IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M70 of 2011

B E T W E E N

PLAINTIFF M70/2011

Plaintiff

ORIGINAL

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP

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First Defendant

THE COMMONWEALTH OF AUSTRALIA

Second Defendant

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M106 of 2011

B E T W E E N

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

Plaintiff

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP

First Defendant

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THE COMMONWEALTH OF AUSTRALIA

Second Defendant

PLAINTIFFS' SUBMISSIONS IN REPLY

I. SECTION 198(2)

1. The Defendants identify the principle in *Anthony Hordern & Sons Ltd v Amalgamated Clothing & Allied Trades Union of Australia*,[1] as considered by this Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom*,[2] too narrowly, as applying "only if those provisions are properly characterised as conferring 'the same power'".[3] However, this is a misreading of *Nystrom* (especially the judgment of Gummow and Hayne JJ) and the authorities to which their Honours refer. In *Nystrom* Gummow and Hayne JJ, concluded that "it must be possible to say that the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to restrictions in the former power".[4] Their Honours spoke of the task as one of statutory construction and did not regard the terminology employed in earlier cases as determinative. They observed that the two powers in question must "deal with the same subject matter"; but their Honours did not say that the two provisions in question must confer "the same power". The difference may be subtle, but it is significant.[5] In particular, in *Nystrom* their Honours held that the subject matter of the powers in question was not the same because one was directed at visa cancellation and the other at deportation; and the ambit of the power to deport was not "wholly subsumed" within the ambit of the power to cancel a visa.

2. In this case, the "subject matter" of the two powers is the same: the taking of a person from Australia. Each is a power to ensure that a person leaves Australia — the general power in s 198 is simply one of "removal"; the specific power in s 198A is a power to take a person to a place to have her claim processed. The differences between the powers pointed to by the Defendants are not such as to change the fact that the subject matter of ss 198 and 198A is the same. Further, the context and purpose of the two sections, the legislative history and the Act as a whole support this construction of the two powers.

3. The Migration Act responds, inter alia, to the international obligations undertaken by Australia in the Convention and Protocol[6]. Those obligations include the requirement to determine whether or not a person seeking entry is a refugee and to protect them from being returned either directly or indirectly to the country where he or she has a well founded fear[7]. The Defendants' submissions[8] are wrong to suggest otherwise. The characterisation of the Plaintiffs' argument as imposing "guarantees" or "requirements"[9] on the Executive to process all asylum seekers in Australia should be rejected. The Plaintiffs' arguments proceed from an analysis of the legislative scheme as it stands today, giving meaningful effect to the policy choice made in 2001 to find another way to deal with Australia's

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1 (1932) 47 CLR 1 at 7.

2 (2006) 228 CLR 566.

3 Defendant's Submissions at [47].

4 (2006) 228 CLR 566 at 589.

5 Indeed, it may be observed that in *Anthony Hordern* and subsequent cases applying that princple, the two powers have never been "the same" in the narrow sense for which the Defendants contend. *Anthony Hordern* itself concerned a general power to hear and determine industrial disputes and a specific power to give preferential employement to members of unions subject to certain conditions — not at all "the same power".

6 *Plaintiff M61* (2010) 272 ALR 14 at [27].

7 *Minister for Immigration v Mayer* (1985) 157 CLR 290 at 294, 300, 305.

8 Defendants' submissions at [15].

9 See Defendants' submissions at [23] and [26]; see also [15].

international obligations to persons arriving by boat in Australia and seeking to invoke its protection obligations.[10]

4. The Defendants' approach to the duty in s 198(2) involves construing the Act as requiring Australia to breach its international obligations under the Refugees Convention. The submission at [13] that removal will be reasonably practicable as soon as removal can be effected to any country would involve, for example, accepting the Commonwealth could, at this moment, lawfully use s 198(2) to return both Plaintiffs to Afghanistan – there is no suggestion Afghanistan would not accept them, since they are its nationals.

