (which empowered the Minister to deport a non-citizen who was convicted of certain offences committed when the non-citizen had been in Australia for less than ten years). The entire Court held that the power conferred by s 501(2) was not so restricted. Gleeson CJ said:[65]

> The provisions of s 501(2), on the one hand, and ss 200 and 201 on the other, are not repugnant, in the sense that they contain conflicting commands which cannot both be obeyed, or produce irreconcilable legal rights or obligations. They create two sources of power, by which a person in the position of the respondent may be exposed, by different processes, and in different circumstances, to similar practical consequences. There is nothing novel, or even particularly unusual, about that. It does not of itself mean that only one source of power is available.

44. Gummow and Hayne JJ said:[66]

> *Anthony Hordern* and the subsequent authorities have employed different terms to identify the relevant general principle of construction. These have included whether the two powers are the "same power", or are with respect to the same subject matter, or whether the general power encroaches upon the subject matter exhaustively governed by the special power. However, what the cases reveal is that it must be possible to say that the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restrictions in the former power. In all the cases considered above, the ambit of the restricted power was ostensibly wholly within the ambit of a power which itself was not expressly subject to restrictions.

45. Their Honours identified the question as "whether the subject matter of the power is in law substantially the same".[67] They held that it was not, as "the ambit of the power to deport is not wholly subsumed within the ambit of the power to cancel a visa by reference to the character test in s 501(2)". [68]

46. Heydon and Crennan JJ likewise held that the question was whether ss 200 and 501(2) conferred power "to do the same thing".[69] Their Honours held that the power to remove a non-citizen consequent on cancellation of a visa was "a much wider power,

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63 (1932) 47 CLR 1 at 7. See also *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 678.

64 (2006) 228 CLR 566.

65 (2006) 228 CLR 566 at 571 [2].

66 (2006) 228 CLR 566 at 589 [59] (emphasis added).

67 (2006) 228 CLR 566 at 589 [61].

68 (2006) 228 CLR 566 at 590 [61] (emphasis added).

69 (2006) 228 CLR 566 at 612 [149].

although it is also for the protection of the Australian community. The powers are distinct and cumulative". Further, they said "[n]ot only to the powers have different purposes, different criteria apply for their exercise".[70]

47. Accordingly, s 198A will limit the power conferred by s 198(2) only if those provisions are properly characterised as conferring "the same power", and where as a matter of construction it is apparent that Parliament has sought to limit the circumstances in which that power is available to those specifically stated. There is no warrant for reading s 198A in that way. On the contrary, s 198A does not confer the "same power" as s 198(2) because:

10 47.1. s 198(2) imposes a duty to remove once the specified preconditions are satisfied, whereas s 198A(1) confers a discretionary power to take a person from Australia;

47.2. s 198(2) applies to unlawful non-citizens, whereas s 198A applies only to offshore entry persons;

47.3. s 198(2) authorises and requires removal to <u>any</u> place that will accept an unlawful non-citizen to whom the section applies, whereas s 198A permits an offshore entry person to be taken only to a "declared country"; and

47.4. s 198(2) applies only to a detainee, whereas s 198A applies whether or not an offshore entry person is in detention.

20 48. The differences in the circumstances in which the powers arise, the persons to whom the powers apply, and the places in respect of which the powers may be used all demonstrate that it cannot be said that ss 198A and 198(2) confer the same power. Instead, there are two sources of power that have similar practical consequences.

49. Section 198(2) applies according to its terms to an offshore entry person who has been detained under s 189(3), and requires that person to be removed from Australia as soon as reasonably practicable if no investigation or assessment for the purposes of s 46A or s 195A is being undertaken. Taking an offshore entry person from Australia pursuant to s 198A(1) amounts to "removing" that person from Australia and so has the effect of satisfying the requirement of s 198(2).

30 **Issue 2 – Legislative Instruments Act 2003**

50. Section 5(3) of the LI Act has the effect that an instrument that is registered is taken to be a legislative instrument whether or not the instrument meets the description in s 5(1).

51. The Declaration has today been registered and will come into effect as a legislative instrument tomorrow under s 12(1)(d) of the LI Act. It will then (assuming it is valid) supply the precondition for exercises of power under s 198A(1).

52. Issue 2 therefore no longer arises.

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70 (2006) 228 CLR 566 at 615 [162]-[163]

Issue 3 – Constraints on the exercise of power under s 198A(3)(a)

53. The Plaintiffs' primary position is that the Minister is constrained in the exercise of his power to make a declaration under s 198A(3)(a) by the objective existence of jurisdictional facts, being the circumstances described in s 198A(3)(a)(i) to (iv). The Plaintiff's fallback position is that the Minister is constrained by the existence of alternative jurisdictional facts, being the Minister's satisfaction as to the existence of the circumstances described in s 198A(3)(a)(i) to (iv).

54. The primary and fallback positions require jurisdictional preconditions to the exercise of the power conferred by s 198A(3)(a) to be identified by a process of implication.

55. Both the nature of the power conferred by s 198A(3)(a) and the form in which that power is expressed are opposed to the drawing of such an implication.

56. The Plaintiffs' attempt to transpose to s 198A(3)(a) words drawn from *BHP Petroleum Pty Ltd v Balfour*[71] highlights an essential point about the nature of the power.[72] The effect of a declaration by the Minister under s 198A(3) is not to deem the circumstances described in s 198A(3)(a)(i) to (iv) to be true. It is the existence of the Minister's declaration itself, not the truth of the content of that declaration, that engages the operation of s 198A(1).

57. Section 198A(3)(a) on its proper construction confers on the Minister a discretion, not subject to preconditions, whose valid exercise is bounded by "the minimum constraint applicable to the exercise of any statutory power, namely that it must be exercised in good faith and within the scope and for the purpose of the statute".[73] Good faith and proper purpose doubtless require consideration by the Minister in the exercise of the discretion of the matters which a declaration under s 198A(3)(a) will assert. It is therefore not accurate to describe the "substantive content" of s 198A(3)(a)(i) to (iv) as "otiose" in the absence at least of an implicit requirement of satisfaction.[74] But s 198A(3)(a)(i) to (iv) do not set out "criteria", and the decision whether they ought to be declared is a is one that pertains directly to the conduct of Australia's international affairs and for which the Minister is domestically politically accountable.

