

**IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY**

No M70 of 2011

**B E T W E E N**

**PLAINTIFF M70/2011**

Plaintiff

and

**MINISTER FOR IMMIGRATION AND  
CITIZENSHIP**

First Defendant

**THE COMMONWEALTH OF  
AUSTRALIA**

Second Defendant

10

**IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY**

No M106 of 2011

**B E T W E E N**

**PLAINTIFF M106/2011  
BY HIS LITIGATION GUARDIAN  
PLAINTIFF M70/2011**

Plaintiff

and

**MINISTER FOR IMMIGRATION AND  
CITIZENSHIP**

First Defendant

**THE COMMONWEALTH OF  
AUSTRALIA**

Second Defendant

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Date of document: 17 August 2011  
Filed on behalf of: the plaintiff

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**PLAINTIFFS' ANNEXURE 1  
APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND  
REGULATIONS**

The provisions set out below have not been amended since the date of the Plaintiff's Application for an Order to Show Case and are still in force, in this form, at the date of making these submissions.

***The Constitution***

**Section 75 Original jurisdiction of High Court**

In all matters:

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...

(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;

...

(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

the High Court shall have original jurisdiction.

***Migration Act 1958 (Cth)***

**Section 4 Object of Act**

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(1) The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.

(2) To advance its object, this Act provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain.

(3) To advance its object, this Act requires persons, whether citizens or non-citizens, entering Australia to identify themselves so that the Commonwealth government can know who are the non-citizens so entering.

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(4) To advance its object, this Act provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by this Act.

**Section 4AA Detention of minors a last resort**

(1) The Parliament affirms as a principle that a minor shall only be detained as a measure of last resort.

(2) For the purposes of subsection (1), the reference to a minor being detained does not include a reference to a minor residing at a place in accordance with a residence determination.

...

## Section 5 Interpretation

(1) In this Act, unless the contrary intention appears:

...

**detain** means:

- (a) take into immigration detention; or
- (b) keep, or cause to be kept, in immigration detention;

and includes taking such action and using such force as are reasonably necessary to do so.

10 Note: This definition extends to persons covered by residence determinations (see section 197AC).

**detainee** means a person detained.

Note: This definition extends to persons covered by residence determinations (see section 197AC).

...

**excised offshore place** means any of the following:

- (a) the Territory of Christmas Island;
- (b) the Territory of Ashmore and Cartier Islands;
- (c) the Territory of Cocos (Keeling) Islands;
- 20 (d) any other external Territory that is prescribed by the regulations for the purposes of this paragraph;
- (e) any island that forms part of a State or Territory and is prescribed for the purposes of this paragraph;
- (f) an Australian sea installation;
- (g) an Australian resources installation.

Note: The effect of this definition is to excise the listed places and installations from the migration zone for the purposes of limiting the ability of offshore entry persons to make valid visa applications.

...

**immigration cleared** has the meaning given by subsection 172(1).

30 **immigration detention** means:

- (a) being in the company of, and restrained by:
  - i) an officer; or
  - (ii) in relation to a particular detainee—another person directed by the Secretary to accompany and restrain the detainee; or
- (b) being held by, or on behalf of, an officer:
  - (i) in a detention centre established under this Act; or

- (ii) in a prison or remand centre of the Commonwealth, a State or a Territory; or
- (iii) in a police station or watch house; or
- (iv) in relation to a non-citizen who is prevented, under section 249, from leaving a vessel—on that vessel; or
- (v) in another place approved by the Minister in writing;

but does not include being restrained as described in subsection 245F(8A), or being dealt with under paragraph 245F(9)(b).

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Note 1: See also section 198A, which provides that being dealt with under that section does not amount to immigration detention.

Note 2: This definition extends to persons covered by residence determinations (see section 197AC).

...

**non-citizen** means a person who is not an Australian citizen.

...