5. No conundrum[11] is raised by the Plaintiffs' approach to s 198(2), for three reasons. First, the Defendants have ignored the discretionary nature of detention under s 189(3). Second, the Plaintiffs do not accept that the Executive (through the Minister) can lawfully "choose" in advance never to exercise the powers under s 46A in relation to the whole category of persons covered by that power (see below). Third, if ss 46A, 189(3), 195A, and 198A are seen as a parallel scheme to deal with persons seeking to invoke Australia's protection obligations who arrive in Australia in particular places and by particular means, there is no need to construe s 198(2) in a way which assumes that scheme would, deliberately, be frustrated by the executive.

III. SECTION 198A(3): JURISDICTIONAL FACTS

Defendants' submission ignore the nature of the power

6. When the Defendants rely on the nature of the power in s 198A(3),[12] they ignore two of the most critical features of s 198A: namely, that it contains provisions directly affecting liberty and authorising the use of force. The s 198A(3) declaration is the precondition for those deprivations and effects to occur. Yet the Defendants suggest the power is subject to the barest of judicial supervision.[13] Speaking of principles of statutory construction as applied to this same piece of legislation, Gleeson CJ said[14] that "people whose fundamental rights are at stake are ordinarily entitled to expect more than good faith." The Defendants are also inviting this Court to construe s 198A(3) (despite expression of criteria in the legislation itself and despite its function as the precursor to the use of coercive powers against individuals), as having no real jurisdictional content other than good faith so that this Court's function under s 75(v) is reduced in a way contrary to the approach advanced by the majority in *Plaintiff S157*.[15]

7. The Defendants offer no real textual reason why the s 198A(3) power should be construed as subject to such limited judicial review. Instead, they offer only a political justification – the endangering of international relations.[16] Yet even this argument is answered by an examination of, for example, extradition legislation,[17] where the very kinds of inquiries which the Defendants describe as "complex",[18] or requiring the court to "sit in judgment over the laws and conduct of that State"[19]

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10 The changes in 2001 were accompanied by the express statement that Australia would continue to abide by its international obligations: see Minister's Second Reading Speech at *Hansard,* 18 September 2001 at 30871.

11 Defendants' submissions at [24].

12 Defendants' submissions at [57].

13 Ibid.

14 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 494, [37].

15 (2003) 211 CLR 476 at 513-514.

16 Defendants' submissions at [73].

17 Extradition Act 1988 (Cth), s 7.

18 Defendants' submissions at [72].

19 Defendants' submissions at [73].

are precisely what the statute requires and the Court (including this Court[20]) has no difficulty doing.

8. On the one hand the Defendants submit,[21] without developing any argument as to why, that the effect of the language in s 198A(3) is not to deem the circumstances in s 198A(3)(i)-(iv) to be true. The Plaintiffs agree with this submission. Yet, the Defendants then submit that the effect of a declaration is that the four propositions are "asserted as facts".[22] Aside from the deliberate change of verb by the Defendants, it is difficult to see what real difference there is between these two propositions.

10 ***Facts about the use of s 198A in relation to Nauru are irrelevant***

9. There is some parallel between how the Defendants seek to use an historical declaration about Nauru and what this Court has said about not being able to rely on Ministerial intentions[23] or on subjective Parliamentary reasoning processes,[24] and/or extrinsic material (let alone Ministerial press conferences) as the destination of first resort in a construction exercise.[25] However, the Defendants' reliance on the Nauruan experience is affected by further difficulties:

9.1. There is no reference at all in the extrinsic material[26] attending the passing of the legislation in 2001 to the international and domestic obligations of Nauru.

20 9.2. The argument that those matters might have been discoverable, on searching of public records,[27] would extend the amount of information to be imputed to Parliamentarians when they vote on legalisation to a very wide category indeed.