58. There is no allegation, nor any agreed fact capable of supporting an allegation, that the Minister acted otherwise than in good faith and within the scope and purpose of the provision in making the Declaration.

<u>The Plaintiffs' primary position – Jurisdictional facts as objectively ascertained</u>

59. The legislative history to s 198A is contrary to the Plaintiff's submission that the power to declare a country under s 198A is not available unless the law of the country to be declared has a particular content.

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71 (1987) 180 CLR 474 at 479-480 (Mason CJ, Brennan, Deane, Toohey and Guadron JJ).

72 Cf. Plaintiffs' submissions [50].

73 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 523 [59]. As to proper purpose see also *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 187 (Gibbs CJ), 215 (Stephen J), 476 (Mason J) and 283 (Wilson J).

74 Cf. Plaintiffs' submissions [23].

60. Section 198A was introduced by the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (**Amendment Act**).

61. On 1 September 2001, the then Australian Prime Minister announced a decision to establish a processing centre for refugees on Nauru.[75] On 10 September 2011, the Republic of Nauru and the Commonwealth signed a "Statement of Principles" in relation to asylum seekers, which provided the basis for joint cooperation in humanitarian endeavours relating to asylum seekers.[76] Eight days later (on 18 September 2001), the Bill for the Amendment Act was introduced into Parliament by the then Minister for Immigration and Multicultural Affairs.[77] On 27 September 2001, Parliament enacted that Bill in the terms in which it had been introduced, and the Amendment Act commenced.[78] Only five days after that, on 2 October 2001 the then Minister for Immigration and Multicultural Affairs made a declaration under s 198A(3) in relation to Nauru.

62. That sequence of events demonstrates that, at the time Parliament enacted s 198A, it was contemplated that the power conferred by that section would be used to make a declaration with respect to Nauru. The taking of asylum seekers to Nauru was mentioned by several speakers in the parliamentary debates.[79]

63. At that time, Nauru was not a party to the Refugees Convention, the Protocol thereto, or to any of a range of other instruments of international law establishing various obligations on countries to protect human rights.[80] Further, Nauru's domestic law did not contain any specific provisions or protections relating to person who under international law would be classified as refugees or asylum seekers.[81] These were matters of public record. If they were not adverted to in the debates or other explanatory material, that suggests that they were not regarded by anybody as relevant to the scope of the provisions that were being enacted.[82]

64. The enactment of s 198A in those circumstances strongly suggests that Parliament did not intend to condition the Minister's power to make a declaration under s 198A(3)(a) on the existence of laws of the kinds upon which the Plaintiffs invite this Court to focus.

65. The language of s 198A(3) is inconsistent with an intention to specify jurisdictional facts. The four propositions set out therein are to be "declared" – ie, to be asserted as facts – by the Minister. Such language plainly connotes that they are matters for assessment by the Minister. Had it been intended to authorise the Minister to declare a country for the purposes of the section, if certain objective prerequisites were met, it would have been easy for the drafter to say so.

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75 ASOF [2].

76 ASOF [3].

77 ASOF [4].

78 ASOF [5].

79 *Hansard*, House of Representatives, 19 September 2001, 30966, 30969, 30972, 30975, 30976, 31013, 31014, 31015; *Hansard*, 24 September 2001, 27690, 27691, 27698, 27705, 27710, 27724, 27725, 27727, 27817.

80 ASOF [7].

81 ASOF [8].

82 Cf Plaintiffs' Submissions [26].

66. The nature of the facts described in s 198A(3)(a)(i) to (iv) tends strongly against the Plaintiff's primary submission. The Federal Court has considered the operation of s 198A on several occasions, and it has:

66.1. characterised the nature of the criteria identified in s 198A(3)(a) as "evaluative and polycentric",[83] and "broad ranging and subjective";[84]

66.2. characterised key words in s 198A(3)(a)(i) to (iv) ("protection", "access", "effective" and "relevant standards") as "arguably subjective";[85]

66.3. indicated that the existence of the criteria in any given case may not be "indisputable" but may be "very much [a question] of degree".[86]

67. Questions of this nature are not appropriate to be resolved by a process of adjudication.[87] French J (as his Honour then was) captured the position in *P1/2003 v Minister for Immigration & Multicultural & Indigenous Affairs*, when his Honour said:[88]

> The form of the section suggests a legislative intention that the subject matter of the declaration is for ministerial judgment. It does not appear to provide a basis upon which a court could determine whether the standards to which it refers are met.

68. Contrary to the Plaintiffs' submissions, it is not the case that the scope of the facts described in s 198A(3)(a) extend only to facts about a country's "legal obligations" together with a judicial system that is capable of ensuring those obligations are enforced.[89] Such a construction is not consistent with the text of the provision, which refers simply to what a country *does* (not what it is obliged to do) and what relevant human right standards it meets in fact. It is also not consistent with the focus of international human rights law, which does not usually mandate that a country pass laws to give effect to protection or human rights obligations. The question is whether the country in fact does or will give effect to its international obligations.

69. The matters described in subparagraphs (i) to (iii) go to the practical reality of the "protection" afforded by a country. That approach has long been accepted in the

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83 *P1/2003 v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1029 at [49] (French J).

84 *Sadiqi v Commonwealth (No 2)* (2009) 181 FCR 1 at 49 [224] (McKerracher J).

85 *P1/2003 v Ruddock* (2007) 157 FCR 518 at 537 [69] (Nicholson J), referring to *Eremin v Minister for Immigration, Local Government and Ethnic Affairs* (1990) 21 ALD 69. The Plaintiffs' contention at para [56] of their submissions that the criteria in s 198A(3)(a) stand in "stark contrast" to the regime considered by the Full Federal Court in *Eremin* is specious.