**officer** means:

- (a) an officer of the Department, other than an officer specified by the Minister in writing for the purposes of this paragraph; or
- 20 (b) a person who is an officer for the purposes of the Customs Act 1901, other than such an officer specified by the Minister in writing for the purposes of this paragraph; or
- (c) a person who is a protective service officer for the purposes of the Australian Federal Police Act 1979, other than such a person specified by the Minister in writing for the purposes of this paragraph; or
- (d) a member of the Australian Federal Police or of the police force of a State or an internal Territory; or
- (e) a member of the police force of an external Territory; or
- 30 (f) a person who is authorised in writing by the Minister to be an officer for the purposes of this Act; or
- (g) any person who is included in a class of persons authorised in writing by the Minister to be officers for the purposes of this Act, including a person who becomes a member of the class after the authorisation is given.

...

**offshore entry person** means a person who:

- (a) entered Australia at an excised offshore place after the excision time for that offshore place; and
- 40 (b) became an unlawful non-citizen because of that entry.

...

**Refugees Convention** means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951.

**Refugees Protocol** means the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

...

**remove** means remove from Australia.

...

### Section 13 Lawful non-citizens

- 10 (1) A non-citizen in the migration zone who holds a visa that is in effect is a lawful non-citizen.
- (2) An allowed inhabitant of the Protected Zone who is in a protected area in connection with the performance of traditional activities is a lawful non-citizen.

### Section 14 Unlawful non-citizens

- (1) A non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen.
- 20 (2) To avoid doubt, a non-citizen in the migration zone who, immediately before 1 September 1994, was an illegal entrant within the meaning of the Migration Act as in force then became, on that date, an unlawful non-citizen.

### Section 36 Protection visas

- (1) There is a class of visas to be known as protection visas.  
Note: See also Subdivision AL.
- (2) A criterion for a protection visa is that the applicant for the visa is:
- 30 (a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
- (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
- (i) is mentioned in paragraph (a); and
- (ii) holds a protection visa.

#### *Protection obligations*

- (3) Australia is taken 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 and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

- (4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.
- (5) Also, if the non-citizen has a well-founded fear that:
- (a) a country will return the non-citizen to another country; and
  - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;

10 subsection (3) does not apply in relation to the first-mentioned country.

*Determining nationality*

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.

...  
**Section 45 Application for visa**

- 20 (1) Subject to this Act and the regulations, a non-citizen who wants a visa must apply for a visa of a particular class.

...  
**Section 46 Valid visa application**

- (1) Subject to subsections (1A), (2) and (2A), an application for a visa is valid if, and only if:
- (a) it is for a visa of a class specified in the application; and
  - (b) it satisfies the criteria and requirements prescribed under this section; and
  - (ba) subject to the regulations providing otherwise, any visa application charge that the regulations require to be paid at the time when the application is made, has been paid; and
  - (c) any fees payable in respect of it under the regulations have been paid; and
  - (d) it is not prevented by section 48 (visa refused or cancelled earlier), 48A (protection visa), 91E (CPA and safe third countries), 91K (temporary safe haven visa), 91P (non-citizens with access to protection from third countries), 161 (criminal justice), 164D (enforcement visa), 195 (detainees) or 501E (visa refused or cancelled on character grounds).
- (1A) Subject to subsection (2), an application for a visa is invalid if:
- 40 (a) the applicant is in the migration zone; and

- (b) since last entering Australia, the applicant has held a visa subject to a condition described in paragraph 41(2)(a); and
- (c) the Minister has not waived that condition under subsection 41(2A); and
- (d) the application is for a visa of a kind that, under that condition, the applicant is not or was not entitled to be granted.

(2) Subject to subsection (2A), an application for a visa is valid if:

- (a) it is an application for a visa of a class prescribed for the purposes of this subsection; and
- (b) under the regulations, the application is taken to have been validly made.

(2A) An application for a visa is invalid if:

- (a) prescribed circumstances exist; and
- (aa) the Minister has not waived the operation of this subsection in relation to the application for the visa; and
- (ab) the applicant has been required by an officer to provide one or more personal identifiers in relation to the application; and
- (b) the applicant has not complied with the requirement.

Note: An invalid application for a visa cannot give rise to an obligation under section 65 to grant a visa: see subsection 47(3).

