IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **No M96 OF 2016**

BETWEEN:

PLAINTIFF M96A/2016
First Plaintiff

AND

PLAINTIFF M96B/2016
Second Plaintiff

AND

THE OFFICER IN CHARGE, MELBOURNE IMMIGRATION TRANSITACCOMMODATION
First Defendant

AND

COMMONWEALTH OF AUSTRALIA
Second Defendant

PLAINTIFFS' SUBMISSIONS

HIGH COURT OF AUSTRALIA
FILED
28 NOV 2016
THE REGISTRY MELBOURNE

Filed on behalf of: The Plaintiffs
Prepared by: Joel Townsend; Guy Coffey; Hollie Kerwin
Law firm: Victoria Legal Aid
Tel: (03) 9280 3757; (03) 9280 3736; (03) 9269 0416 Fax (03) 9269 0210
Email: hollie.kerwin@vla.vic.gov.au; guy.coffey@vla.vic.gov.au; joel.townsend@vla.vic.gov.au
350 Queen Street, Melbourne, VIC 3000
Address for service DX 210646 Melbourne

PART I PUBLICATION OF SUBMISSIONS

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

Part II ISSUE

2. The ultimate issue is whether the plaintiffs' detention by or on behalf of the defendants was and is lawful, in circumstances where the plaintiffs were brought to Australia by officers of the Commonwealth for temporary purposes including medical treatment, and have at all times needed to be in Australia for those purposes.

PART III SECTION 78B NOTICES

3. Notices under s 78B of the *Judiciary Act 1903* (Cth) were given by the plaintiffs on 5 August 2016.

Part V RELEVANT FACTS

4. The defendants have demurred to the plaintiffs' amended statement of claim dated 20 October 2016. For the purposes of determining the demurrer, the defendants are taken to have admitted the allegations in the statement of claim.[1] By the demurrer, the defendants deny the legal sufficiency of the facts alleged to entitle the plaintiffs to a legal remedy.[2]

5. The plaintiffs, a mother and daughter, were brought to Australia by officers of the Commonwealth on 1 November 2014. Since that time, they have been detained in Australia by or on behalf of the defendants. They are currently detained at the Melbourne Immigration Transit Accommodation (**MITA**).

6. The plaintiffs first arrived in Australia at Christmas Island in August 2013. Being "unauthorised maritime arrivals" within the meaning of s 5AA of the *Migration Act 1958* (Cth), they were detained under s 189(3) of that Act and were subsequently taken to Nauru (a "regional processing country") pursuant to s 198AD(2) in February 2014.

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1 *Kathleen Investments (Aust) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 125, 126 (Barwick CJ), 135 (Gibbs J).

2 *South Australia v The Commonwealth* (1962) 108 CLR 130 at 141-142 (Dixon J); *Crouch v The Commonwealth* (1948) 77 CLR 339 at 349 (Latham CJ); *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 368-369 [119]-[121] (Gummow and Hayne JJ), *cf.* at 414-417 [275]-[279] (Kirby J).

7. On or about 1 November 2014, the plaintiffs were brought to Australia by Commonwealth officers (see s 198B of the *Migration Act*).[3] The first plaintiff was brought to Australia for the purposes of medical treatment, including the investigation and treatment of breast lumps and orthodontic treatment.[4] The second plaintiff was brought to Australia to accompany her daughter, and to receive continued medical treatment in relation to chest pains, irregular heartbeat and anxiety-related conditions.[5] Neither of the plaintiffs was told how long they would remain in Australia, nor that they would be held in detention while they were in Australia.[6]

10 8. The plaintiffs have received and continue to receive medical treatment in Australia.[7] In particular, the second plaintiff's health has deteriorated while she has been detained at the MITA. Since their arrival in Australia on 1 November 2014, each of the plaintiffs has needed to be in Australia for the purposes of receiving medical treatment.[8]

9. The plaintiffs are not entitled to apply for a visa while they are in Australia (*Migration Act*, ss 46(1)(e)(iii) and 46B). While the Minister has a personal and non-compellable discretion to permit a transitory person to apply for a visa, the Minister has not given any consideration whether to permit the plaintiffs to make a valid application for a visa.[9]

20 **PART VI PLAINTIFFS' ARGUMENT**

Legislative context

10. Section 198B(1) of the *Migration Act* provides that "an officer may, for a temporary purpose, bring a transitory person to Australia from a country or place outside Australia". The term "transitory person" is defined in s 5 of the *Migration Act*, and relevantly includes a person who was taken to a regional processing country under s 198AD.