Defendants' construction of s 198A(3) is wrong, including the construction of "protection" in s 198A(3)

10. It begs the question to submit that s 198A(3) uses verbs such as "provides" and "meets" so that this must lead to examining what a country "does".[28] Part of what a nation "does" is to undertake international obligations, and implement those through its domestic law, or otherwise provide in its domestic law for the respect
30 of human rights. Australia "provides" protection for asylum seekers through, *inter alia*, the law in the Migration Act. The so-called "practical reality" begins with the content of the legal system in which that 'reality' must operate. The hypothetical example in [71] of the Defendants' submission is just that: it is unlikely in the extreme that a country will "in fact" offer the requisite protection without a legal system underpinning that fact.[29] The converse may not always be true, but that

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20 See, for example, *Republic of Croatia v Sneddon* (2010) 265 ALR 621.

21 Defendants' submissions at [56].

22 Defendants' submissions at [65].

23 *Re Bolton; ex parte Beane* (1987) 162 CLR 514 at 518.

24 *Zheng v Cai* (2009) 239 CLR 446 at 455-456.

25 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [31]-[33].

26 Even taken at its widest to incude whatever might have been said by any Parliamentarian in *Hansard*: see Defendants' submissions at fn 79.

27 Defendants' submissions at [63].

28 Defendants' submissions at [68].

29 The Defendants refer elsewhere in their submissions to *Al-Sallal* (1999) 94 FCR 549. At [47] in that case, the Full Federal Court noted that the US is not a party to the Refugees Convention but may provide better protection than countries that are parties. However, this overlooks two matters. First, the United States is a party to the Protocol, having acceded to it in 1968. By so acceding, the US accepted as binding the obligations imposed by the Convention (Protocol, art 1). Thus it is a misunderstanding to conclude that because the US is not a party to the Convention it is not bound to give effect to the obligations contained therein. Second, the Plaintiffs do not say that an examination of legal obligation is restricted to the Refugees Convention. The US "provides" protection and "meets" relevant human rights

situation is accommodated by the Plaintiffs' arguments in relation to the "can I" and "should I" aspects of the s 198A(3) task.[30]

11. There is no valid comparison with the concept of "effective protection"[31] in determining whether a fear of persecution is well founded, and the task of declaring a country in under s 198A(3). The former task is clearly evaluative, because it concerns the well-foundedness of a fear held by an individual. The latter is a precondition[32] to two things, both of which will involve evaluation – a discretion whether to declare a country that passes the jurisdictional hurdle, and then an assessment under s 198A(1) whether an individual should be sent to that country. But the purpose of the criteria in s 198A(3)(i)-(iv) is quite different – it is the setting of a legal standard by Parliament, designed to equate to the legal standard which prevails in Australia for asylum seekers and refugees, so as to ensure that there is no diminution of Australia's performance of its international obligations.[33]

12. The cases relating to the "safe third country" provisions of the Act (ss 91M-91Q), are not applicable to the present case because of the different text and context of those provisions, in particular that they operate in relation to a person who has a right to enter and reside in a third country.[34]

IV. SECTION 198A(3): MINISTERIAL SATISFACTION

13. As to [82] of the Defendants' submissions, the Plaintiffs do not invite the Court to disbelieve the Minister's evidence. However, nor can the Minister's evidence bind or preclude this Court from examining the evidence as a whole in order to determine, for itself, whether an exercise of power was lawful.

14. There are statements in the Minister's affidavit that demonstrate that he asked himself the wrong question, including:

    14.1. Identification (as part of his decision-making process), his belief that Malaysia had made "a significant conceptual shift" in how it wanted to treat refugees and asylum seekers, and had "begun the process of improving protections offered to such persons".[35] Section 198A(3) is concerned with a present state of affairs in a country, rather than intentions or possibilities of different states of affairs in the future.

