IN THE HIGH COURT OF AUSTRALIA **No. M79 OF 2012**

MELBOURNE REGISTRY

BETWEEN:

PLAINTIFF M79/2012

Plaintiff

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP

Defendant

DEFENDANT'S SUBMISSIONS (ANNOTATED)

Filed for the Defendant:
SPARKE HELMORE
Lawyers
Level 16
321 Kent Street
SYDNEY NSW 2000

Ref: DEP020-00156
Contact: Rohan White
DX 282 SYDNEY
Ph: 02 9260 2427
Fax: 02 9260 2486
Email: Rohan.White@sparke.com.au

PART I CERTIFICATION

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

PART II ISSUES

2. The issues in this proceeding are:

   2.1. whether the Defendant (**the Minister**) had power under s 195A of the *Migration Act 1958* (Cth) (**the Act**) to grant the Plaintiff a temporary safe haven (class UJ subclass 449) visa (**the TSH Visa**);

   2.2. whether the TSH Visa was granted for an improper purpose; and

   2.3. whether the protection visa application made by the Plaintiff on 18 September 2012 was valid (**the PV Application**).

3. Those issues arise in the following circumstances (which flesh out the Plaintiff's summary).

4. On 7 February 2010 the Plaintiff arrived in Australia at Christmas Island without a visa and was detained.[1] On 19 April 2010, he made a request for a Refugee Status Assessment. On 9 June 2010, an officer determined that the Plaintiff was not a refugee, and on 17 May 2011 an Independent Merits Reviewer reached the same conclusion. However, the Plaintiff sought judicial review with respect to the Independent Merits Reviewer's recommendation, and his detention continued while that proceeding was pursued.

5. On 12 April 2012 the Minister, acting pursuant to a policy to release certain groups from immigration detention while their asylum claims were assessed or judicial review proceedings were underway,[2] exercised his power under s 195A of the Act to grant simultaneously[3] to the Plaintiff:[4]

   5.1. a temporary safe haven (class UJ subclass 449) visa (**the TSH Visa**); and

   5.2. a bridging E (class WE subclass 050) visa (the **First Bridging Visa**).

6. Similar decisions were made at various times with respect to 2,383 offshore entry persons.[5]

---

1 SCB 12 at [13].
2 SCB 88 at [3].
3 SCB 89 at [6], [8]; SCB 23 at [10].
4 SCB 33 at [4] (Decision instrument); SCB 40-41 (notification letter).
5 SCB 90 at [10].

7. The Minister would not have granted the First Bridging Visa but for the grant of the TSH Visa,[6] because the grant of the First Bridging Visa alone would have permitted the Plaintiff to start the refugee assessment process afresh by lodging a valid application for a protection visa. That would have wasted the significant resources that had already been deployed in assessing protection claims for the purpose of informing the consideration by the Minister of whether to exercise his personal public interest powers to permit the lodgement of a valid protection visa application.[7]

8. The effect of the grant of the TSH Visa was that, by reason of s 91K of the Act, the existing refugee assessment process could continue to its conclusion for the purpose of informing the Minister's consideration of the possible exercise of his personal public interest power under s 91L of the Act.[8] The grant of the TSH Visa meant that the Plaintiff (and others in the same position) could be released from immigration detention without that release otherwise altering their legal rights.

9. The grant of the TSH Visa alone would have permitted the Plaintiff to reside in the community while the assessment of his claims was completed. There was no need to grant a bridging visa to achieve that object. The bridging visas were granted because the conditions attached to those visas were more beneficial than those available under a TSH Visa (including access to various support services and programs).[9] It was therefore to the advantage of the Plaintiff that the TSH visa have a short duration, because only once that visa ceased did the First Bridging Visa take effect (pursuant to ss 68(4) and 82(3) of the Act).

10. In summary, the Minister contends that:

    10.1. the TSH Visa was validly granted;

    10.2. alternatively, if the TSH Visa was invalid, the First Bridging Visa was also invalid because its grant was not severable from the grant of the TSH Visa;

    10.3. if both the TSH Visa and the First Bridging Visa were invalid, s 46A(1) prevented the Plaintiff from making a valid application for a visa.[10]

---

6 SCB 89 at [9].

7 SCB 89 at [5]-[6], [9]. The grant of the bridging visa alone would have had that effect because s 46A(1) applies only to unlawful non-citizens, and thus has no application to a non-citizen who holds a bridging visa.

8 SCB at [6].

9 SCB 89 at [7]; SCB 23 at [10].

10 The Plaintiff says, and the Minister accepts, that the effect of the granting of the Second Bridging Visa on 15 October 2012 (Special Case at [20]) means that, if the TSH Visa is invalid, the Plaintiff could now make a further application for a protection visa, and that further application would be valid (Plaintiff's Submissions at footnote 26). However, to date and notwithstanding both these proceedings and the extant judicial review proceedings, the Plaintiff has chosen to make no such further application. In those circumstances, the issues in 10.2 and 10.3 should not be dismissed as moot.

PART III 78B NOTICES

11. The Minister considers that notices pursuant to s 78B of the *Judiciary Act 1903* (Cth) are not required.

PART IV CONTESTED MATERIAL FACTS

12. The material facts are set out in the Special Case. The Minister does not contest the summary of material facts in the Plaintiff's Submissions nor the Plaintiff's Chronology. It will be necessary below to elaborate on the status of the Plaintiff as a person detained after being found in an excised offshore place.

PART V APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

13. The Plaintiff's statement of applicable constitutional provisions, statutes and regulations is accepted, save that the following additional provisions are identified: *Migration Act*, ss 34, 35, 40, Division 4A of Part 2; *Acts Interpretation Act 1901* (Cth), ss 13, 23 (annexed to these submissions).

PART VI ARGUMENT

Summary

14. The TSH Visa was validly granted for the following reasons:

    14.1. Section 195A confers a broad remedial power on the Minister to grant a visa to a person in detention so as to permit his or her release from detention.

    14.2. The power conferred by s 195A is to be exercised in the "public interest", not by reference to the criteria that ordinarily govern the grant of visas. Thus, when exercising the power under s 195A, the Minister is not subject to:

        (a) the Regulations; or

        (b) the requirement imposed by s 65 that if the Minister is not satisfied that a visa applicant meets the criteria for a visa he must refuse to grant the visa.

    14.3. Accordingly, the Minister can grant a TSH Visa in the exercise of his power under s 195A whether or not the criteria for that visa are satisfied (irrespective of whether those criteria are found exclusively in the Regulations, or partly in the Act and partly in the Regulations).

    14.4. Further, s 37A of the Act does not create the criterion for the grant of a TSH Visa contended for by the Plaintiff, namely that a person to whom the visa is granted has a need for protection in response to a humanitarian emergency involving the actual or likely displacement of the person from his or her place

of residence and a grave fear for his or her personal safety because of the circumstances of the displacement.

14.5. Although not strictly arising from the issues as joined between the parties, if the Court were to consider whether s 37A independently imposes a criterion for the grant of a TSH visa:

(a) the better view is that no criterion is imposed;

(b) alternatively, if a criterion is imposed, that criterion could only be that the person to whom the visa is granted "needs temporary safe haven" as a consequence of circumstances in their country of residence; and the Plaintiff has not advanced a case that such a criterion was not satisfied in his case.

14.6. Section 37A does not require that a TSH Visa be issued for the first time only to a person who needs to travel to Australia.