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3 Amended Statement of Claim, para 9

4 Amended Statement of Claim, para 10.

5 Amended Statement of Claim, para 11.

6 Amended Statement of Claim, para 12.

7 Amended Statement of Claim, para 17 and 18.

8 Amended Statement of Claim, para 19.

9 Amended Statement of Claim, para 20.

11. The prohibition in s 42 against a non-citizen travelling to Australia without a visa that is in effect does not apply to a non-citizen brought to Australia under s 198B: s 42(2A)(ca).

12. Section 198AD deals with taking "unauthorised maritime arrivals" (as defined in s 5AA) to a regional processing country. If s 198AD applies, an officer must as soon as reasonably practicable take the unauthorised maritime arrival to a regional processing country (s 198AD(2)), and for such purposes is given a range of coercive powers (s 198AD(3)). There are a number of circumstances where s 198AD does not apply to an unauthorised maritime arrival – where the Minister has made a written determination that s 198AD does not apply (s 198AE), where there is no regional processing country (s 198AF), or where there is no regional processing country which will accept the unauthorised maritime arrival (s 198AG).

13. Section 198AH provides for the application of s 198AD to "transitory persons" who are "unauthorised maritime arrivals". In particular, s 198AH(1A) relevantly provides that s 198AD will apply to a transitory person if and only if:[10]

> *(a) the person is an unauthorised maritime arrival who is brought to Australia from a regional processing country under section 198B for a temporary purpose; and*
>
> *(b) the person is detained under section 189; and*
>
> ***(c) the person no longer needs to be in Australia for the temporary purpose (whether or not the purpose has been achieved).***
>
> [Emphasis added]

14. Section 198 deals with the removal from Australia of unlawful non-citizens (defined in ss 13 and 14 as a non-citizen in the migration zone who does not hold a visa that is in effect). As acknowledged in a note to s 198(1A), some unlawful non-citizens may be transitory persons. Section 198(1A) addresses the circumstances in which a transitory person (other than an "unauthorised maritime arrival") brought to Australia under s 198B must be removed:[11]

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[10] The application of s 198AD to transitory persons is also subject to the exceptions set out in ss 198AE, 198AF and 198AG.

[11] The situation of transitory persons who are "unauthorised maritime arrivals" is dealt with in a consistent manner by s 198AD as qualified by s 198AH(1) and (1A). Where it applies, the duty under s 198AD to take an "unauthorised maritime arrival" to a regional processing country displaces and takes precedence over the power and duty to remove under s 198. See, Revised Explanatory Memorandum to the Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012, p 29.

> *(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).***
>
> [Emphasis added]

Section 198(11) provides that s 198 does not apply to an unauthorised maritime arrival to whom s 198AD applies.

15. The effect of these provisions may be summarised as ensuring that a person who is brought to Australia from a regional processing country under s 198B can and will remain for so long as the person needs to be in Australia for the purpose for which he or she was brought here. If and when the person no longer needs to be in Australia for that purpose (whether or not the purpose has been "achieved"), he or she must be removed to a regional processing country as soon as reasonably practicable. However, there is no duty to remove the person from Australia while he or she still "needs" to be here for the relevant purpose.

16. Section 189 of the *Migration Act* provides that, if an officer "knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person". Under s 196, an unlawful non-citizen detained under s 189 must be kept in immigration detention until:

> *(a) he or she is removed from Australia under section 198 or 199; or*
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> ***(aa) an officer begins to deal with the non-citizen under subsection 198AD(3); or***
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> *(b) he or she is deported under s 200; or*
>
> *(c) he or she is granted a visa.*
>
> [Emphasis added]

17. Because a transitory person is unable to make a valid application for a visa (ss 46(1)(e)(iii), 46B), he or she must be kept in immigration detention until the occasion arises for the exercise of the powers to remove the person from Australia or to "deal with" the person under s 198AD(3) – that is, to exercise coercive powers for the purposes of taking the person to a regional processing country. That occasion will not arise while the person still needs to be in Australia for the purposes for which they were brought here under s 198B. During that period, the person has no right to apply for a visa.