(2AA) An officer must not require, for the purposes of paragraph (2A)(ab), 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 liveness scanning 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 (2AC)(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):

- 10
- (i) fingerprints or handprints of the person (including those taken using paper and ink or digital liveness scanning 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 (2AC)(a); or

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

- 20
- (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 (2AC)(a).

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

(2AB) In requiring, for the purposes of paragraph (2A)(ab), a person to provide a personal identifier, an officer must not contravene regulations made for the purposes of paragraph (2AC)(b).

(2AC) The regulations:

- 30
- (a) may prescribe other types of personal identifiers; and
  - (b) may provide that a particular personal identifier referred to in subsection (2AA), or a particular combination of such personal identifiers, must not be required except in the circumstances prescribed for the purposes of this paragraph.

(2B) The applicant is taken not to have complied with a requirement referred to in paragraph (2A)(ab) unless the one or more personal identifiers are provided 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.

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(2C) However, subsection (2B) does not apply, in circumstances prescribed for the purposes of this subsection, if the personal identifier is of a prescribed type and the applicant:

- (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.
- (3) The regulations may prescribe criteria that must be satisfied for an application for a visa of a specified class to be a valid application.
- (4) Without limiting subsection (3), the regulations may also prescribe:
- (a) the circumstances that must exist for an application for a visa of a specified class to be a valid application; and
  - (b) how an application for a visa of a specified class must be made; and
  - (c) where an application for a visa of a specified class must be made; and
  - (d) where an applicant must be when an application for a visa of a specified class is made.

...

#### **Section 46A Visa applications by offshore entry persons**

- (1) An application for a visa is not a valid application if it is made by an offshore entry person who:
- (a) is in Australia; and
  - (b) is an unlawful non-citizen.
- (2) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an offshore entry person, determine that subsection (1) does not apply to an application by the person for a visa of a class specified in the determination.
- (3) The power under subsection (2) may only be exercised by the Minister personally.
- (4) If the Minister makes a determination under subsection (2), the Minister must cause to be laid before each House of the Parliament a statement that:
- (a) sets out the determination; and
  - (b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that the Minister's actions are in the public interest.
- (5) A statement under subsection (4) must not include:
- (a) the name of the offshore entry person; or
  - (b) any information that may identify the offshore entry person; or
  - (c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the

matter concerned—the name of that other person or any information that may identify that other person.

- (6) A statement under subsection (4) must be laid before each House of the Parliament within 15 sitting days of that House after:
- (a) if the determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or
  - (b) if the determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.
- (7) The Minister does not have a duty to consider whether to exercise the power under subsection (2) in respect of any offshore entry person whether the Minister is requested to do so by the offshore entry person or by any other person, or in any other circumstances.

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**Section 47 Consideration of valid visa application**

- (1) The Minister is to consider a valid application for a visa.
- (2) The requirement to consider an application for a visa continues until:
- (a) the application is withdrawn; or
  - (b) the Minister grants or refuses to grant the visa; or
  - (c) the further consideration is prevented by section 39 (limiting number of visas) or 84 (suspension of consideration).
- (3) To avoid doubt, the Minister is not to consider an application that is not a valid application.
- (4) To avoid doubt, a decision by the Minister that an application is not valid and cannot be considered is not a decision to refuse to grant the visa.

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...

**Section 65 Decision to grant or refuse to grant visa**

- (1) After considering a valid application for a visa, the Minister:
- (a) if satisfied that:
    - (i) the health criteria for it (if any) have been satisfied; and
    - (ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and
    - (iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 500A (refusal or cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and
    - (iv) any amount of visa application charge payable in relation to the application has been paid;

is to grant the visa; or
  - (b) if not so satisfied, is to refuse to grant the visa.

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Note: See also section 195A, under which the Minister has a non-compellable power to grant a visa to a person in detention under section 189 (whether or not the person has applied for the visa). Subdivision AA, this Subdivision, Subdivision AF and the regulations do not apply to the Minister's power under that section.