14.7. The grant of a TSH Visa to a person to facilitate the person's release from detention, while also preserving any steps in the refugee assessment processes that have previously occurred, is not an improper purpose. It was open to the Minister to conclude that the grant of such a visa was in the "public interest".

15. As a consequence of the matters in paragraph 14, s 91K applied, and continues to apply, to prevent the Plaintiff from making a valid application for a protection visa. For that reason, the PV Application was not a valid application for a visa.

16. If, contrary to the Minister's contention, the TSH Visa was not validly granted, then the First Bridging Visa is also invalid. That follows because the Minister made a single decision under s 195A, not two separate decisions. If the grant of the TSH Visa was invalid, there was no valid decision to grant the First Bridging Visa.

17. As a consequence of paragraph 16 above, s 46A(1) applied to prevent the Plaintiff from making a valid application for a protection visa prior to the grant of the Second Bridging Visa on 15 October 2012. For that reason, the PV Application was not a valid application.

Question 1: Was the Plaintiff validly granted the TSH Visa?

Nature and scope of power under s 195A to grant a visa

18. Section 195A relevantly provides as follows:

Persons to whom section applies

(1) This section applies to a person who is in detention under section 189.

Minister may grant visa

(2) If the Minister thinks that it is in the public interest to do so, the Minister may grant a person to whom this section applies a visa of a particular class (whether or not the person has applied for the visa).

(3) In exercising the power under subsection (2), the Minister is not bound by Subdivision AA, AC or AF of Division 3 of this Part or by the regulations, but is bound by all other provisions of this Act.

19. Aspects of s 195A, as relevant to this case, should be observed.

10 20. **First, breadth of s 195A**: Section 195A is in broad terms – the only constraints upon the Minister's decision to grant a visa are:

20.1. that the person to whom the visa is to be granted is in detention under s 189; and

20.2. that the Minister thinks it is in the public interest to grant the visa.

The power is expressed in a manner which deliberately frees it from the usual constraints applicable to the granting of visas contained in Subdivisions AA (which 20 concerns applications for visas, and includes ss 45, 46A and 47), AC (which concerns the grant of visas, and includes s 65) or AF (which governs bridging visas) of Division 3 of Part 2, or by the Regulations: see s 195A(3).

21. Thus, when exercising the power under s 195A in this case to grant the TSH Visa, the Minister was not subject to:

21.1. the criteria set out in Subclass 449 in Schedule 2 of the Regulations (as the Plaintiff accepts); or 30

21.2. the requirement imposed by s 65 of the Act that, if not satisfied that the Plaintiff meets the criteria for a visa, the Minister must refuse to grant that visa (which the Plaintiff does not address).

22. The exclusion of s 65 is particularly significant, because it has the consequence that the Minister is able to grant a visa irrespective of whether any criteria in the Act that would otherwise govern the grant of the visa are satisfied. That is reflected in the analysis of all members of the Court in *Plaintiff S10-2011 v Minister for Immigration* 40 *and Citizenship*, who characterised s 195A as a "dispensing provision" or "dispensation section". As French CJ and Kiefel J said:[11]

> The dispensing provisions and other like provisions in the Act have a distinctive function in its legislative scheme. The Act creates a range of official powers, duties and discretions, particularly in relation to the grant of visas, which are tightly controlled by the Act itself and, under the Migration Regulations, by conditions and criteria to be satisfied before those powers and discretions can be exercised. The dispensing provisions stand apart from the scheme of tightly controlled powers and discretions. They confer upon the

50 [11] (2012) 86 ALJR 1019; [2012] HCA 31 at [30] (footnotes omitted) (emphasis added); see also [57] and [99] (Gummow, Hayne, Crennan and Bell JJ); [114] and [118] (Heydon J).

> Minister a degree of flexibility allowing him or her **to grant visas which might not otherwise be able to be granted because of non-satisfaction of substantive or procedural requirements.**

23. Similarly in *Plaintiff S10-2011*, Gummow, Hayne, Crennan and Bell JJ said that the "legislative supposition" upon which powers including s 195A were conferred is "that there will be cases in which the requirements which otherwise control the administration of the Act are not to dictate a particular outcome",[12] and that against that background it was "not surprising that the focus of the four dispensation sections [including s 195A] is upon the Minister's view of the public interest **rather than upon satisfaction of conditions for the issue of visas**".[13] That clearly acknowledges that the criteria for visas do not govern the exercise of the power conferred by s 195A.

24. **Second, breadth of the "public interest"**: The use of the phrase "public interest" to identify the prime constraint on the power conferred by s 195A reveals a legislative choice to confer a power of broad import on the Minister.[14] As French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ said in *The Pilbara Infrastructure Pty Ltd v The Australian Competition Tribunal*:[15]

> It is well established that, when used in a statute, the expression "public interest" imports a discretionary value judgment to be made by reference to undefined factual matters. As Dixon J pointed out in *Water Conservation and Irrigation Commission (NSW) v Browning*, when a discretionary power of this kind is given, the power is "neither arbitrary nor completely unlimited" but is "unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view".

25. A power granted by reference to the "public interest" is of particularly broad width when conferred upon a Minister. As Hayne J pointed out in *Minister for Immigration and Ethnic Affairs v Jia Legeng*, "[c]onferring power on a Minister may well indicate that a particularly wide range of factors and sources of information may be taken into account, given the types of influence to which Ministers are legitimately subject".[16] Heydon J made a similar point in the *Malaysia Declaration Case*, stating:[17]

> The only criterion for the exercise of the powers in ss 46A and 195A is the "public interest". This is an extremely broad and diffuse criterion. The correct interpretation of legislation conferring a non-compellable discretionary power in those terms, on a political officer who is obliged to table in the Parliament exercises of the power under ss 46A(6) and 195A(6), and to submit to questioning and debate about them, is that the issues to be considered or not considered in connection with possible exercises of the discretions are to be a matter for the repository of the power.

---

12 (2012) 86 ALJR 1019; [2012] HCA 31 at [99(v)].

13 (2012) 86 ALJR 1019; [2012] HCA 31 at [99(ix)] (emphasis added).

14 *ICM Agriculture Limited v Commonwealth* (2009) 240 CLR 140 at [20] (French CJ, Gummow and Bell JJ).

15 (2012) 86 ALJR 1126; [2012] HCA 36 at [42] (footnotes omitted). See also *Osland v Secretary, Department of Justice (No 2)* (2010) 241 CLR 320 at 329-330 [13]-[14] per French CJ, Gummow and Bell JJ; *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 (Mason CJ, Brennan, Dawson and Gaudron JJ).

16 (2001) 205 CLR 507 at 565 [187]. See also at 528 [61] (Gleeson CJ and Gummow J).

17 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 218 [190].

26. **Third, position of the particular Plaintiff**: In bringing together the dispensing power of s195A with the public interest considerations that might legitimately inform it, in the instant case, one must, as Gummow, Hayne, Crennan and Bell JJ observed in *Plaintiff S10-2011*, attend to the position of the particular plaintiff(s).[18]

27. The present Plaintiff, unlike the plaintiffs in *Plaintiff S10-2011*, but closer to the plaintiff in the *Offshore Processing Case*,[19] was detained on being found in an excised offshore place. The consequences for the Plaintiff are that:

    27.1. he was detained under s189(3);

    27.2. he was an unlawful non-citizen: ss 13 and 14;

    27.3. he was an off-shore entry person: s 5 definition;

    27.4. by reason of 27.22 and 27.33, he could not make a valid application for a visa: s 46A(1), unless the Minister raised the bar, under s 46A(2);

    27.5. absent raising that bar, therefore, he had no right to engage the review processes of the Act;

    27.6. recognising the ruling in the *Offshore Processing Case*, a process was put in place to afford the Plaintiff procedural fairness, which led to an adverse recommendation to the Minister (against which the Plaintiff has sought judicial review).