86 *P1/2003 v Ruddock* (2007) 157 FCR 518 at 537 [68] (Nicholson J).

87 See further, for example, Aronson, Dyer & Groves, *Judicial Review of Administrative Action* (4th ed, 2009) at [7.180]; Campbell & Groves, "Polycentricity in Administrative Decision-Making", in Groves (ed), *Law and Government in Australia* (2005), at 213-240; King, "The Pervasiveness of Polycentricity" [2008] PL 101. These materials draw from, among other sources, a series of seminal articles by Professor Lon Fuller.

88 [2003] FCA 1029 at [49]. After referring to French J's reasoning with approval, Nicholson J refused to extend time to permit an appeal against French J's judgment on the basis that an appeal would have had insufficient prospects of success: *P1/2003 v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1370 at [14].

89 Plaintiffs' submissions [4.4.2] and [53].

Federal Court in the analogous context of the "safe third country" scheme.[90] Thus, to adapt what the Full Court of the Federal Court said in *Minister for Immigration and Multicultural Affairs v Al-Sallal* in considering whether or not a country provides the protection described in those sub-sections, the question whether the country is a party to the Refugees Convention (or any other international law) is relevant but not determinative.[91] In this regard, the Plaintiffs' attempt to link the expression "protection" to the Refugees Convention[92] does not assist. The Convention does not use that expression as a general description of the obligations it imposes on contracting parties. Rather, the concept of "protection" arises, in two distinct senses, in the definition of "refugee".[93] Neither of those senses directs attention solely to the legal standards applicable in a particular country. In its broader (and presently more relevant) sense, "protection" refers to protection against ill-treatment or violence[94] – ie, a practical rather than legal concept.

70. Likewise, while the content of the composite expression "relevant human rights standards" in s 198A(3)(iv) undoubtedly is informed by the content of international laws that provide for the protection of human rights of asylum seekers or refugees (including customary international law, which includes a prohibition on refoulement, and which is binding on Malaysia),[95] whether a country "meets" those standards is a question of practical reality, not an inquiry into whether the country is a party to every relevant treaty or has in its domestic law obliged itself to carry out the terms of such treaties.[96] A limited inquiry of that kind would do little to ensure that offshore entry persons who are transferred to a third country are treated appropriately.

71. The Plaintiffs have not advanced any reason why Parliament would have intended to prevent the Minister from making a declaration in relation to a country which meets the criteria in s 198A(3) as a matter of fact, simply because it lacks particular laws ensuring that protection is provided. The only possible reason that emerges from their submissions is that a construction which requires attention only to the content of laws is consistent with the criteria operating as jurisdictional facts; but that inverts the proper analysis.

72. Thus, any decision as to whether the facts described in s 198A(3)(a) in relation to a country actually exist is not merely an enquiry into the existence of certain laws. Instead, it is a complex and necessarily polycentric and evaluative assessment that "presents so many variables as to require handling by the method of … ad hoc discretion".[97] Indeed, it is difficult to identify the kinds of evidence that the court could receive if it was necessary for it to attempt to determine whether the jurisdictional facts

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90 *Al-Zafiry v Minister for Immigration and Multicultural Affairs* [1999] FCA 443 at [26], approved by a Full Federal Court (comprising Heerey, Carr and Tamberlin JJ) in *Minister for Immigration and Multicultural Affairs v Al-Sallal* (1999) 94 FCR 549 at 558-559 [42] and [46].

91 *Minister for Immigration and Multicultural Affairs v Al-Sallal* (1999) 94 FCR 549 at 559 [46].

92 Plaintiffs' Submissions [28].

93 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, 9-11 [17]-[22] per Gleeson CJ.

94 Cf *Horvath v Secretary of State for the Home Department* per Lord Hope of Craighead, quoted in *Khawar* (2002) 210 CLR 1, 10 [19].

95 Cf. Plaintiffs' submissions [39].

96 Cf. Plaintiffs' submissions [40].

97 Cf. Campbell & Groves, "Polycentricity in Administrative Decision-Making", in Groves (ed), *Law and Government in Australia* (2005), at 216, referring to Hart & Sacks, *The Legal Process* (1958), at 669.

objectively existed in relation to a country. And even if it were true that the facts described in s 198A(3)(a)(i) to (iv) are merely *legal* facts, contrary to the Plaintiffs' submissions, the task of finding of such facts is not "confined" and is "complex".[98] For example, an inquiry into Malaysia's international obligations would not begin and end with the treaties to which it is a party. Customary norms, such as the obligation of non-refoulement,[99] would need to be considered. That inquiry would also involve consideration of what are the "relevant" human rights standards for the purposes of para (iv). Not every treaty obligation bearing upon human rights is necessarily relevant to the provision of "that protection".

73. The conclusion that the validity of a declaration under s 198A(3)(a) does not depend on the objective truth of the matters described in sub-paragraphs (i) to (iv) is further strengthened by the fact that, as was recognised in *Sadiqi v Commonwealth (No 2)*, it is not likely that Parliament intended Australian courts to sit in judgment on whether other countries satisfy these criteria – including, in particular, whether they "meet relevant human rights standards" in providing relevant protection to asylum seekers and refugees.[100] The making of such judgments may affect Australia's international relations with State with whom it has friendly relations. That is not an abstract concern. Where Australia has made an arrangement with another State with whom it has friendly relations to address a topic of regional concern, such an arrangement can only be endangered if Australian courts sit in judgment over the laws or conduct of that State. The Act should not be construed as requiring Australian courts to make judgments of that kind, which ought to remain exclusively within the competence of the executive government.[101] (It is not being argued here that the matters set out in s 198A(3)(a) are not justiciable. However, their nature is such that a court should be slow to conclude that they were intended to be subjects for judicial determination.)