- (2) To avoid doubt, an application put aside under section 94 is not taken for the purposes of subsection (1) to have been considered until it has been removed from the pool under subsection 95(3).

...

10 **Section 195A Minister may grant detainee visa (whether or not on application)**

*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.

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*Minister not under duty to consider whether to exercise power*

- (4) The Minister does not have a duty to consider whether to exercise the power under subsection (2), whether he or she is requested to do so by any person, or in any other circumstances.

*Minister to exercise power personally*

- (5) The power under subsection (2) may only be exercised by the Minister personally.

*Tabling of information relating to the granting of visas*

- (6) If the Minister grants a visa under subsection (2), he or she must cause to be laid before each House of the Parliament a statement that (subject to subsection (7)):

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- (a) states that the Minister has granted a visa under this section; and
- (b) sets out the Minister's reasons for granting the visa, referring in particular to the Minister's reasons for thinking that the grant is in the public interest.

- (7) A statement under subsection (6) in relation to a decision to grant a visa is not to include:

- (a) the name of the person to whom the visa is granted; or
- (b) any information that may identify the person to whom the visa is granted; or

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

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

(a) if the decision to grant the visa is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or

(b) if the decision to grant the visa is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

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...

### **Section 172 Immigration clearance**

#### *When a person is immigration cleared*

(1) A person is immigration cleared if, and only if:

(a) the person:

(i) enters Australia at a port; and

(ii) complies with section 166; and

(iii) leaves the port at which the person complied and so leaves

with the permission of a clearance authority and otherwise than in immigration detention; or

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(b) the person:

(i) enters Australia otherwise than at a port; and

(ii) complies with section 166; and

(iii) leaves the prescribed place at which the person

complied and so leaves with the permission of a clearance authority and otherwise than in immigration detention; or

(ba) the person:

(i) enters Australia by virtue of the operation of section 10; and

(ii) at the time of the person's birth, had at least one parent who was immigration cleared on his or her last entry into Australia; or

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(c) the person is refused immigration clearance, or bypasses immigration clearance, and is subsequently granted a substantive visa; or

(d) the person is in a prescribed class of persons.

#### *When a person is in immigration clearance*

(2) A person is in immigration clearance if the person:

(a) is with an officer or at an authorised system for the purposes of section 166; and

- (b) has not been refused immigration clearance.

*When a person is refused immigration clearance*

- (3) A person is refused immigration clearance if the person:
  - (a) is with a clearance officer for the purposes of section 166; and
  - (b) satisfies one or more of the following subparagraphs:
    - (i) the person has his or her visa cancelled;
    - (ii) the person refuses, or is unable, to present to a clearance officer evidence referred to in paragraph 166(1)(a);
    - (iii) the person refuses, or is unable, to provide to a clearance officer information referred to in paragraph 166(1)(b);
    - (iv) the person refuses, or is unable, to comply with any requirement referred to in paragraph 166(1)(c) to provide one or more personal identifiers to a clearance officer.

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*When a person bypasses immigration clearance*

- (4) A person, other than a person who is refused immigration clearance, bypasses immigration clearance if:
  - (a) the person:
    - (i) enters Australia at a port; and
    - (ii) is required to comply with section 166; and
    - (iii) leaves that port without complying; or
  - (b) the person:
    - (i) enters Australia otherwise than at a port; and
    - (ii) is required to comply with section 166; and
    - (iii) does not comply within the prescribed period for doing so.

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**Section 189 Detention of unlawful non-citizens**

- (1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.
- (2) If an officer reasonably suspects that a person in Australia but outside the migration zone:
  - (a) is seeking to enter the migration zone (other than an excised offshore place); and
  - (b) would, if in the migration zone, be an unlawful non-citizen;
 the officer must detain the person.
- (3) If an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer may detain the person.
- (4) If an officer reasonably suspects that a person in Australia but outside the migration zone:

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- (a) is seeking to enter an excised offshore place; and
  - (b) would, if in the migration zone, be an unlawful non-citizen;
- the officer may detain the person.