28. In summary, the Plaintiff may be described as a person, as of 12 April 2012, whom the Act required to remain at that time in detention, without a visa or any immediate lawful right to apply for one or otherwise remain in Australia, pending the outcome of processes which were being carried out that might or might not alter that status.

29. The question for the Minister, in the public interest, was whether simply to allow that series of events and processes to continue to play out or to dispense with them by creating a different regime.

30. The Minister's decision involved the fashioning of the following regime in place of how the Act and procedural fairness would otherwise have played out:

    30.1. the Plaintiff gained the benefit of an immediate release from detention;

    30.2. the Plaintiff gained the benefit of an almost immediate right to work in the community, notwithstanding no prior right to do so;

---

[18] *Plaintiff S10-2011* (2012) 86 ALJR 1019; [2012] HCA 31 at [59]-[61], [78]-[80].

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

30.3. the Plaintiff's entitlement to have a procedurally fair decision on whether to permit him to make a valid application for a protection visa, through a process already set in play, was preserved; and

30.4. the Plaintiff suffered the restriction (if in truth it is a restriction) that his attempts to convert his status from unlawful non-citizen to lawful non-citizen were confined to the existing process preserved under 30.3; and that he could not use the fresh benefits he received under 30.1 and 30.2 as a launch-pad to start further claims.

31. The Minister thereby focused on the critical question: was the public interest better served by a release of the Plaintiff from detention, on terms, or by continued detention, on the terms otherwise dictated by the Act.

32. And in fashioning "the terms" for the release from detention, the Minister focused on, and was entitled to focus on, whether the category of visa known as a TSH Visa would achieve the public interest objectives. Whether the Plaintiff otherwise would meet all criteria for such a visa, and the legal and practical consequences of granting such a visa, became matters that, to the extent that the Minister wished to consider them, were relevant only through the public interest prism.

33. **Fourth, support from context:** Based on the above points, it is not necessary to go beyond the plain terms of s 195A to conclude that it supports the grant of a TSH Visa, irrespective of any criteria that may or may not be found in s 37A of the Act. However, the circumstances in which s 195A was introduced into the Act further support a broad construction of the power s 195A confers, because they demonstrate that that power is remedial in nature: it was designed to equip the Minister with a wide power to effect the release of unlawful non-citizens from detention. There is no suggestion that any fetter on the kinds of visa that could be granted was intended. Indeed, the indications are to the contrary. Thus, the Explanatory Memorandum to the *Migration Amendment (Detention Arrangements) Bill 2005* (Cth) stated:[20]

> Subsection 195A(2) empowers the Minister to grant to a person who has been detained in accordance with section 189 a visa of a particular class ... if the Minister thinks that it is in the public interest to do so. This is a non-compellable, discretionary power dependent upon the Minister's consideration that such grant of a visa would be in the public interest. **It is intended that it will be used to release a person from detention where it is not in the public interest to continue to detain them.**
>
> Subsection 195A(3) specifies that where the Minister chooses to exercise the discretionary power in subsection (2), he or she is not bound by provisions contained in Subdivisions AA (Applications for visas), AC (Grant of visas) or AF (Bridging visas) of Division 3 of Part 2 of the Act or by the regulations, but is bound by all other provisions of the Act. This is to clarify that in the exercise of the section 195A power, the Minister is

[20] Explanatory Memorandum at [20]-[21] (emphasis added).

not bound by the usual requirements that apply to the grant of visas. The Minister will have the **flexibility to grant any visa that the Minister considers is appropriate** to that individual's circumstances....

34. For the above reasons, provided the Minister thinks it in the public interest to do so, when exercising his power under s 195A the Minister can grant any visa, regardless of whether the person to whom he proposes to grant the visa satisfies any criteria that otherwise would be relevant to a grant of a visa of that kind. It is irrelevant that some such criteria may be found in parts of the Act that are not dis-applied by s 195A(3), because the provisions that create visa criterion derive their legal effect only through the operation of s 65[21] (a point emphasised in the note to s 65(1), which expressly refers to s 195A). The statement in the Explanatory Memorandum that the Minister can grant **any visa** that he considers appropriate under s 195A is correct because the exclusion of Subdivision AC (including s 65) has the consequence that visa criteria specified in parts of the Act that are **not** separately excluded by s 195A(3) are nevertheless rendered irrelevant.

35. The contrary view would mean, amongst other things, that s 195A could not be used to grant protection visas unless the Minister was first satisfied that the criterion in s 36(2) were met. That would be contrary to the terms, remedial purpose and explanatory material pertaining to s 195A.

36. Finally, the power conferred by s 195A operates in a somewhat similar manner to the power conferred on a court by s 447A of the Corporations Law. The exercise of power by the Minister under section 195A does not circumvent the operation of the Act; rather, s 195A is to be understood as an integral part of the legislative scheme that permits alterations to the way in which the Act is to operate in relation to those persons to whom it applies.[22]

37. For the above reasons, it is unnecessary to decide whether s 37A in its operation independently of s 195A creates the mandatory criterion for the grant of a TSH Visa contended for by the Plaintiff. It is only if it was not open to the Minister to decide that it is in the "public interest" to grant the TSH Visa that any question of power arises with respect to s 195A. No argument of that kind having been advanced, the attack on the validity of the TSH Visa should be dismissed.

---

21 See *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372; [2012] HCA 46 at [179] (Hayne J), noting that it is s 65 of the Act that "gives practical effect to the prescription of criteria under s 31(3)".

22 *Australasian Memory Pty Limited v Brien* (2000) 200 CLR 270 at [24].

Construction and effect of s 37A: the Plaintiff's mandatory criterion is erroneous

38. If, contrary to the above, it is necessary to examine the operation of s 37A, the starting point is to focus on the precise terms of the mandatory criterion (or criteria) that the Plaintiff seeks to insert into s 37A(1). The elements of that suggested criterion seem to be:[23]

    38.1. that the need for protection responds to a "humanitarian emergency";

    38.2. more specifically, that the emergency involves the "actual or likely displacement of the person from his or her place of residence and a grave fear for the person's personal safety because of the circumstances of the displacement"; and

    38.3. that, in the case of an initial TSH Visa, the person must be outside Australia at the date of the grant of the visa, needing to "travel to, enter and remain in" Australia in order to escape the harm arising from the humanitarian emergency (this aspect of the Plaintiff's argument is dealt with separately, below).

39. Even if mandatory criteria were read into s 37A, which is to be doubted (see below), they should not be criteria of the rigid and restrictive kind contended for by the Plaintiff.

40. Section 37A does not in terms establish any mandatory criterion for the grant of a TSH Visa, let alone those criteria contended for by the Plaintiff. A clear contrast can be drawn with s 36(2), which does establish a legislative criterion for the grant of a protection visa.