74. The existence of an express power of revocation in s 198A(3)(b) highlights the absurdity of any construction of s 198A(3)(a) whereby the existence or non-existence of the facts described in s 198A(3)(a) are matters for judicial determination. The power of revocation ought to be construed as exercisable in the like manner and subject to the like conditions as the power to make a declaration: s 33(3) of the *Acts Interpretation Act 1901*. The Act cannot be read as *obliging* the Minister to revoke a declaration under s 198A(3)(a) in any circumstance. Yet, it would be an odd result if the Act were to be construed as *prohibiting* the Minister from declaring a country under s 198A(3)(a) unless the facts described in sub-paragraphs (i) to (iv) exist while *empowering* (but not obliging) the Minister to revoke such a declaration if facts change. That would make the power to make a declaration subject to far more stringent conditions than the power to revoke a declaration.

75. For all of the above reasons, the Court should find that the valid exercise of the power conferred by s 198A(3) is not dependent on the objective existence, as jurisdictional facts, of the matters described in s 198A(3)(a)(i) to (iv).

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98 Cf. Plaintiffs' submissions [56].

99 Hathaway, The Rights of Refugees Under International Law (2005), 363-370

100 (2009) 181 FCR 1 at 49 [223].

101 Cf. *Al-Rahal v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 73 at 82 [39] (Lee J), referring to Hailbronner, "The Concept of 'Safe Country' and Expeditious Asylum Procedures: A Western European Perspective" (1993) 5(1) IJRL 31 at 56.

The Plaintiffs' fallback position – The Minister's satisfaction as a jurisdictional fact

76. The form of legislative provision that confers power on a Commonwealth official to make a decision or to issue an instrument, expressly subject to his or her satisfaction as to certain matters, is very common. A wide array of powers conferred on officials by the Act are so conditioned: see, eg, ss 36(2)(a), 65, 73, 116, 128, 131, 134. The absence of any express requirement for the Minister to be satisfied of the existence of the matters described in s 198A(3)(a) is therefore conspicuous, and engages the presumption that where Parliament uses different language within the same Act, it intended a different result.[102]

77. Consistently with the application of that presumption, the absence of any reference to the satisfaction of the Minister reflects a legislative recognition of the polycentric and evaluative character of the matters that s 198A(3)(a) sets out. As Gleeson CJ and Gummow J (with whom Hayne J relevantly agreed) recognised in *Minister for Immigration and Multicultural Affairs v Jia Legeng*,[103] powers conferred on the Minister under the Act:

> Form part of a statutory scheme which involves a complex pattern of administrative and judicial power, and differing forms of accountability. The Minister is a Member of Parliament, with political accountability to the electorate, and a member of the Executive Government, with responsibility to Parliament. As French J recognised in his decision at first instance in the case of Mr Jia, the Minister functions in the arena of public debate, political controversy, and democratic accountability. At the same time, the Minister's exercise of statutory powers is subject to the rule of law, and the form of accountability which that entails.

78. Their Honours went on to find that consequences that flowed from the circumstance that power was vested in the Minister included that "the conduct of a Minister may need to be evaluated in the light of his or her political role, responsibility and accountability".[104]

79. However, even if, contrary to the submission advanced above, the Minister's power to make a declaration is conditioned on the Minister's satisfaction as to the existence of the facts described in s 198A(3)(a)(i) to (iv), the declaration is nonetheless valid.

80. The Plaintiff's argument to the contrary is confined to the submission that the Minister either misconstrued s 198A(3), or asked himself the wrong question.

81. As to the first of those matters, if the proper construction of s 198A(3) is that the Minister was required to focus on the laws in effect in Malaysia, and not upon the practical reality, then the Minister would have erred. However, for the reasons advanced above, there is no warrant for reading s 198A(3) in that way.

82. As to the second matter, the submission that the Minister asked himself the wrong question, by focusing on the circumstances of the 800 people to be transferred to Malaysia pursuant to the Arrangement between Australia and Malaysia, cannot be

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102 See, e.g., *Scott v Commercial Hotel Merbein Pty Ltd* [1930] VLR 75.

103 (2001) 205 CLR 507 at 528 [61].

104 (2001) 205 CLR 507 at 529 [63]. See also at 583 [244] – 584 [246] (Callinan J).

accepted.[105] The Minister's sworn evidence is that he did no such thing.[106] The matter has been referred on the footing that that evidence is unchallenged, and it is not now open to the Plaintiffs to argue, in substance, against its acceptance. Nor, when the evidence deals with the specific complaints raised about the Minister's reasoning,[107] can that evidence be discounted by complaining that it does not go further and explain the reasoning process in greater detail.[108]

83. In deciding to make the Declaration, the Minister understood that he needed to consider whether Malaysia met the criteria set out in s 198A(3) generally (and not only whether the particular persons transferred under the agreement between Australia and Malaysia would receive treatment in accordance with those criteria).[109]

84. In considering that issue he had regard to:

84.1. a submission (**Submission**) prepared by the Department of Immigration and Citizenship dated 22 July 2011 and, in particular, advice from the Department of Foreign Affairs and Trade that was attached to the submission (**DFAT advice**);[110]

84.2. his own knowledge of Malaysia's commitment to improving its processes for dealing with asylum seekers;[111]

84.3. his own knowledge: that Malaysia had made a "significant conceptual shift in its thinking about how it wanted to treat refugees and asylum seekers"; that Malaysia had "begun the process of improving protections offered to such persons";[112]

84.4. his own knowledge that the UNHCR considered that the proposed arrangement involving Australia and Malaysia "would have potential benefits and would be workable";[113] and

84.5. his understanding, based on statements made to him, that Malaysia was "actively considering allowing working rights for all asylum seekers".[114]

85. The Submission stated that the Minister "should", before making a declaration under s 198A(3) in respect of Malaysia, satisfy himself of the matters described in subparagraphs (i) to (iv).[115] It further stated that it was open to the Minister to be satisfied that Malaysia meets these criteria.[116] The DFAT submission specifically

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105 Cf Plaintiff's submissions [74] to [81].