- (5) In subsections (3) and (4) and any other provisions of this Act that relate to those subsections, **officer** means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

Note: See Subdivision B for the Minister's power to determine that people who are required or permitted by this section to be detained may reside at places not covered by the definition of **immigration detention** in subsection 5(1).

10 ...

### Section 196 Duration of detention

- (1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:
- (a) removed from Australia under section 198 or 199; or
  - (b) deported under section 200; or
  - (c) granted a visa.
- (2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.
- (3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa.
- (4) Subject to paragraphs (1)(a), (b) and (c), if the person is detained as a result of the cancellation of his or her visa under section 501, the detention is to continue unless a court finally determines that the detention is unlawful, or that the person detained is not an unlawful non-citizen.
- (4A) Subject to paragraphs (1)(a), (b) and (c), if the person is detained pending his or her deportation under section 200, the detention is to continue unless a court finally determines that the detention is unlawful.
- (5) To avoid doubt, subsection (4) or (4A) applies:
- (a) whether or not there is a real likelihood of the person detained being removed from Australia under section 198 or 199, or deported under section 200, in the reasonably foreseeable future; and
  - (b) whether or not a visa decision relating to the person detained is, or may be, unlawful.
- (5A) Subsections (4) and (4A) do not affect by implication the continuation of the detention of a person to whom those subsections do not apply.
- (6) This section has effect despite any other law.
- (7) In this section:

**visa decision** means a decision relating to a visa (including a decision not to grant the visa, to cancel the visa or not to reinstate the visa).

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...

**Section 198 Removal from Australia of unlawful non-citizens**

- (1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.
- (1A) In the case of an unlawful non-citizen who has been brought to Australia under section 198B for a temporary purpose, an officer must remove the person as soon as reasonably practicable after the person no longer needs to be in Australia for that purpose (whether or not the purpose has been achieved).
- 10 (2) An officer must remove as soon as reasonably practicable an unlawful non-citizen:
- (a) who is covered by subparagraph 193(1)(a)(i), (ii) or (iii) or paragraph 193(1)(b), (c) or (d); and
  - (b) who has not subsequently been immigration cleared; and
  - (c) who either:
    - (i) has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; or
    - 20 (ii) has made a valid application for a substantive visa, that can be granted when the applicant is in the migration zone, that has been finally determined.
- (2A) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:
- (a) the non-citizen is covered by subparagraph 193(1)(a)(iv); and
  - (b) since the Minister's decision (*the original decision*) referred to in subparagraph 193(1)(a)(iv), the non-citizen has not made a valid application for a substantive visa that can be granted when the non-citizen is in the migration zone; and
  - 30 (c) in a case where the non-citizen has been invited, in accordance with section 501C, to make representations to the Minister about revocation of the original decision—either:
    - (i) the non-citizen has not made representations in accordance with the invitation and the period for making representations has ended; or
    - (ii) the non-citizen has made representations in accordance with the invitation and the Minister has decided not to revoke the original decision.
- Note: The only visa that the non-citizen could apply for is a protection visa or a visa specified in regulations under section 501E.
- 40 (3) The fact that an unlawful non-citizen is eligible to apply for a substantive visa that can be granted when the applicant is in the

migration zone but has not done so does not prevent the application of subsection (2) or (2A) to him or her.

- (5) An officer must remove as soon as reasonably practicable an unlawful non-citizen if the non-citizen:
- (a) is a detainee; and
  - (b) was entitled to apply for a visa in accordance with section 195, to apply under section 137K for revocation of the cancellation of a visa, or both, but did neither.
- (6) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:
- (a) the non-citizen is a detainee; and
  - (b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and
  - (c) one of the following applies:
    - (i) the grant of the visa has been refused and the application has been finally determined;
    - (iii) the visa cannot be granted; and
  - (d) the non-citizen has not made another valid application for a substantive visa that can be granted when the applicant is in the migration zone.
- (7) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:
- (a) the non-citizen is a detainee; and
  - (b) Subdivision AI of Division 3 of this Part applies to the non-citizen; and
  - (c) either:
    - (i) the non-citizen has not been immigration cleared; or
    - (ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and
  - (d) either:
    - (i) the Minister has not given a notice under paragraph 91F(1)(a) to the non-citizen; or
    - (ii) the Minister has given such a notice but the period mentioned in that paragraph has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