    14.2. Similarly, the Minister suggests that he took into account other prospective matters, including the possibility that Malaysia would allow work rights for all asylum seekers and other possible improvements of the plight of asylum seekers in Malaysia in the future.[36]

15. Further, for the Minister to depose as to his "understanding that he needed" to take into account the general situation in Malaysia is not determinative of whether it was his satisfaction as to the general situation in Malaysia which was the reason he made the decision, or whether it was the existence and content of the Arrangement which was the reason. If the latter, it involves the wrong question and the ground is made out.

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standards as the Plaintiffs construe s 198A(3) because of all its international and domestic legal obligations.

30 See Plaintiff's principal submissions at [72].

31 Defendants' submissions at [69].

32 Rather than the "limited inquiry" asserted by the defendants at [70].

33 See discussion in M Foster, "'Protection elsewhere: The legal implications of requiring refugees to seek protection in another state" (2007) 28 *Michigan Journal of International Law* 223-286.

34 S 91N.

35 Minister's Affidavit at [7].

36 Minister's Affidavit at [9] and [13] and [15].

V. SECTION 198A(1): FAILURE TO CONSIDER INDIVIDUAL CIRCUMSTANCES

16. The Defendants contend that there is nothing in the "subject matter, scope or purpose of the Act" to support the proposition that an officer exercising power under s 198A(1) must consider the operation of the domestic law of the country in question in relation to past offences by a person who is to be taken to that country.[37] This is to ignore the manifest purpose and structure of s 198A read as a whole, which is to ensure that a person is taken to another country that meets the s 198A(3) criteria in relation to him or her and not just generally.

16.1. The terms of s 198A(3) are directed at whether a particular country meets the necessary standards for asylum seekers and refugees. In contrast, the different work for s 198A(1) is to consider individual circumstances. Such circumstances are a mandatory consideration for the officer exercising the power.

16.2. Once there is a valid declaration under s 198A(3), s 198A(1) retains a discretion in the officer as to whether to take a person to a declared country. The discretion allows for the officer to decide not to take a person to a declared country if that person would not have the necessary protections in the declared country for reasons particular to him or her.

16.3. It is an integral part of an individual's circumstances whether the person is liable to arrest and punishment for offences committed previously in the country in question.

16.4. This construction of s 198A(1) is supported by the purpose of the Act as explained in *Plaintiff M61* and by the effect on the fundamental rights of the person in question.[38]

VI. SECTION 198A(1): UNLAWFUL FETTER/DICTATION

17. The Plaintiffs make two distinct, but related arguments that powers conferred by the Act have been subject to unlawful fettering. The first of these — that the Minister impermissibly fettered his power under ss 46A and/or 195A, is addressed as "Issue 6" by the Defendants. The second — that the officer's discretion under s 198A(1) was impermissibly fettered by the Minister's letter dated 25 July 2011 (the **Letter**)[39] — has not been addressed by the Defendants and is more fully explained below.

Fettering of the Minister's discretion under ss 46A and/or 195A

18. As Lord Browne Wilkinson observed in *R v Secretary of State for the Home Department; ex parte Venables*:[40]

> When Parliament confers a discretionary power exercisable from time to time over a period, such power must be exercised on each occasion in the light of the circumstances at that time. In consequence, the person on whom the power is conferred cannot fetter the future exercise of his discretion by committing himself

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37 Defendants' submissions at [89].

38 *Coco v R* (1994) 179 CLR 427 at 435-6 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Lacey v Attorney-General (Qld)* (2011) 275 ALR 646 at [17] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

39 ASF [38], Attachment 35.

40 [1998] AC 407 at 496-497, quoted with approval by Gleeson CJ in *Neat Domestic Trading Pty Limited v AWB Ltd* (2003) 216 CLR 277. And see *Green v Daniels* (1977) 13 ALR 1 at 9 (Stephen J); *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 640 (Brennan J); *Perder v Lightowler* (1990) 101 ALR 151 at 157 (Spender J); *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189 at 206 (French and Drummond JJ); *Plaintiff S157/2002 v Commonwealth* 211 CLR 476 at [25] (Gleeson CJ).