41. It is not disputed that s 37A was introduced into the Act at the time of a humanitarian response to the genocide in Kosovo.[24] However, the visa is not confined to persons coming from that region, or persons suffering a similar plight, either on its face or by criteria imposed by the Regulations.[25] On the contrary, the Regulations envisage that the grant of a TSH Visa may be appropriate in a range of circumstances.[26] Those Regulations are authorised by s 31(3) of the Act, which expressly contemplates that the Regulations may prescribe criteria for the class of visas created by s 37A. In those circumstances, there is no necessity to imply any additional criteria from the Act itself, let alone the highly rigid and restrictive criteria propounded by the Plaintiff, particularly given that Parliament has explicitly created criteria for some kinds of

---

23 Plaintiff's Submissions at [59]-[62]

24 Second Reading Speech to the Migration Legislation Amendment (Temporary Safe Haven Visas) Bill 1999 (Cth), *Hansard*, Senate, 21 April 1999 at 3965-3966.

25 See item 449.221 of Schedule 2 of the *Migration Regulations 1994* (Cth).

26 Migration Regulations, clauses 448.221 and 449.221.

visas and has otherwise left it to the Regulations both to create categories of visa and to prescribe their criteria.

42. Further, as the Plaintiff correctly observes, in the present case the Regulations are not applicable (see s 195A(3)). Accordingly, they cannot be a source for the mandatory criterion that the Plaintiff asserts.

43. In addition, the note to s 37A(1) states that a TSH Visa "is granted to a person to give the person temporary safe haven in Australia". The note is not sufficient in itself to generate a criterion for the grant of a TSH Visa, let alone the specific criterion contended for by the Plaintiff. Although the note now forms part of the Act (by contrast to the position when s 37A was first enacted),[27] it is not itself a substantive provision.[28] The note assists only in so far as it aids in construing the language used in the substantive provisions in s 37A.

44. All that remains is the name of the visa ("temporary safe haven visa"). This is an insufficient basis on which to imply the imposition of a criterion (or criteria) in the rigid and restrictive manner propounded by the Plaintiff.

45. In light of the manner in which the issues are joined between the parties, it is not strictly necessary for this Court to resolve two further issues:

    45.1. The first of these issues is whether, independently of s 195A, s 37A(1) contains any criterion for the grant of a TSH Visa. The better view is that s 37A(1) does not create any criteria for the grant of a TSH Visa at all. It simply creates and names a class of visa — "there is a class of temporary visas ... **to be known as** temporary safe haven visas". That drafting is similar to that employed in ss 34(1), 35(1) and 36(1). In the context of s 36(1), it has never been suggested that the formulation creates a criterion that must be satisfied before a protection visa can be granted.

    45.2. The other issue that it is not strictly necessary to determine is whether, if s 37A does contain a criterion other than that contended for by the Plaintiff, in what terms should the criterion be articulated? The Minister contends that the criterion could only be that the person to whom the visa is granted needs temporary safe haven as a consequence of the circumstances in their country

---

27 *Acts Interpretation Act 1901* (Cth) s 13.

28 Section 13 was introduced into the *Acts Interpretation Act* by the *Acts Interpretation Amendment Act 2011* (Cth). The Explanatory Memorandum concerning that provision stated that "new section 13 would not prescribe how much weight (if any) should be given to particular material forming part of an Act in interpreting the Act. Of course, primacy should normally be given to the substantive provisions of an Act over headings and explanatory notes in interpreting an Act." That Act expressly gives retrospective operation to the amendment to s 13: see *Acts Interpretation Amendment Act 2011* (Cth) Sch 3, item 1.

of residence. There is no textual foundation for any more detailed or more demanding criterion.

46. The Plaintiff has not advanced a case that a criterion in the terms postulated in 45.2 was not satisfied in relation to the Plaintiff. Nor does the Special Case support such an argument, The Plaintiff has sought asylum in Australia based on his claim to have a well-founded fear of persecution in Sri Lanka.[29] Whether that claim is ultimately good or bad, and the Plaintiff continues to maintain that it is good (otherwise these proceedings are just an exercise in delay), the material before the Court does not establish that the Plaintiff did not need temporary safe haven as a consequence of the circumstances in Sri Lanka.

Construction and effect of s 37A: effect of "travel to, enter and remain in"

47. It is appropriate to deal separately with the aspect of the Plaintiff's argument based on the words "travel to, enter and remain in" in s 37A.

48. The description of a TSH Visa in s 37A as a visa "to travel to, enter and remain in Australia" does not create a requirement that a TSH Visa can be granted for the first time only to a person who is outside Australia (being a person who therefore needs to "travel to" Australia).

49. The Plaintiff accepts, correctly, that a **second or further** grant of a TSH Visa may be made to a person within Australia.[30] However, the Plaintiff asks the Court to read s 37A as if it imposes a restriction on the grant of a TSH Visa that varies depending on whether a person has previously been granted a TSH Visa. Acceptance of that submission would require the Court to rewrite s 37A, and to treat it as if it said "on the first grant, to travel to, enter and then remain, and on a subsequent grant, to travel to, enter or remain, in Australia".

50. There is no basis for interpreting s 37A in that way.

    50.1. The use of the term "and" to connect "travel to", "enter" and "remain in" does not require the construction for which the Plaintiff contends. Although the ordinary meaning of "and" is conjunctive,[31] it may also be used disjunctively.[32] Close attention to context and purpose is therefore required in discerning the relevant usage.

---

29 SCB 48ff, in particular SCB 66-69.

30 Plaintiff's Submissions at [61].

31 *Victims Compensation Fund v Brown* (2003) 77 ALJR 1797 at [13] (Heydon J, with whom McHugh ACJ, Gummow, Kirby and Hayne JJ agreed).

32 See, eg, *Thompson v Randwick Corporation* (1951) 81 CLR 87 at 91 (the Court).

50.2. Here, as the Plaintiff concedes, "and" is used disjunctively for a second or further grant of a TSH Visa. That reading is confirmed by s 91K of the Act, which expressly contemplates that a TSH visa may be sought by a person who is already in Australia. The Regulations likewise contemplate that a TSH visa may be sought by a person who is already in Australia, and thus has no need to "travel to" Australia.[33]

50.3. If the words "travel to, enter and remain" do not prevent the grant of a second or subsequent TSH Visa to a person who is already in Australia, there is no textual basis upon which they could prevent the grant of an initial TSH Visa to such a person. The meaning of the words cannot vary with the facts particular to a given visa applicant. Nor is there any reason to attempt to give the words of s 37A(1) such a differential operation. There are a variety of circumstances in which a person who is already in Australia might become (or have already been) eligible for a TSH Visa. For example, a person might have travelled to Australia on a tourist visa and, while here, events in his or her home country might occur that satisfy the criteria in the Regulations.[34] There is no reason to imply a restriction on the power of the Minister to grant a remedial visa of this kind that would prevent its grant to a person in such circumstances.

51. The same composite phrase "travel to, enter and remain in" Australia is used in s 38A of the Act, which provides for a class of temporary visas to be known as enforcement visas.

51.1. Enforcement visas are governed by Division 4A of Part 2. That Division expressly provides that in certain circumstances an enforcement visa is granted to a person within the migration zone (see, e.g., s 164B(2)).

51.2. Thus, in s 38A the composite phrase does not impose a limitation such that the visa may only be granted to a person who needs to travel to Australia. The phrase in that section must use "and" disjunctively.