- (8) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:
- (a) the non-citizen is a detainee; and
  - (b) Subdivision AJ of Division 3 of this Part applies to the non-citizen; and
  - (c) either:
    - (i) the Minister has not given a notice under subsection 91L(1) to the non-citizen; or
    - (ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.
- (9) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:
- (a) the non-citizen is a detainee; and
  - (b) Subdivision AK of Division 3 of this Part applies to the non-citizen; and
  - (c) either:
    - (i) the non-citizen has not been immigration cleared; or
    - (ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and
  - (d) either:
    - (i) the Minister has not given a notice under subsection 91Q(1) to the non-citizen; or
    - (ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.
- (10) For the purposes of subsections (6) to (9), a valid application under section 137K for revocation of the cancellation of a visa is treated as though it were a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

**198A Offshore entry person may be taken to a declared country**

- (1) An officer may take an offshore entry person from Australia to a country in respect of which a declaration is in force under subsection (3).
- (2) The power under subsection (1) includes the power to do any of the following things within or outside Australia:

- (a) place the person on a vehicle or vessel;
  - (b) restrain the person on a vehicle or vessel;
  - (c) remove the person from a vehicle or vessel;
  - (d) use such force as is necessary and reasonable.
- (3) The Minister may:
- (a) declare in writing that a specified country:
    - (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and
    - (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and
    - (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
    - (iv) meets relevant human rights standards in providing that protection; and
  - (b) in writing, revoke a declaration made under paragraph (a).
- (4) An offshore entry person who is being dealt with under this section is taken not to be in **immigration detention** (as defined in subsection 5(1)).
- (5) In this section, officer means an **officer** within the meaning of section 5, and includes a member of the Australian Defence Force.

...

#### Section 474 Decisions under Act are final

- (1) A privative clause decision:
- (a) is final and conclusive; and
  - (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
  - (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.
- (2) In this section:
- privative clause decision** means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5).
- (3) A reference in this section to a decision includes a reference to the following:

- 10
- (a) granting, making, varying, suspending, cancelling, revoking or refusing to make an order or determination;
  - (b) granting, giving, suspending, cancelling, revoking or refusing to give a certificate, direction, approval, consent or permission (including a visa);
  - (c) granting, issuing, suspending, cancelling, revoking or refusing to issue an authority or other instrument;
  - (d) imposing, or refusing to remove, a condition or restriction;
  - (e) making or revoking, or refusing to make or revoke, a declaration, demand or requirement;
  - (f) retaining, or refusing to deliver up, an article;
  - (g) doing or refusing to do any other act or thing;
  - (h) conduct preparatory to the making of a decision, including the taking of evidence or the holding of an inquiry or investigation;
  - (i) a decision on review of a decision, irrespective of whether the decision on review is taken under this Act or a regulation or other instrument under this Act, or under another Act;
  - (j) a failure or refusal to make a decision.
- 20 (4) For the purposes of subsection (2), a decision under a provision, or under a regulation or other instrument made under a provision, set out in the following table is not a privative clause decision:

<b>Decisions that are not privative clause decisions</b>		
<b>Item</b>	<b>Provision</b>	<b>Subject matter of provision</b>
1	section 213	Liability for the costs of removal or deportation
2	section 217	Conveyance of removees
3	section 218	Conveyance of deportees etc.
4	section 222	Orders restraining non-citizens from disposing of property
5	section 223	Valuables of detained non-citizens
6	section 224	Dealing with seized valuables
7	section 252	Searches of persons
8	section 259	Detention of vessels for search
9	section 260	Detention of vessels/dealing with detained vessels
10	section 261	Disposal of certain vessels