> now as to the way in which he will exercise his power in the future ... By the same token, the person on whom the power has been conferred cannot fetter the way he will use that power by ruling out of consideration on the future exercise of that power factors which may then be relevant to such exercise.
>
> These considerations do not preclude the person on whom the power is conferred from developing and applying a policy as to the approach which he will adopt in the generality of cases ... But the position is different if the policy adopted is such as to preclude the person on whom the power is conferred from departing from the policy or from taking into account circumstances which are relevant to the particular case in relation to which the discretion is being exercised. If such an inflexible and invariable policy is adopted, both the policy and the decisions taken pursuant to it will be unlawful.

19. It may be accepted that, as s 46A(7) provides, 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*".[41] However, to accept that proposition is not to accept that the Minister is entitled to fetter the discretions conferred upon him by ss 46A(2) and 195A(2) by declining to consider to exercise his powers in the future, whether generally or in relation to a particular class of persons. It is inconsistent with the terms of those sections for the Minister to decide in advance, in relation not to an individual but in relation to all offshore entry persons arriving after 25 July 2011, that he will not, in any circumstances, consider the exercise of the powers conferred by ss 46A(2) and 195A(2).

20. The Minister has not, contrary to the Defendants' submissions, issued "instructions ... that only cases of a certain kind are to be brought to his attention".[42] He has, in effect, issued instructions that no cases are to be brought to his attention until further notice. This is quite different from the circumstances considered by this Court in *Plaintiff M61* and by the Full Federal Court in *Bedlington v Chong*.[43] Those cases concerned circumstances where the Minister had indicated those cases in relation to which he would consider exercising his power.[44] While mandamus will not issue to the Minister in relation to his discretions under ss 46A and 195A, those powers are not thus immunised against judicial supervision of any kind. A declaration that the Minister has made an error of law remains an available remedy;[45] and such an error of law can found injunctive relief under s 75(v) to prevent the Minister from taking steps to remove the Plaintiffs from Australia.

Fettering of the officer's discretion under s 198A(1)

21. In addition to the fetter the Minister imposed upon his own discretions, the Minister impermissibly fettered the discretion of the officer upon whom the power to decide to take a person to another country is conferred by s 198A(1), by the issue of the Letter.

22. The Letter purports to be a direction to all officers of the Department that there is to be no processing of offshore entry persons arriving after 25 July 2011; that the Minister will not consider exercising his powers under ss 46A and 195A in relation

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41 And see s 195A(4), which is in materially similar terms.

42 Defendants' Submissions at [113].

43 Cited by the Defendants at n 178.

44 *Plaintiff M61/2011* (2010) 272 ALR 14 at [70]; *Bedlington* (1998) 87 FCR 75 at 80.

45 The utility of such relief is twofold: first, its impact on the officer exercising the discretion conferred by s 198A(1): if the Minister is not permitted to fetter his discretion in this way, the decision of the officer under s 198A(1) will have miscarried, because that officer will have proceeded on an erroneous basis, namely that the Minister would not consider exercising his powers under ss 46A and 195A; and second, its impact on the duty under s 198(2) (if that duty be engaged) to remove a person from Australia as soon as is "reasonably practical". See *Plaintiff M61/2011* (2010) 272 ALR 14 at [100]-[104].

to such persons; and he expects all such persons to be removed to Malaysia in accordance with the Arrangement.[46]

23. The Plaintiffs contend that the directions in the Letter are not directions pursuant to s 499 of the Act, nor "lawful" directions with which an officer has a duty to comply by reason of s 13 of the *Public Service Act 1999* (Cth), for two reasons.

24. First, the directions in the letter are not directions "about" the exercise of power under the Act;[47] they amount to a direction to an officer exercising a power under s 198A(1) as to the outcome of the exercise of that power, not a direction as to the manner in which the power is to be exercised (eg. by reference to particular factors). A direction as to the outcome of the exercise of power under s 198A(1) goes beyond the terms of s 499.