51.3. Given that the composite phrase is used disjunctively in s 38A, the same construction should apply where the same phrase appears in other parts of the Act.[35]

---

33 See, in particular, *Migration Regulations 1994* (Cth) reg 2.04(2)(b) and Sch 1, item 1223B and Sch 2, clause 449.412, which contemplates that a TSH visa (subclass 449) may be granted to a person who is in Australia.

34 Cf Plaintiff's Submissions at [61].

35 *Taikato v R* (1996) 186 CLR 454 at 461-462 (Brennan CJ, Toohey, McHugh and Gummow JJ), citing *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618. See also *Bennion on Statute Law* (3rd edn, 1990) at 188: "It is presumed that a word or phrase is not to be taken as having different meanings within the same instrument, unless this intention is made clear. Where the context shows that the term has a particular meaning in one place, it will be taken to have that meaning elsewhere. Thus Cleasby B said: 'It

52. Other provisions in the Act likewise support the contention that the use of the composite phrase "travel to, enter and remain in Australia" permits the Minister to grant the visa for the person either to travel to, enter and remain in Australia or simply to remain in Australia. Thus:

52.1. Section 40(1) provides that **all** visas may be subject to regulations that provide that visas only be granted in specified circumstances. Section 40(2) provides that the circumstances may include that the person is outside Australia.

52.2. Section 31(4) provides that the regulations may prescribe whether visas of a class are visas to travel to and enter Australia, or to remain in Australia, or both.

These provisions suggest that a requirement that a person to whom a visa is to be granted be outside Australia will be imposed by regulation, rather than found in the section that creates the visa class (save where the language of the section is unequivocal, as in ss 34 and 35, those being visa classes that are expressly excluded from s 31(3) of the Act).

53. For the above reasons, the word "and" in s 37A(1) should be construed disjunctively. While some other provisions of the Act use "or" when dealing with similar concepts, the Plaintiff is correct to acknowledge that the language of the Act is inconsistent.[36] It therefore does not provide any clear basis for any contrary construction of s 37A.

54. In support of his interpretation of s 37A, the Plaintiff relies on what he describes as "legislative history and other extrinsic materials".[37] The factual material to which the Plaintiff refers goes beyond the agreed facts in the special case (and further it plainly involves "speculation").[38] The material ought be disregarded for that reason. But the material is irrelevant in any event because the Plaintiff seeks to use the circumstances in which s 37A of the Act was introduced, and the manner in which the visa class has since been administered, to limit the scope of the section. But even if the "facts" to which the Plaintiff refers were included in the special case and were properly before the Court, they would not assist as aids to the construction of s 37A.[39]

---

is a sound rule of construction to give the same meaning to the same words occurring in different parts of an Act of Parliament' (*Courtauld v Legn* (1869) LR 4 Ex 126, 130)."

36 Plaintiff's Submissions at [35]-[46]. Likewise, the use of terminology in the Regulations in not uniform: Plaintiff's Submissions at [52].

37 Plaintiff's Submissions at [53]-[57].

38 In particular, the material in footnotes 42-46 of the Plaintiff's Submissions.

39 See discussion in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at [13] (French CJ), [127]-[128] (Gummow, Hayne, Crennan, Bell JJ), [225] (Kiefel J), in relation to the Respondent's attempt there to rely upon the contemplated use, and subsequent actual use, of s 198A of the Act to allow offshore processing in Nauru.

No improper purpose in granting the TSH Visa

55. In assessing whether the grant of the TSH Visa was for an "improper purpose", the Plaintiff's focus on the note to s 37A is apt to mislead.[40] So is the submission that the TSH Visa was "purportedly granted" pursuant to clause 449.221(2) of Schedule 2 to the Regulations.[41] The propriety of the Minister's grant of the TSH Visa is to be assessed against s 195A, because that is the section under which the Minister acted in granting the visa. Accordingly, whether the Minister acted for proper and improper purposes must be identified by reference to the "public interest", not by reference to whether the grant was for the purpose of providing the Plaintiff with "safe haven in response to a humanitarian emergency".

56. The Plaintiff was granted a TSH Visa to facilitate his release from detention while he pursued his application for judicial review of the recommendation of an Independent Merits Reviewer that he not be recognised as a refugee.[42] The decision to grant the TSH Visa is properly characterised as having two interlinked purposes, neither of which is improper:

    56.1. It was a proper purpose to grant the Plaintiff the TSH Visa to allow him to be released from detention. The management of the mandatory detention regime, the potential for future pressures on that regime, and the governmental decision to take steps to achieve the release of groups of offshore entry persons,[43] are matters the Minister was entitled to regard as making it in the public interest to grant the TSH Visa.

    56.2. It was likewise a proper purpose to grant the Plaintiff the TSH Visa, as opposed to some other visa, because the characteristics of the TSH Visa (including that its grant attracted the statutory bar in s 91K) were such that its grant would enable the Minister to preserve the existing assessment process in relation to the Plaintiff. The Minister regarded the preservation of existing assessment processes as necessary to avoid wasting the resources already deployed in carrying out the refugee status assessment and independent merits review processes[44] for the Plaintiff and some 2,383 other offshore entry persons in respect of whom similar decisions were made.[45] That objective

---

40 Plaintiff's Submissions at [69].

41 Plaintiff's Submissions at [59].

42 SCB 33 at [4] (addressing the people listed in Table 2, which included the Plaintiff).

43 Minister's Affidavit at [3], [6] – SCB 88-89.

44 Minister's Affidavit at [9] — SCB 90. It was open to the Minister to consider the numbers of offshore entry persons involved when considering whether it was in the public interest to grant a TSH Visa to the Plaintiff; the power under s 195A is not conditioned at all, let alone only, on the consideration of individual interests: *Plaintiff S10* (2012) 86 ALJR 1019; [2012] HCA 31 at [99(vi)-(vii)] (Gummow, Hayne, Crennan and Bell JJ); [114] (Heydon J).

45 Minister's Affidavit at [10] — SCB 90.

was of sufficient importance that the Minister would not have exercised his power under s 195A to release the Plaintiff from detention if it could not have been achieved. The Minister was entitled to conclude that it was in the public interest to grant the TSH Visa as a means of accommodating his dual objectives of releasing the Plaintiff from immigration detention while not undermining the Government's decision as to the transitional approach it would adopt to the completion of existing assessment processes.[46]

57. It is no answer to the above argument for the Plaintiff to submit that the TSH Visa was not granted to render the Plaintiff a lawful non-citizen, and thus to secure his release from detention, because of the grant of the First Bridging Visa.[47]

57.1. The Plaintiff wrongly asserts that the purpose of making the Plaintiff a lawful non-citizen **had been achieved** by the grant of the First Bridging Visa.[48] That assertion would not be accurate either if the grant of the visas was simultaneous, or if the grant of the TSH Visa preceded the grant of the BV.

57.2. As explained in paragraphs 61 to 68 below, the two visas were granted simultaneously; therefore, the First Bridging Visa had not, at the time of the grant of the TSH Visa, secured the Plaintiff's release from detention.

57.3. Even if, contrary to that contention, the visas were granted sequentially, there is no evidence to permit this Court to conclude that the First Bridging Visa was granted first in time. It would be necessary for the Plaintiff to prove that on the balance of probabilities, and he has not discharged that onus. On the contrary, all of the relevant documents mention the TSH Visa first.[49] Further, it is the TSH Visa (as a substantive visa) that takes priority over a bridging visa under the Act.[50] It is also clear that the TSH Visa was first to be in effect. Accordingly, if only one visa was validly granted, the better view is that it was the TSH Visa.