106 Affidavit of Christopher Eyles Guy Bowen of 14 August 2011 (**Minister's Affidavit**).

107 See para 39 of the Amended Application in each matter, and the Minister's Affidavit at [12]-[15].

108 Plaintiff's Submissions [79], [81].

109 Minister's Affidavit [12].

110 ASOF [37]; Minister's affidavit [11] and [15].

111 Minister's Affidavit [13].

112 Minister''s Affidavit [7] and [13].

113 Minister's Affidavit [8] and [13].

114 Minister's Affidavit [9] and [13].

115 Submission [6].

116 Submission [13].

addressed each of the relevant criteria, and concluded that Malaysia provides the relevant protection and meets the relevant human rights standards.

86. Taking these matters into account, the Minister was satisfied that Malaysia met the criteria in s 198A(3).[117] In forming his satisfaction on this matter, the Minister was reassured, in particular, by the DFAT advice that Malaysia did provide basic support and protection to asylum seekers.[118]

87. Finally, the chronology of events cannot bear the significance which the Plaintiffs seek to give it.[119] The existence of an arrangement for the reception by Malaysia of persons removed from Australia and their treatment was clearly at least potentially relevant to whether, as a matter of discretion, the Minister would consider it appropriate to make a declaration. It was also likely to be, in practical terms essential to the utility of any declaration. There is nothing surprising in the fact that a declaration was not made until the Arrangement was in place.

Issue 4 – Individual circumstances and the decision under s 198A(1)

88. The Plaintiffs contend that the decision to take Plaintiff M70 to Malaysia pursuant to s 198A(1)[120] was flawed because the officer failed to consider his "individual circumstances" by not considering the operation of Malaysian law on him.[121] The "individual circumstance" identified is the exposure of Plaintiff M70 to sanctions under the *Immigration Act 1959* (Malaysia) by reason of having entered and exited Malaysia with a people smuggler on route to Australia. That circumstance is common to 80 to 90 percent of offshore entry people.[122]

89. The Plaintiffs advance no submission in support of the contention that s 198A(1) makes it mandatory[123] for an officer "to consider whether [the Plaintiff] had committed any offences under Malaysian law". The terms of s 198A(1) are inconsistent with that submission: they do not require consideration to be given to any identified matters, meaning that relevant considerations can only be identified having regard to the subject matter, scope and purpose of the Act.[124] Nor is there anything in the subject matter, scope or purpose of the Act to support the proposition that an officer considering removing a person to a declared country under s 198A(1) must consider the operation of the domestic law of that country in respect of possible past offences committed in that country: even if Malaysia was to enforce its general criminal law

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117 Minister's Affidavit [11] and[12] and Exhibit CEGB-4 to the Minister's Affidavit.

118 Minister's Affidavit [13].

119 Plaintiff's Submissions [77].

120 Attachment 15. No such decision has been made in relation to Plaintiff M106.

121 Plaintiff's submissions 85.

122 Attachment 36 (Minister's statement of 7 August 2011).

123 See *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24, at 39-40.

124 *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24, at 39-40; *Minister for Immigration, Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505, at 523 [72]; *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363, at 378; *Price v Elder* (2000) 97 FCR 218 at 221; *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 606 [126].

(which for the reasons detailed below is very unlikely), that would not be contrary to Australia's obligations under the Convention.[125]

90. To the extent that the question whether Plaintiff M70 had committed immigration offences in Malaysia on route to Australia might potentially be considered to be relevant, that question could only be considered in the context of other information that bore upon the likely consequences of those offences. That material included the terms of the Arrangement between Australia and Malaysia (**Arrangement**),[126] the Operational Guidelines to give effect to that Arrangement (**Guidelines**),[127] and the Exemption Order made by the relevant Malaysian Minister under s 55 of the *Immigration Act 1959* (Malaysia),[128] the first two of which were expressly considered by the officer.[129] Irrespective of the operation of the exemption order,[130] the contention that the officer was legally required to consider whether the Plaintiff would be prosecuted for past immigration offences in Malaysia would mean that the officer was legally required to make her decision on the assumption that Malaysia would not comply with its commitments under the Arrangement or Operational Guidelines.

91. While the Arrangement and Guidelines are not legally binding, they nevertheless indicate what is likely to occur in practice in Malaysia.

91.1. Under clause 10(3) of the Arrangement, Malaysia agrees that the "Government of Malaysia will facilitate the Transferees' lawful presence during any person when Transferees claims to protection are being considered and, where Transferees have been determined to be in need of protection, during any period while they wait to be settled".

91.2. Under clause 10(4) of the Arrangement, it is agreed that "[w]hile in Malaysia Transferees will enjoy standards of treatment consistent with those set out in the Operational Guidelines at Annex A".

91.3. Clause 2.2.2(b) of the Guidelines provides that transferees who seek asylum will be permitted to remain in Malaysia under an "exemption order".

91.4. Clause 2.3.1(a) of the Guidelines provides that transferees are "permitted to remain in Malaysia and will not be liable to being detained an arrested due to their ongoing presence in Malaysia under this Arrangement".

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125 *Applicant S v Minister for Immigration and Multicultural Affairs (2004)* 217 CLR 387 at 402 [43]; *Applicant A v Minister for Immigration and Multicultural Affairs* (1997) 190 CLR 225 at 233, 244, 258-259.

126 Attachment 30.

127 Attachment 31.

128 Attachment 40. Section 55 of the *Immigration Act 1959* provides that "Notwithstanding anything contained in this Act, the Minister may by order exempt any person or class of persons, either absolutely or conditionally, from all or any of the provisions of this Act".

129 Attachment 8, p 6.

130 The exemption order applies to persons transferred to Malaysia under the Arrangement, and exempts such persons from the requirements under s 6 of the *Immigration Act 1959* (clauses 2 and 3). The exemption order does not apply in the circumstances listed in clause 4. That clause contains five cumulative requirements, as is evidenced by the word "and" at the end of paragraph (d). The Plaintiff's disjunctive reading of clause 4 (Plaintiff's submissions, [89] and fn 81) would give the exemption order an absurd operation, because the people to whom the Arrangement applies are intended to have their claims assessed by the UNHCR (Arrangement, clause 10(2)(a)) but on the Plaintiff's interpretation registration with the UNHCR would void the operation of the exemption order.