25. Second, the directions in the Letter, in particular the direction that all offshore entry persons arriving after 25 July 2011 are to be removed to Malaysia in accordance with the Arrangement, are inconsistent with the conferral of a discretionary power on an officer by s 198A(1). Where an Act confers a discretion on an officer, the officer must exercise the discretion him or herself, and not act at the direction of another, even a Minister.[48]

26. Further, "whatever hint of flexibility and of room for consideration of exceptional cases may be thought to be conveyed"[49] by the documents to which the officer making the Pre-Removal Assessment decision had regard, the application of the general rule to the Plaintiffs, particularly Plaintiff M106, an unaccompanied minor, contained no suggestion of anything other than an inflexible rule which prevented (or will prevent) the exercise of the s 198A(1) discretion in the Plaintiffs' favour.

VI. GUARDIANSHIP ACT

27. Plaintiff M106 submits that the duty of guardianship intersects with the decision to take the Plaintiff to Malaysia, be it under s 198A or 198(2), at two points:

    27.1. by requiring the Minister to exercise his discretionary powers under the Migration Act in the best interests of the ward; and

    27.2. by giving or withholding consent under s 6A of the Guardianship Act.

28. The first aspect requires reconciliation between the two Acts to produce an harmonious whole. The duty that the plaintiff seeks to enforce is that conferred by

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46 If a part or parts of the Letter are held not to be a purported direction pursuant to s 499 of the Act (cf *NT Power Generation Pty Ltd v Power and Water Authority* 219 CLR 90 at [127]ff), the Plaintiffs contend that the Letter nonetheless impermissibly fettered the officer's discretion because in terms the Letter purported to direct officers and because it would have been so understood by the officer (noting that the Minister's direction was referred to in the "Pre-Removal Assessment Process for Transfers to a Third Country" (Attachment 9 – AB 105), a document to which the officer who conducted the "Pre-Removal Assessment" had regard: Attachment 8 – AB 88).

47 See discussion in *Nemer v Holloway* (2003) 87 SASR 147; *Zayen Nominees Pty Ltd v Minister for Health* (1983) 47 ALR 158 at 188-189 (Northrop J); *Perder Investments Pty Ltd v Lightowler* (1990) 25 FCR 150 at 158-159; *Riddell v Secretary, Department of Social Security* (1993) 114 ALR 340 at 346-347; *Aboriginal Legal Service Ltd v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 69 FCR 565 at 567 (Black CJ), 575-577 (Tamberlin J), 579-581 (Sackville J). Cf s 496(1A), in relation to delegated powers; and see s 499(4) as a textual indication that s 499(1) is confined to general directions, in contrast to s 496(1A).

48 See, eg, *The Queen v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189 (Kitto J, with whom Menzies J agreed), 202 (Menzies J); *Ansett Transport Industries (Operations) Pty Ltd v the Commonwealth* (1977) 139 CLR 54 at 82-3 (Mason J, dissenting); *the King v Mahony; Ex parte Johnston* (1931) 46 CLR 131 at 145 (Evatt J); *Bread Manufacturers of NSW v Evans* (1981) 180 CLR 404 at 418 (Gibbs CJ), 429, 439 (Mason and Wilson JJ). In this case, the statutory context is one in which certain discretions are conferred on the Minister and certain discretions are conferred on officers.

49 *Green v Daniels* (1977) 13 ALR 1 at 7 (Stephen J).

the Guardianship Act. The means by which the Minister could discharge that duty is to consider and exercise his discretionary powers including under ss 46A and 195A. His continued failure to do so is a breach of his guardianship duty.

29. In relation to the second, independent aspect, the Plaintiff adopts the submission of HREOC, at [51] to [52] and withdraws the submission at para [120] of his submissions. The Defendants meet the argument by submitting that there is no relevant overlap, s 46A(7) and 195A(4) are inconsistent with the duty or preclude meaningful relief and that s 6A of the Guardianship Act shows that to the extent there is an overlap the Migration Act prevails unaffected.