57.4. The Plaintiff's argument incorrectly assumes that the grant of the First Bridging Visa was to enable release from detention and asserts that the grant of the TSH Visa was *solely* to attract the statutory bar.[51] However, the purpose of securing the Plaintiff's release from detention was able to be secured by granting a TSH Visa alone. The Minister decided to grant the First

---

46 Minister's Affidavit at [4]-[5], [10] — SCB 90.
47 Plaintiff's Submissions at [68].
48 Plaintiff's Submissions at [68].
49 SCB 23 at [9], 29-30, 33, 36, 40.
50 Migration Act 1958 (Cth) ss 82(3), 68(4).
51 Plaintiff's Submissions at [65].

Bridging Visa, to come into effect upon the expiry of the TSH Visa, for the purpose of permitting the Plaintiff the **additional** benefits of access to various support services not available to the holder of a TSH Visa, including Medicare.[52] That beneficial purpose in granting the bridging visa does not mean that the TSH Visa was not issued for the purpose of releasing the Plaintiff from detention. That is particularly true given the Minister's evidence[53] that the First Bridging Visa would not have been issued without the TSH Visa, meaning that the Plaintiff would not have been released from detention unless the TSH Visa was granted.

58. For the above reasons, the answer to Question 1 is "yes".

Question 2: Is the Plaintiff's application for a protection visa valid?

Consequence of valid grant of TSH Visa

59. There is no dispute that, if the Minister is correct and the TSH Visa was validly granted, then s 91K applied, and continues to apply, to prevent the Plaintiff from making a valid application for a protection visa.[54]

60. As a consequence, the PV Application was not a valid application for a visa, and it follows from the answer to Question 1 that the answer to Question 2 is "no".

Consequence of invalid grant of the TSH Visa

61. If, contrary to the Minister's contention, the TSH Visa was not validly granted, then a separate issue arises under Question 2. That issue is whether the First Bridging Visa is likewise invalid because:

    61.1. there was one decision by the Minister under s 195A, not two separate decisions, so that if that decision was invalid then both the visas that the Minister purported to grant by that decision are invalid; and

    61.2. the grant of the First Bridging Visa was so connected with the decision to grant the TSH Visa, and would not have been made had the TSH Visa not been granted, that the grant of the First Bridging Visa is incapable of being severed from the grant of the TSH Visa.

---

52 Minister's Affidavit at [7] — SCB 89. This purpose also explains the short duration of the TSH Visa.

53 Minister's Affidavit at [9] – SCB 89.

54 Plaintiff's Submissions at [27].

62. The Act contemplates that a person may hold two visas at the same time,[55] as the Plaintiff acknowledges.[56] In particular, it expressly contemplates that a person may hold a bridging visa and a substantive visa at the same time; and if the bridging visa does not come into effect or ceases to have effect by reason of s 82(3), it revives upon the substantive visa ceasing to have effect (under s 68(4)).

63. There is nothing in the Act to suggest that two visas that may be held at the same time may not be granted simultaneously by one decision under s 195A. The Plaintiff's reliance on the use of the singular in s 195A and elsewhere is misplaced — the singular includes the plural, unless the statute evinces a contrary intention.[57] No such contrary intention is evinced in s 195A (or in the Act generally). There is no textual indication of such intention; nor is there any reason to imply a limitation of this kind into s 195A, given that, as discussed above, it is a broad and flexible power.

64. In this case, there is clear evidence that there was a single decision under s 195A simultaneously to grant both the TSH Visa and the First Bridging Visa so as to enable the Plaintiff to be released from detention and to preserve the existing assessment process.[58] Further, the nature of the power conferred by s 195A supports the conclusion that there was a single simultaneous grant of both visas, because the power conferred by s 195A is available only with respect to a person who is detained pursuant to s 189 of the Act. For that reason, if visas had been granted sequentially there would be, at the very least, uncertainty as to the power to grant a second visa.

65. As there was a single decision to grant two visas, those visas should be seen to stand or fall together. If (contrary to the Minister's submissions) the grant of the TSH Visa was invalid, then that was because the Minister misapprehended the nature and scope of the discretionary power he was exercising. In those circumstances, the remarks of Mason CJ, Brennan, Gaudron and McHugh JJ in *Coco v The Queen* are apt:[59]

> No doubt in some circumstances it is possible to disregard that part of the decision that goes beyond power and treat as valid that part of the decision which is within power. But that must become a **much more contentious exercise when the invalid part of the decision has influenced the making of the valid part of the decision**. In this case,

---

55 *Minister for Immigration and Citizenship v Nystrom* (2006) 228 CLR 566 at [36] (Gummow and Hayne JJ), [118] (Heydon and Crennan JJ, Gleeson CH agreeing).

56 Plaintiff's Submissions at [23]. The Plaintiff's characterization of this as occurring in "exceptional circumstances" does not alter the fact that it is something expressly contemplated by the Act. The Plaintiff says that the Act "intends that a person will only hold one substantive visa at any one time"; a submission of that kind was said to be framed too broadly by Gummow and Hayne JJ in *Nystrom* (2006) 228 CLR 566 at [30]. But in any event, here the Plaintiff was not granted two substantive visas: he was granted one substantive visa and one bridging visa.

57 *Acts Interpretation Act 1901* (Cth) s 23(b).

58 Minister's Affidavit at [6] — SCB 89. There is one decision record evidencing the grant of two visas by one decision: SCB 33-34; and one Statement to Parliament (as required by s 195A(4)): SCB 36.

59 (1994) 179 CLR 427 at 443 (emphasis added).

> the approval is expressed in such a way as to make it appear that authorization to enter private property was an integral and essential element in the approval to use the listening devices. So much is made clear by the reference to installation in both the paragraph which constitutes the approval and the first condition. In this situation there is no scope for speculation, on the assumption that speculation is legitimate, about what Carter J would have done had he appreciated that authorization of entry onto private property was beyond power.
>
> If it were necessary to consider the question from the viewpoint of severance, we would come to the conclusion that it is not possible to sever. **The fact that what is bad is an integral and essential element of what is good leads to the conclusion that the approval is wholly void.**

66. In *Ruhani v Director of Police (No 2)*,[60] this Court referred to the absence of any legislative provision that would displace the:

> common law presumption that ... the balance of the instrument is not to be carried into effect independently of the part which fails. It could not be said that to treat the visa as effective, shorn of the conditions, would be to effect no change to the substantial purpose and effect of the instrument.

67. The test is "the intention of the maker".[61] The Minister's evidence in relation to this issue is unequivocal: if the Minister had not been able to grant the TSH Visa to the Plaintiff simultaneously with the First Bridging Visa, he would not have exercised his power under s 195A to grant the First Bridging Visa.[62] This evidence is uncontested. It shows that the grant of the TSH Visa was an "integral and essential element" in the decision to grant the two visas. To adapt the words of Aickin J in *Bread Manufacturers*, it is plain that the Minister intended to produce two results at the same point of time. "The intention necessarily involved in such a process is that both events should happen."[63] As a consequence, the grant of the TSH Visa was inseverable from the grant of the First Bridging Visa.