91.5. Clause 3 of the Guidelines provides that "Detailed guidance concerning the operation of the Arrangement as it relates to Transferees will be provided to law enforcement agencies and other relevant authorities to ensure ... that their treatment will be in accordance with this Arrangement".

92. Finally, the Plaintiffs suggestion that they are exposed to whipping in Malaysia is unfounded.[131] That submission assumes the exemption order would have no effect on offences committed on route to Australia, but that proposition of Malaysian law has not been established.[132] In any event, the agreed fact is that Malaysian courts "generally exercise their discretion not to order whipping of a person who is registered as a refugee with the UNHCR and has a UNHCR file number".[133]

Issue 5 – the Guardianship Act

93. It is agreed that Plaintiff M106 is under 18 and arrived in Australia otherwise than in the charge of a parent or adult relative.[134] It can also be inferred, from his assertion of a fear of persecution in his home country, that he entered Australia intending to become a permanent resident. On that basis, the Defendants accept that he is a "non-citizen child" within the meaning of s 4AAA of the *Immigration (Guardianship of Children) Act 1946* (***Guardianship Act***).

94. On that basis, the Minister is by force of s 6 of the Guardianship Act the "guardian of the person, and of the estate in Australia" of Plaintiff M106. Section 6 provides that the Minister has, as guardian, "the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have".

95. The departure of a non-citizen child from Australia is dealt with specifically by s 6A. A non-citizen child may not leave Australia except with the consent in writing of the Minister (s 6A(1)); but the Minister is not to withhold that consent unless satisfied that to grant it would be "prejudicial to the interests of the non-citizen child" (s 6A(2)). However, s 6A(4) provides that the section "shall not affect the operation of any other law regulating the departure of persons from Australia".

96. It should also be noted that a power of delegation exists under s 5 of the Guardianship Act; and that power has been exercised so as to delegate the Minister's powers and functions under the Act (with certain presently irrelevant exceptions) to various officers of the Minister's Department and of State and Territory agencies.[135] However, this is

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131 Cf Plaintiff's submissions [91] and [93].

132 It is a longstanding rule of the common law that criminal proceedings cannot continue unless the law that creates the crime is in force at all times until the proceeding is complete. If a criminal law becomes inoperative at any time prior to conviction, no conviction is possible, even if the law validly applied at the time the offence occurred: see, e.g., *Victorian Stevedoring and General Contracting Company Pty Ltd v Dignan* (1931) 46 CLR 73 at 105-106; *R v M'Kenzie* (1820) Russ. & R. 429; 168 E.R. 881. There is no evidence one way or the other as to whether this principle is recognised in Malaysian law. Contrary to the Plaintiff's approach, the question whether they could be prosecuted under s 6 of the *Immigration Act 1959* cannot be answered simply by reading the terms of that Act.

133 ASOF [53].

134 ASOF [20].

135 *Immigration (Guardianship of Children) Delegation 2011* (***IMMI 10/076)*** cls 8-9.

not relied on as an answer to the Plaintiff's argument, because that delegation does not prevent the performance or exercise of a power or function by the Minister.[136]

97. The Guardianship Act as originally enacted applied to "immigrant children" and was framed so as to rely on the immigration power. Section 6, in that form, was construed and upheld by this Court in *R v Director-General of Social Welfare (Vic); Ex parte Henry*.[137] The Act was amended by Part V of the *Migration (Miscellaneous Amendments) Act 1983* so as to relate to "non-citizen" rather than "immigrant" children, and to rely on the aliens power. Section 6A was added by the *Immigration (Guardianship of Children) Act 1948*.

98. Regulations had earlier been made under the *National Security Act 1939* appointing the Minister as guardian of the person of an "overseas child" on the child's arrival in Australia, but vesting that guardianship in an officer of a State government upon the child's "reception" into the State.[138] An "overseas child" was defined for these purposes as a person under 21 who had been accepted into the custody of the Commonwealth Government under an arrangement with the United Kingdom Government.[139] In his Second Reading Speech on the Bill for the Guardianship Act, the Minister said that it was intended to serve a "dual purpose": to allow the Minister to continue as guardian of overseas children who remained in Australia after the expiry of the earlier regulations; and to "enable the Minister to act as legal guardian of all children who will be brought to Australia in future as immigrants under the auspices of any governmental or nongovernmental migration organization".[140] The purpose of that guardianship was said to be to fulfil the Commonwealth's obligation "to see that child migrants are properly accommodated and cared for until they reach 21 years of age". This was to be done by exercising "control and supervision" over children who would be cared for by the various voluntary organisations that brought them to Australia. The addition of s 6A in 1948 was, according to the Minister, intended to "ensure that children will not be taken from or induced to leave Australia without the permission of the Minister, as their legal guardian".[141]

Minister's obligations as guardian

99. Section 6 expressly equates the Minister's position as guardian with that of a "natural guardian". At the time of enactment of the Guardianship Act that phrase was understood "in its original and strict sense" to refer to the guardianship of a father over his infant heir-apparent;[142] and, in a "wider sense", to guardianship of an infant child arising in the child's father or mother by parental right.[143] The powers and duties of the Minister under s 6 are therefore akin to those of a parent.[144]

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136 *Acts Interpretation Act 1901*, s 34AB(d).

137 (1974) 133 CLR 369.

138 National Security (Overseas Children) Regulations (SR No 202 of 1940), reg 3.

139 National Security (Overseas Children) Regulations (SR No 202 of 1940), reg 2.

140 *Hansard*, House of Representatives, 31 July 1946, 3369-3370.

141 *Hansard*, House of Representatives, 5 October 1948, 1122.