Reconciliation

30. The Defendants divorce the two regimes by equating the position of the Minister under the Guardianship Act to that of a private parent as at 1946, submitting that the two Acts operate in different realms of discourse.[50]

31. Although not entirely clear, the Commonwealth seemingly suggests[51] that the term "natural guardian" is to be understood in the sense that term was used in 1946 and thus connotes only "limited duties" (said to involve "maintenance, education and advancement, but not involving any obligation of the guardian to expend his or her own resources"). To the extent that is the Commonwealth's submission, it should be rejected.

32. Although sometimes misleadingly labelled a "rebuttable presumption", it is well established that Parliament may (depending upon the context, scope and purpose of the relevant provision) have intended that the terms of a statute would be construed in an "ambulatory" or "always speaking" fashion.[52] Such an intention is discernible in s 6, which confers on the Minister:

> ...the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have... (emphasis added)

33. That is, the Minister is to have a set of obligations and powers equivalent to those of a "natural guardian", as judged by the standards prevailing during the period of the child's guardianship. It would be strange if Parliament were to be taken to have intended that the children to whom the Guardianship Act applied would be treated in a manner that differed from all other children in Australia, frozen in time as at 1946. The Defendants' submissions do not take into account that the jurisdiction of the Court of Chancery was considerably more extensive than suggested in the older authorities: see Deane J in *Marion's Case*.[53]

34. Notwithstanding its suggestion that the Minister's guardianship obligations are to be fixed by reference to the state of affairs which existed over sixty years ago, the Commonwealth accepts that there is an obligation on the Minister to treat the best interests of the child as the paramount consideration (CS [101]). The analysis that follows turns upon the proposition that that obligation cannot displace "powers or duties which the guardian has in another capacity".

Sections 46A and 195A

35. The duty that the Plaintiff seeks to enforce is that of guardian. The Minister has the capacity to avoid the harm that would attend removal. The Minister's decision to refuse to consider the exercise of his powers is not without legal consequence,

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50 Defendants' submissions at [109].

51 Defendants' submissions at [99].

52 *Forsyth v Deputy Commissioner of Taxation* (2007) 231 CLR 531 at [39] per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ.

53 (1992) 175 CLR 218 at 292.

because it places the Minister in a position of breach of his guardianship duty.

36. The Defendants' submission is that the Minister's duties under the Guardianship Act are eviscerated by force of the terms of ss 46A(7) and 195A(5) of the Migration Act or deny the utility of relief. As submitted in the Plaintiff's principal submissions at [124], there is no basis in the text of either enactment or the extrinsic materials for the proposition that those provisions cut down the duties imposed upon the Minister in connection with his statutory guardianship. Indeed, in the second reading speech to the Guardianship Bill 1946, the Minister's guardianship was described as "overriding".

37. The apparent mischief to which ss 46A(7) and 195A(5) were rather addressed is to oust the general presumption which otherwise arises in respect of most discretionary powers - that is, that a decision maker will generally be taken (subject to a contrary statutory intention) to be bound to consider the exercise of a discretionary power.[54] Such a provision cannot affect the specific duties derived from the Minister's independently arising and "overriding" guardianship. It follows that the ss 46A(7) and 195A(5) do not alter the duty to act in the best interests of the child.

38. It is said, by the Defendants, that the utility of such a declaration is not apparent. Yet, as in *Plaintiff M61*:[55] that relief is directed to determining a legal controversy – one which involves the potential contravention of the Minister's important duties as guardian; it is not directed to answering some abstract or hypothetical question; Plaintiff M106 has a "real interest" in raising the questions to which the declaration would go – the Minister has, by the direction, denied to himself "the exercise of power to avoid breach by Australia of its international obligations";[56] a conclusion that the Minister has acted unlawfully leads to a conclusion that the powers conferred by s198A(1) may not lawfully be exercised and would support an injunction restraining officer's of the Minister's Department from taking any further action on the basis of the Minister's unlawful action;[57] and there is considerable public interest in that matter and in the discharge of a statutory guardianship intended to protect vulnerable children.