Decisions that are not privative clause decisions		
Item	Provision	Subject matter of provision
11	Division 14 of Part 2	Recovery of costs
12	section 269	Taking of securities
13	section 272	Migrant centres
14	section 273	Detention centres
15	Part 3	Migration agents registration scheme
16	Part 4	Court orders about reparation
17	section 353A	Directions by Principal Member
18	section 354	Constitution of Migration Review Tribunal
19	section 355	Reconstitution of Migration Review Tribunal
20	section 355A	Reconstitution of Migration Review Tribunal for efficient conduct of review
21	section 356	Exercise of powers of Migration Review Tribunal
22	section 357	Presiding member
23	Division 7 of Part 5	Offences
24	Part 6	Establishment and membership of Migration Review Tribunal
25	section 421	Constitution of Refugee Review Tribunal
26	section 422	Reconstitution of Refugee Review Tribunal
27	section 422A	Reconstitution of Refugee Review Tribunal for efficient conduct of review
28	Division 6 of Part 7	Offences
29	Division 9 of Part 7	Establishment and membership of Refugee Review Tribunal
30	Division 10 of Part 7	Registry and officers
31	regulation 5.35	Medical treatment of persons in detention

- (5) The regulations may specify that a decision, or a decision included in a class of decisions, under this Act, or under regulations or another instrument under this Act, is not a privative clause decision.
- (6) A decision mentioned in subsection 474(4), or specified (whether by reference to a particular decision or a class of decisions) in

regulations made under subsection 474(5), is a ***non-privative clause decision***.

- (7) To avoid doubt, the following decisions are ***privative clause decisions*** within the meaning of subsection 474(2):
- (a) a decision of the Minister not to exercise, or not to consider the exercise, of the Minister's power under subsection 37A(2) or (3), section 48B, paragraph 72(1)(c), section 91F, 91L, 91Q, 195A, 197AB, 197AD, 351, 391, 417 or 454 or subsection 503A(3);
  - (b) a decision of the Principal Member of the Migration Review Tribunal or of the Principal Member of the Refugee Review Tribunal to refer a matter to the Administrative Appeals Tribunal;
  - (c) a decision of the President of the Administrative Appeals Tribunal to accept, or not to accept, the referral of a decision under section 382 or 444;
  - (d) a decision of the Minister under Division 13A of Part 2 to order that a thing is not to be condemned as forfeited.

...

20      **Section 494AA      Bar on certain legal proceedings relating to offshore entry persons**

- (1) The following proceedings against the Commonwealth may not be instituted or continued in any court:
- (a) proceedings relating to an offshore entry by an offshore entry person;
  - (b) proceedings relating to the status of an offshore entry person as an unlawful non-citizen during any part of the ineligibility period;
  - (c) proceedings relating to the lawfulness of the detention of an offshore entry person during the ineligibility period, being a detention based on the status of the person as an unlawful non-citizen;
  - (d) proceedings relating to the exercise of powers under section 198A.
- (2) This section has effect despite anything else in this Act or any other law.
- (3) Nothing in this section is intended to affect the jurisdiction of the High Court under section 75 of the Constitution.
- (4) In this section:
- Commonwealth*** includes:
- (a) an officer of the Commonwealth; and
  - (b) any other person acting on behalf of the Commonwealth.

40      ***ineligibility period*** means the period from the time of the offshore entry until the time when the person next ceases to be an unlawful non-citizen

**offshore entry** means an entry into Australia that occurs:

- (a) at an excised offshore place; and
- (b) after the excision time for the offshore place concerned.

...

#### **Section 499 Minister may give directions**

(1) The Minister may give written directions to a person or body having functions or powers under this Act if the directions are about:

- (a) the performance of those functions; or
- (b) the exercise of those powers.

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(1A) For example, a direction under subsection (1) could require a person or body to exercise the power under section 501 instead of the power under section 200 (as it applies because of section 201) in circumstances where both powers apply.

(2) Subsection (1) does not empower the Minister to give directions that would be inconsistent with this Act or the regulations.

(2A) A person or body must comply with a direction under subsection (1).

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(3) The Minister shall cause a copy of any direction given under subsection (1) to be laid before each House of the Parliament within 15 sitting days of that House after that direction was given.

(4) Subsection (1) does not limit subsection 496(1A).