68. Thus if, contrary to the Minister's principal submissions, the TSH Visa was invalid, the First Bridging Visa was also invalid. As a consequence the Plaintiff was not a lawful non-citizen at the time he made the PV Application. In those circumstances, s 46A(1) applied to prevent him from making a valid application for a protection visa at that time (and at any time prior to the grant of the Second Bridging Visa on 15 October 2012). For that reason, the PV Application was not a valid application.

69. Thus the answer to Question 2 is "no".

---

60 (2005) 222 CLR 580 at [20]. The Court cited *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 370-371; *Harrington v Lowe* (1996) 190 CLR 311 at 326-328; *Director of Public Prosecutions v Hutchinson* [1990] 2 AC 783 at 804, 808; *Commissioner of Police v Davis* [1994] 1 AC 283 at 298-299. Citing many of the same cases, Aronson, Dyer and Groves state: "[A]n alteration in the substance of the unobjectionable part by deletion of the bad part should be fatal to severability": *Judicial Review of Administrative Action* (4th edn, 2009) at 738 [10.175].

61 *Bread Manufacturers of NSW v Evans* (1981) 180 CLR 404 at 441 (Mason and Wilson JJ); see also 445 (Aickin J).

62 Minister's Affidavit at [9] — SCB 89.

63 *Bread Manufacturers of NSW v Evans* (1981) 180 CLR 404 at 445 (Aickin J).

Question 3: Who should pay the costs of this special case?

70. The Minister has agreed with the Plaintiff that, if the Plaintiff is successful in respect of Question 1, then the Minister will pay the Plaintiff's costs of the proceeding regardless of the answer to Question 2.

71. Having regard to that agreement, the answer to Question 3 is that costs should follow the answer to Question 1.

Conclusion: Orders Sought

72. The questions of law stated for the opinion of the Full Court in the Special Case should be answered:

Question 1: Yes.

Question 2: No.

Question 3: Costs should follow the answer to Question 1.

PART VII ESTIMATE OF TIME FOR PRESENTATION OF ORAL ARGUMENT

73. The Minister estimates that 1.5 hours is required for oral argument.

Date of filing: 11 January 2013

Justin Gleeson SC
Telephone: (02) 6141 4145
Facsimile: (02) 6141 4149
Email: justin.gleeson@ag.gov.au

Stephen Donaghue SC
Telephone: (03) 9225 7919
Facsimile: (03) 9225 6058
Email: s.donaghue@vicbar.com.au

Kristen Walker
Telephone: (03) 9640 3281
Facsimile: (03 9640 3108
Email: k.walker@mc8.com.au

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M79 OF 2012

BETWEEN:

PLAINTIFF M79/2012
Plaintiff

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP
Defendant

DEFENDANT'S ANNEXURE

***Migration Act 1958* (Cth) [Version in force at 11 January 2013]**

34 Absorbed person visas

(1) There is a class of permanent visas to remain in, but not re-enter, Australia, to be known as absorbed person visas.

(2) A non-citizen in the migration zone who:

(a) on 2 April 1984 was in Australia; and

(b) before that date, had ceased to be an immigrant; and

(c) on or after that date, has not left Australia, where left Australia has the meaning it had in this Act before 1 September 1994; and

(d) immediately before 1 September 1994, was not a person to whom section 20 of this Act as in force then applied;

is taken to have been granted an absorbed person visa on 1 September 1994.

(3) Subdivisions AA, AB, AC (other than section 68), AE and AH do not apply in relation to absorbed person visas.

Filed for the Defendant:

SPARKE HELMORE
Lawyers
Level 16
321 Kent Street
SYDNEY NSW 2000

Ref: DEP020-00156
Contact: Rohan White

DX 282 SYDNEY

Ph: 02 9260 2427
Fax: 02 9260 2486
Email: Rohan.White@sparke.com.au

35 Ex-citizen visas

(1) There is a class of permanent visas to remain in, but not re-enter, Australia, to be known as ex-citizen visas.

(2) A person who:

(a) before 1 September 1994, ceased to be an Australian citizen while in the migration zone; and

(b) did not leave Australia after ceasing to be a citizen and before that date;

is taken to have been granted an ex-citizen visa on that date.

(3) A person who, on or after 1 September 1994, ceases to be an Australian citizen while in the migration zone is taken to have been granted an ex-citizen visa when that citizenship ceases.

(4) Subdivisions AA, AB, AC (other than section 68), AE and AH do not apply in relation to ex-citizen visas.

40 Circumstances for granting visas

(1) The regulations may provide that visas or visas of a specified class may only be granted in specified circumstances.

(2) Without limiting subsection (1), the circumstances may be, or may include, that, when the person is granted the visa, the person:

(a) is outside Australia; or

(b) is in immigration clearance; or

(c) has been refused immigration clearance and has not subsequently been immigration cleared; or

(d) is in the migration zone and, on last entering Australia:

(i) was immigration cleared; or

(ii) bypassed immigration clearance and had not subsequently been immigration cleared.

(3) Without limiting subsection (1), if:

(a) prescribed circumstances exist; and

(b) the Minister has not waived the operation of this subsection in relation to granting the visa to the person;

the circumstances under subsection (1) may be, or may include, that the person has complied with any requirement of an officer to provide one or more personal identifiers in relation to the application for the visa.

(3A) An officer must not require, for the purposes of subsection (3), a person to provide a personal identifier other than:

(a) if the person is an applicant for a protection visa—any of the following (including any of the following in digital form):

(i) fingerprints or handprints of the person (including those taken using paper and ink or digital livescanning technologies);

(ii) a photograph or other image of the person's face and shoulders;

(iii) an audio or a video recording of the person;

(iv) an iris scan;

(v) the person's signature;

(vi) any other personal identifier contained in the person's passport or other travel document;

(vii) any other personal identifier of a type prescribed for the purposes of paragraph (3C)(a); or

(b) if the person is an applicant for a temporary safe haven visa within the meaning of section 37A, or any other visa of a class that the regulations designate as a class of humanitarian visas—any of the following (including any of the following in digital form):

(i) fingerprints or handprints of the person (including those taken using paper and ink or digital livescanning technologies);

(ii) a photograph or other image of the person's face and shoulders;

(iii) an iris scan;

(iv) the person's signature;

(v) any other personal identifier contained in the person's passport or other travel document;

(vi) any other personal identifier of a type prescribed for the purposes of paragraph (3C)(a); or

(c) if paragraphs (a) and (b) do not apply—any of the following (including any of the following in digital form):

(i) a photograph or other image of the person's face and shoulders;

(ii) the person's signature;

(iii) any other personal identifier contained in the person's passport or other travel document;

(iv) any other personal identifier of a type prescribed for the purposes of paragraph (3C)(a).

Note: Division 13AB sets out further restrictions on the personal identifiers that minors and incapable persons can be required to provide.

(3B) In requiring, for the purposes of subsection (3), a person to provide a personal identifier, an officer must not contravene regulations made for the purposes of paragraph (3C)(b).

(3C) The regulations:

(a) may prescribe other types of personal identifiers; and

(b) may provide that a particular personal identifier referred to in subsection (3A), or a particular combination of such personal identifiers, must not be required except in the circumstances prescribed for the purposes of this paragraph.

(4) A person is taken not to have complied with a requirement referred to in subsection (3) unless the one or more personal identifiers are provided to an authorised officer by way of one or more identification tests carried out by an authorised officer.

Note: If the types of identification tests that the authorised officer may carry out are specified under section 5D, then each identification test must be of a type so specified.