Section 6A of the Guardianship Act

39. The Commonwealth accepts that s 6A demonstrates a degree of overlap between the two Acts but submits that the obligation for consent does not apply to s 198(2) and 198A.

40. On its proper construction, consent under s 6A is a necessary but not sufficient basis for a child to be permitted to leave Australia. The giving or withholding of consent does not affect the operation of a law that "regulates" departure, in the sense that compliance with such laws remains necessary. Such a law does not cease to operate according to its terms. For example, until 1938, the *Passports Act 1920* (Cth) provided that no person over the age of 16 years shall embark at any place within the Commonwealth for a journey to any place beyond the Commonwealth unless they were a holder of a passport or other document authorising their departure and that passport had been "viséed or indorsed in the prescribed manner and the visé or indorsement had not been cancelled".[58] The

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54 *R v The Australian Broadcasting Tribunal and Others; Ex parte 2HD Proprietary Limited* (1979) 144 CLR 4 at 49; *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505.

55 (2010) 85 ALJR 133 at [103].

56 Ibid.

57 *Project Blue Sky v ABA* (1998) 194 CLR 355 at 393.

58 Certain exceptions applied to that requirement (s3(2)) and the Minister was empowered to grant exemptions from that requirement, including on the basis of certain conditions: ss3(3) and 3(4). Note also the attenuation of the requirement when the Minister notified (in the Gazette) an arrangement of

Minister's written consent could not erase any such requirement.

41. On no view could the power to regulate be said to connote the power to bring into existence the very subject matter to be regulated – for regulation necessarily implies the prior existence of that subject matter. [59] As such, in the current context, the laws to which s6A(4) is addressed could not be said to be those conferring a power to mandate or bring about the departure of persons from Australia.

42. The language of the Guardianship Act supports the construction. First, in contrast to s 8, which refers to laws "relating" to a subject matter, s 6A(4) is limited to laws "regulating" a subject matter[60]. The purpose of the amendment is also relevant. The amendment was introduced in 1948 as part of three measures, all of which were designed for the benefit of the child: making the Minister the guardian of the estate as well as the person of the minor; permitting placement of the child with private custodians; an requiring the consent of the Minister for the child to leave Australia[61]. The amendment should be read so as to advance the interests of the child.

43. The Minister has not given his consent to the removal nor given consideration to whether or not the removal would be prejudicial to Plaintiff M106's interests. A decision under s 6A to give or withhold consent is a "decision" for the purposes of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**).[62] It is not a "privative clause decision" within the meaning of s 474 of the Act and it is not excluded by Schedule 2 of the ADJR Act. It would also be reviewable under s 39B of the *Judiciary Act* 1903 (Cth).[63]

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the nature referred to in s4. The *Passports Act 1920* (Cth) was repealed by the *Passports Act 1938* (Cth), which did not include a similar requirement.

59 *Municipal Corporation of City of Toronto v Virgo* [1896] AC 88 at 93-94; *Melbourne Corporation v Barry* (1922) 31 CLR 174 at 188-190 per Isaacs J and 211- 212 per Higgins J; *Williams v Melbourne Corporation* (1933) 49 CLR 142 at 148-149 per Starke J and 155-156 per Dixon J; *Brunswick Corporation v Stewart* (1941) 65 CLR 88 at 93-94 per Rich ACJ and 95 per Starke J; *Yanner v Eaton* (1999) 201 CLR 351 at [37].

60 See also s 12(b).

61 *Immigration (Guardianship of Children) Act* 1948 No 62 of 1948; *Hansard* 18 November 1948.

62 See s 3(2).

63 *X's case* (1999) 92 FCR 524 at [79].