...

### ***Immigration (Guardianship of Children) Act 1946 (Cth)***

#### **Section 4 Definitions**

In this Act, unless the contrary intention appears:

...

**non-citizen** means a person who is not an Australian citizen.

**non-citizen child** means a person who is a non-citizen child under subsection 4AAA(1) or (4).

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...

**relative** of a person includes:

- (a) a parent of the person; and
- (b) anyone who is a step-parent of the person or would be except that he or she is not legally married to his or her de facto partner (within the meaning of the *Acts Interpretation Act 1901*); and
- (c) anyone else who would be a relative of the person if someone mentioned in paragraph (a) or (b) were a relative of the person.

...

**Section 4AAA Non-citizen child**

- (1) Subject to subsections (2) and (3), a person (the **child**) is a non-citizen child if the child:
- (a) has not turned 18; and
  - (b) enters Australia as a non-citizen; and
  - (c) intends, or is intended, to become a permanent resident of Australia.
- (2) Subsection (1) does not apply if the child enters Australia in the charge of, or for the purposes of living in Australia under the care of:
- (a) a parent of the child; or
  - (b) a relative of the child who has turned 21; or
  - (c) an intending adoptive parent of the child.
- (3) Subsection (1) does not apply if:
- (a) the child enters Australia in the charge of, or for the purposes of living in Australia under the care of, a person who is not less than 21 years of age (the **adult**); and
  - (b) a prescribed adoption class visa is in force in relation to the child when the child enters Australia; and
  - (c) the adult intends to reside with the child in a declared State or Territory.
- (4) A person is a non-citizen child if:
- (a) the person has not turned 18; and
  - (b) a direction under section 4AA is in force in relation to the person.

**Section 5 Delegation**

- (1) The Minister may, in relation to any matters or class of matters, or in relation to any non-citizen child or class of non-citizen children, by writing under his or her hand, delegate to any officer or authority of the Commonwealth or of any State or Territory all or any of his or her powers and functions under this Act (except this power of delegation) so that the delegated powers and functions may be exercised by the delegate with respect to the matters or class of matters, or the child or class of children, specified in the instrument of delegation.
- (2) Where under this Act the exercise of any power or function by the Minister or the operation of any provision of this Act is dependent upon the opinion or state of mind of the Minister in relation to any matter, that power or function may be exercised by the delegate or that provision may operate (as the case may be) upon the opinion or state of mind of the delegate in relation to that matter.

- (3) A delegation under this section shall be revocable at will, and no delegation shall prevent the exercise of any power or function by the Minister.

**Section 6 Guardianship of non-citizen children**

The Minister shall be the guardian of the person, and of the estate in Australia, of every non-citizen child who arrives in Australia after the commencement of this Act to the exclusion of the parents and every other guardian of the child, and shall have, as guardian, the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have, until the child reaches the age of 18 years or leaves Australia permanently, or until the provisions of this Act cease to apply to and in relation to the child, whichever first happens.

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**Section 6A Non-citizen child not to leave Australia without consent**

- (1) A non-citizen child shall not leave Australia except with the consent in writing of the Minister.
- (2) The Minister shall not refuse to grant any such consent unless he or she is satisfied that the granting of the consent would be prejudicial to the interests of the non-citizen child.
- (3) A person shall not aid, abet, counsel or procure a non-citizen child to leave Australia contrary to the provisions of this section.

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Penalty: Two hundred dollars or imprisonment for six months.

- (4) This section shall not affect the operation of any other law regulating the departure of persons from Australia.

**Section 7 Custody of non-citizen children**

- (1) The Minister may place a non-citizen child in the custody of a person who:
- (a) is willing to be the custodian of that child; and
  - (b) is, in the opinion of the Minister, a suitable person to be the custodian of that child;

and that person shall thereupon become the custodian of that child.

- (2) The Minister may, at any time, if he or she considers it necessary so to do in the interests of a non-citizen child, remove the child from the custody of his or her custodian and place the child in the custody of some other person, who shall thereupon be the custodian of that child.

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