(5) However, subsection (4) does not apply, in circumstances prescribed for the purposes of this subsection, if the personal identifier is of a prescribed type and the person:

(a) provides a personal identifier otherwise than by way of an identification test carried out by an authorised officer; and

(b) complies with any further requirements that are prescribed relating to the provision of the personal identifier.

Division 4A—Enforcement visas

164A Definitions

In this Division:

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

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

enforcement visa (environment matters) means an enforcement visa that is granted by section 164BA.

enforcement visa (fisheries matters) means an enforcement visa that is granted by section 164B.

environment detention means detention under Schedule 1 to the *Environment Protection and Biodiversity Conservation Act 1999*.

fisheries detention means detention under:

(a) Schedule 1A to the *Fisheries Management Act 1991*; or

(b) Schedule 2 to the *Torres Strait Fisheries Act 1984*.

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

164B Grant of enforcement visas (fisheries matters)

Non-citizen on foreign boat outside migration zone

(1) A non-citizen on a foreign boat outside the migration zone is granted an enforcement visa when, because a fisheries officer has reasonable grounds to believe that the boat has been used, is being used or is intended to be used in the commission of a fisheries detention offence, a fisheries officer:

(a) makes a requirement of the boat's master under subparagraph 84(1)(k)(ii) or paragraph 84(1)(l) of the *Fisheries Management Act 1991* or paragraph 42(1)(g) of the *Torres Strait Fisheries Act 1984*; or

(b) exercises his or her power under paragraph 84(1)(m) of the *Fisheries Management Act 1991* or paragraph 42(1)(h) of the *Torres Strait Fisheries Act 1984* in relation to the boat;

whichever occurs first.

Note 1: Under subparagraph 84(1)(k)(ii) and paragraph 84(1)(l) of the *Fisheries Management Act 1991*, a fisheries officer may require the master of a boat to bring or take the boat into the migration zone. Under paragraph 84(1)(m) of that Act, a fisheries officer may bring a boat into the migration zone.

Note 2: Under paragraph 42(1)(g) of the *Torres Strait Fisheries Act 1984*, a fisheries officer may require the master of a boat to bring or take the boat into the migration zone. Under paragraph 42(1)(h) of that Act, a fisheries officer may bring a boat into the migration zone.

Note 3: The grant of an enforcement visa effectively cancels any temporary visa that the non-citizen may have held (see subsection 82(2A)).

Extended operation of subsection (1)

(1A) The references in subsection (1) to subparagraph 84(1)(k)(ii) and paragraphs 84(1)(l) and (m) of the *Fisheries Management Act 1991* are to those provisions:

(a) as they apply of their own force; and

(b) as they apply because of section 87 or 87HA of that Act.

Non-citizen in migration zone

(2) A non-citizen in the migration zone who does not already hold an enforcement visa is granted an enforcement visa when he or she is detained

by a fisheries officer under Schedule 1A to the *Fisheries Management Act 1991* or Schedule 2 to the *Torres Strait Fisheries Act 1984*.

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

Non-citizen in prescribed circumstances

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

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

Non-citizen on foreign boat in prescribed circumstances

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

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

Enforcement visas granted by force of this section

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

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

Exception if Minister's declaration in force

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

(a) the non-citizen; or

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

Declaration

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

Section does not apply to Australian residents

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

164BA Grant of enforcement visas (environment matters)

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

(1) A non-citizen on a vessel (environment matters) outside the migration zone is granted an enforcement visa when, because an environment officer, or the person in command of a Commonwealth ship or a Commonwealth aircraft, has reasonable grounds to suspect that the vessel has been used or otherwise involved in the commission of an environment detention offence, the environment officer or person in command:

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

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

whichever occurs first.

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

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

Non-citizen in migration zone

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

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

Non-citizen in prescribed circumstances

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

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

Non-citizen on vessel or aircraft in prescribed circumstances

(4) An enforcement visa is granted to a non-citizen (who does not already hold an enforcement visa) who was on a vessel (environment matters) or a foreign aircraft (environment matters) when an environment officer exercises under the *Environment Protection and Biodiversity Conservation Act 1999* a

prescribed power in prescribed circumstances in relation to the vessel or aircraft. The visa is granted at the time the power is exercised.

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

Enforcement visas granted by force of this section

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

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

Exception if Minister's declaration in force

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

(a) the non-citizen; or

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

Declaration

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

Section does not apply to Australian residents

(8) This section does not apply to non-citizens who are Australian residents as defined in Schedule 1 to the *Environment Protection and Biodiversity Conservation Act 1999*.

164C When enforcement visa ceases to be in effect

Enforcement visa (fisheries matters)—non-citizen in fisheries detention

(1) The enforcement visa (fisheries matters) of a non-citizen who is in fisheries detention ceases to be in effect:

(a) at the time the non-citizen is released, or escapes, from fisheries detention; or

(b) at the time the Minister makes a declaration under subsection 164B(7) in relation to the non-citizen, or a class of persons of which the non-citizen is a member; or

(c) on the occurrence of a prescribed event;

whichever occurs first.

Enforcement visa (fisheries matters)—non-citizen not in fisheries detention

(2) The enforcement visa (fisheries matters) of a non-citizen who is not in fisheries detention ceases to be in effect:

(a) at the time a decision is made not to charge the non-citizen with a fisheries detention offence; or

(b) at the time the Minister makes a declaration under subsection 164B(7) in relation to the non-citizen, or a class of persons of which the non-citizen is a member; or

(c) on the occurrence of a prescribed event;

whichever occurs first.

Enforcement visa (environment matters)—non-citizen in environment detention

(3) The enforcement visa (environment matters) of a non-citizen who is in environment detention ceases to be in effect:

(a) at the time the non-citizen is released, or escapes, from environment detention; or

(b) at the time the Minister makes a declaration under subsection 164BA(7) in relation to the non-citizen, or a class of persons of which the non-citizen is a member; or

(c) on the occurrence of a prescribed event;

whichever occurs first.

Enforcement visa (environment matters)—non-citizen not in environment detention

(4) The enforcement visa (environment matters) of a non-citizen who is not in environment detention ceases to be in effect:

(a) at the time a decision is made not to charge the non-citizen with an environment detention offence; or

(b) at the time the Minister makes a declaration under subsection 164BA(7) in relation to the non-citizen, or a class of persons of which the non-citizen is a member; or

(c) on the occurrence of a prescribed event;

whichever occurs first.

164D Applying for other visas

(1) The holder of an enforcement visa may not apply for a visa other than a protection visa while he or she is in Australia.

(2) While a non-citizen who has held an enforcement visa remains in Australia when the visa ceases to be in effect, the non-citizen may not apply for a visa other than a protection visa.

***Acts Interpretation Act* (Cth) [Version in force at 11 January 2013]**

13 Material that is part of an Act

(1) All material from and including the first section of an Act to the end of:

(a) if there are no Schedules to the Act—the last section of the Act; or

(b) if there are one or more Schedules to the Act—the last Schedule to the Act;

is part of the Act.

(2) The following are also part of an Act:

(a) the long title of the Act;

(b) any Preamble to the Act;

(c) the enacting words for the Act;

(d) any heading to a Chapter, Part, Division or Subdivision appearing before the first section of the Act.

23 Rules as to gender and number

In any Act:

(a) words importing a gender include every other gender; and

(b) words in the singular number include the plural and words in the plural number include the singular.