142 *Halsbury's Laws of England* (2nd ed 1935) Vol XVII [1427]. See also *Re Adoption of S* (1977) 28 FLR 427, at 430.

143 *Halsbury's Laws of England* (2nd ed 1935) Vol XVII [1430]; Simpson, *A Treatise on the Law and Practice Relating to Infants* (4th ed 1926), 149.

144 *Sadiqi v Commonwealth (No 2)* (2009) 181 FCR 1, at 63 [299].

100. As Gummow J pointed out in *Re Woolley; Ex Parte Applicants M276/2003*,[145] in recent times the principle affording paramount importance to the "best interests of the child" has "suffused much of the legal system". However, the "usual incidents of guardianship"[146] were understood in the first half of the 20th Century as involving fairly specified rights (to custody and control of an infant ward,[147] to control his or her education[148] and to grant or withhold consent to marriage)[149] and limited duties (of maintenance, education and advancement, but not involving any obligation of the guardian to expend his or her own resources).[150] A more contemporary understanding of the role of a parent or guardian, influenced by statutory reforms and international instruments, might place emphasis on responsibilities rather than rights and include obligations to address "the basic human needs of a child, that is to say food, housing, health and education";[151] but that development does not give the parent or guardian any capacity (or obligation) to control decisions made under statutory powers. Nor does it affect the construction of the language adopted by Parliament in 1946. The proposition that the Guardianship Act gives effect to emerging international norms (based on Australia's vote for a non-binding declaration, framed in aspirational terms)[152] is, with respect, far-fetched.

101. It may be accepted that a parent or other guardian, exercising powers or performing duties as such,[153] must treat the best interests of the child as the paramount consideration. However, it does not follow that that obligation (which is, in any event, of somewhat doubtful legal force)[154] displaces powers or duties which the guardian has in another capacity – especially if those powers or duties arise under statute and are to be exercised according to statutory criteria in the public interest.

102. So, for example, if a situation ever arose in which a child of the Minister became the subject of a potential exercise of discretionary power under the Act, it could scarcely be said that the Minister's parental duty (ie, as a "natural guardian") required an exercise of the power favourable to the child: the Minister's relationship with the child would be an irrelevant consideration. Similarly, the Minister's *quasi*-parental status as "guardian" of a non-citizen child does not give him the power, or impose on him the obligation, to intervene on the child's behalf in the performance of functions or the exercise of statutory powers under the Act. On the contrary, such obligations as exist to take into account the special position of minors arise from within the Act itself, either expressly[155] or by implication from the subject-matter, scope and purpose of the Act.[156]

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145 (2004) 225 CLR 1, at 59 [159]. See also the discussion of the development of international norms in *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524, at 534-538.

146 Cf *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 29, at 46-47 [86].

147 *Halsbury's Laws of England* (2nd ed 1935) Vol XVII [1443]; as to parents see Simpson, *A Treatise on the Law and Practice Relating to Infants* (4th ed 1926), Ch VII. See also *Re Woolley* (2004) 225 CLR 1, at 57-59 [157]-[160] per Gummow J.

148 *Halsbury's Laws of England* (2nd ed 1935) Vol XVII [1446].

149 *Halsbury's Laws of England* (2nd ed 1935) Vol XVII [1448].

150 *Halsbury's Laws of England* (2nd ed 1935) Vol XVII [1445]-[1447]. Such duties were generally of imperfect obligation: as to parents see Simpson, *A Treatise on the Law and Practice Relating to Infants* (4th ed 1926), Ch VIII.

151 *X* (1999) 92 FCR 524, at 535 [34].

152 Plaintiffs' Submissions [110].

153 Cf the authorities referred to in Plaintiffs' Submissions [108].

154 See *Re Woolley* (2004) 225 CLR 1, at 59 [159].

155 In s 4AA.

To the extent that "important protections" are found in the Act,[157] that is an argument *against* discovering overlapping protections (applicable only to some minors) in the Minister's role as guardian of certain children.

103. The point can be further illustrated in this way. The "Minister" referred to in s 6 of the Guardianship Act is the Minister "for the time being administering" that provision.[158] The role of guardian under s 6 could therefore be transferred, by purely executive action,[159] to another Minister. If that were done, it could not be said that that other Minister's obligations as guardian of a non-citizen child controlled decisions by delegates of the Minister for Immigration under the Act. Nor can the construction of the Guardianship Act or the Act be determined by the administrative arrangements that are in place from time to time.

104. The majority of this Court was therefore correct, in *WACB v Minister for Immigration and Multicultural and Indigenous Affairs*,[160] in holding that the Minister's obligations as guardian under the Guardianship Act were irrelevant to the construction of a provision of the Act. Kirby J reached the same conclusion on the basis that the general powers and obligations of the Minister as guardian were subject to the specific provision of the Act that was in issue (dealing with notification of a decision).[161] In *Sadiqi v Commonwealth (No 2)*,[162] McKerracher J applied that reasoning (it is submitted correctly) to s 198A.

Section 6A

105. Section 6A of the Guardianship Act deals specifically with the departure of non-citizen children from Australia and thus overlaps with the subject matter of ss 198 and 198A of the Act. Section 6A requires the Minister's consent for a non-citizen child to "leave Australia" and makes the Minister's satisfaction as to the interests of the child a prerequisite for any refusal of consent. If the IGOC Act manifested any legislative intention to override ss 198 and 198A, that intention would be expected to appear in s 6A rather than in the general (and somewhat unclear)[163] duties of the Minister as "guardian" under s 6.

106. Yet s 6A manifests a clear intention *not* to operate in the manner suggested by the Plaintiff. It is expressed not to affect the operation of any other law "regulating the departure of persons from Australia" (subsection (4)). Sections 198 and 198A are clearly laws of that kind. (If laws "regulating" departure from Australia meant only laws imposing limits or procedures on voluntary departure, subsection (4) would be otiose. The requirement for the Minister's consent would not "affect the operation" of any such laws; it would impose a requirement in addition to them.)

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156 Cf *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, at 40 per Mason J.

157 Cf Plaintiffs' Submissions [116].

158 *Acts Interpretation Act 1901*, s 19A(1)(c).

159 Ie, an amendment to the Administrative Arrangements Order. The current Order can be seen at http://www.comlaw.gov.au/Details/C2010Q00232. The nature and early history of such orders was discussed in Joint Committee of Public Accounts, *Third Report 1952-1953* (Commonwealth Parliamentary Papers, 1951-53, vol. 2, p. 507-530).

160 (2004) 210 ALR 190, at 201 [42].

161 (2004) 210 ALR 190, at 217 [106].

162 (2009) 181 FCR 1, at 51 [242]-[243].

163 *WACB* (2004) 210 ALR 190, at 201 [42].

107. Plaintiff M106 argues that the giving or withholding of consent under s 6A does not arise if the Minister, by the exercise of powers available to him, takes steps so that a child does not become subject to removal.[164] So much may be accepted; but that point simply directs attention back to the content of the Minister's obligations as guardian under s 6, and the extent to which those obligations bind the Minister and officers in the performance of statutory functions under the Act. Further, it is no answer to the constructional significance of s 6A (adverted to above), as an indicator of the extent to which the Guardianship Act was intended to displace the ordinary operation of laws dealing with the removal of persons from Australia.

10 108. The particular mechanism by which, Plaintiff M106 argues, the Minister was obliged to give effect to his obligations as guardian (so as to prevent the Plaintiff becoming liable for removal from Australia) was a decision to consider exercising his discretion under s 46A or s 195A of the Act.[165] The proposition that the Minister *must* consider exercising those powers appears to be essential to Plaintiff M106's claim for a declaration,[166] and his contention that there is no power to remove him under ss 198(2) or 198A.[167] That submission is untenable in light of the clear terms of ss 46A(7) and 195A(4), which provide that the Minister is not under any duty to consider exercising the relevant discretions. Plaintiff M106's argument involves redrafting those provisions so as to make them subject to an exception applying to persons to whom the
20 Guardianship Act applies. Such an exercise is beyond anything that a court would undertake in the course of construing statutory provisions.[168] If such violence needs to be done to the statutory language in order to achieve the "integration"[169] for which Plaintiff M106 contends, that is a sufficient indication that the proposed integration is misconceived. The impediments to any claim for relief based on alleged failure to exercise the jurisdiction in ss 46A and 195A are discussed further below.

109. The Guardianship Act and the Act operate in different realms of discourse. The Minister's status as guardian of Plaintiff M106 under the Guardianship Act is irrelevant to the application of ss 198 and 198A of the Act to him, and to the lawfulness of actions taken by officers pursuant to those provisions.

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164 Plaintiffs' submissions [120].

165 Plaintiffs' Submissions [120]-[124].

166 Plaintiff's Submissions [127].

167 Plaintiff's Submissions [128].

168 Cf *Marshall v Watson* (1972) 124 CLR 640, at 649 per Stephen J; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, at 113 per McHugh J (citing Lord Diplock in *Jones v Wrotham Park Estates* [1980] AC 74, at 105).

169 Plaintiffs' Submissions [118].

Issue 6 – Constructive failure to exercise jurisdiction

110. Plaintiff M106 argues that the Minister was obliged to consider exercise of his non-compellable discretionary powers as an aspect of the argument concerning the Guardianship Act.[170] Both Plaintiffs argue, apparently, that the Minister "fettered" his own powers and that this in some way leads to an "unlawful fetter on the officer exercising the s 198A(1) power.[171]

111. Sections 46A and 195A of the Act expressly provide that the Minister is not under any obligation to consider exercising the discretions which they confer.[172] That feature of the provisions is a complete answer to any suggestion that the Minister has failed, constructively or otherwise, to exercise jurisdiction under these provisions. Failure to take action is of no significance in the absence of some duty to take it.

112. It also follows from this aspect of ss 46A and 195A that, even if some relevant error could be identified, mandamus would not lie to require the Minister to take any action pursuant to these provisions; and there would be no utility in granting certiorari to quash any decisions or recommendations preparatory to the possible exercise of the discretions conferred.[173] Plaintiff M106 seeks a declaration that the Minister made an error of law;[174] Plaintiff M70 does not. The utility of any such declaration is far from clear.

113. Further, the only criterion for the exercise of either power is the Minister's satisfaction as to the public interest,[175] which is as broad and diffuse a criterion as there can be.[176] Conferral of a non-compellable discretionary power in those terms, on a political officer and with a requirement for exercises of the power to be tabled in the Parliament,[177] indicates a legislative intention that the issues to be considered or not considered in connection with possible exercises of the discretion are to be a matter for the repository of the power. It is open to the Minister to decide in advance the circumstances in which he is prepared to consider exercising such a power, and to issue instructions to his Department that only cases of a certain kind are to be brought to his attention.[178] Accordingly, and quite apart from the barriers to any grant of relief noted above, the complaint which the Plaintiffs make about the Minister's refusal to consider their claims under ss 46A and 195A (that the Minister applied a "policy or rule") does not identify a ground upon which any relief would lie.

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170 Plaintiffs' Submissions [120]-[127].

171 Plaintiffs' Submissions [101]-[102].

172 Sections 46A(7), 195A(4).

173 *Plaintiff M61/2010E v Commonwealth* (2010) 272 ALR 14, at 37 [99]-[100].

174 Amended Application [6.3].

175 Sections 46A(2), 195A(2).

176 See, e.g., *Australian Securities Commission v Deloitte Touche Tohmatsu* (1996) 70 FCR 93 at 123; *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216; *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 at 162 [20].

177 Sections 46A(6), 195A(6).

178 See *Plaintiff M61* (2010) 272 ALR 14, at 31 [70]; *Bedlington v Chong* (1998) 87 FCR 75, at 80.

PART VII ORDERS SOUGHT

114. The Applications to show cause should be dismissed with costs.

Date: 18 August 2011

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