Legislative history

18. Section 198B was enacted in 2002 by the *Migration Legislation Amendment (Transitional Movement) Act 2002* (Cth). The relevant Explanatory Memorandum noted that there were "a small number of exceptional circumstances" in which it may be necessary to bring to Australia a person who had been removed to Nauru or Papua New Guinea for refugee status assessment, and provided as examples of those situations:[12]

    - *medical treatment for a condition which can not be adequately treated in the place where the person has been taken;*
    - *trials at which the person is to provide evidence in the prosecution of people smugglers; or*
    - *transit through Australia, either to return to their country of origin or to a third country.*

19. The power conferred by new s 198B was not limited to such situations, but rather was at large. When originally enacted, the definition of transitory person excluded a person who had been assessed to be a refugee – however, that limitation was subsequently removed by amendments made in 2013,[13] so as to allow the Commonwealth to bring to Australia for temporary purposes those persons in regional processing countries who had been assessed as refugees but were awaiting a durable resettlement outcome. It appears to have been originally envisaged that the period for which a transitory person was present in Australia would be "as short as possible".[14] In this regard, former s 198C provided that, if a transitory person remained in Australia for a continuous period of 6 months, he or she would be entitled to request the Refugee Review Tribunal (**RRT**) (as it was then called) for an assessment of whether he or she was covered by the definition of refugee in Article 1A of the Refugees Convention.[15]

20. The relevant provisions were further amended by the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth), which introduced the current provisions dealing with regional processing contained in

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12 Revised Explanatory Memorandum, Migration Legislation Amendment (Transitional Movement) Bill 2002, p 2; see also at p 7 (in relation to new s 198B): "The temporary purposes for which this power may be exercised are, for example, to allow a 'transitory person' to receive medical treatment or to give evidence in legal proceedings."

13 *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth).

14 See Revised Explanatory Memorandum, Migration Legislation Amendment (Transitional Movement) Bill 2002, p 2.

15 If the outcome of such an assessment were successful, the Minister was required to determine a class of visa for which the person could apply: see former s 198C(8).

Subdivision B of Division 8 of Part 2 of the *Migration Act* (which then comprised ss 198AA to 198AH).[16] Among other things, the definition of "transitory person" in s 5(1) was amended to include a person who was taken to a regional processing country under new s 198AD, and s 196 was amended to provide that immigration detention ends when an officer begins to deal with a non-citizen under s 198AD(3). Accordingly, the power to bring transitory persons to Australia under s 198B was extended to cover unauthorised maritime arrivals (at that time referred to as "offshore entry persons") who had been taken to regional processing countries under the new statutory regime.

10 21. When first enacted, the obligation under s 198AD to take a transitory person back to a regional processing country did not apply if the person had requested a refugee status assessment by the RRT under former s 198C, unless the Secretary gave a certificate under former s 198D that the person had engaged in "uncooperative conduct" as defined. In 2013, the provision for a transitory person to request a refugee status assessment if he or she had been in Australia for a continuous period of 6 months was repealed.[17]

The *Lim* principle

22. It has long been accepted that the Executive has no power to detain a person in custody other than in accordance with a valid law which authorises such
20 detention.[18] Thus, "any officer of the Commonwealth Executive who purports to authorise or enforce the detention in custody of such an alien without judicial mandate will be acting lawfully only to the extent that his or her conduct is justified by valid statutory provision".[19]

23. In *Chu Kheng Lim v Minister for Immigration*, the Court upheld the validity of laws providing for the mandatory administrative detention of non-citizens who had entered or remained in Australia without a valid entry permit.[20] Brennan,

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16 These amendments were made in response to the High Court's decision in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.

17 *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth), Schedule 1, items 46 and 48.

18 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 13 (Mason CJ), 19 (Brennan, Deane and Dawson JJ), 63 (McHugh J); *Re Bolton; ex parte Beane* (1987) 162 CLR 514 at 528 (Deane J); *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 555 (Latham CJ); *Williams v The Queen* (1986) 161 CLR 278 at 292 (Mason and Brennan JJ).

19 *Chu Kheng Lim* (1992) 176 CLR 1 at 19 (Brennan, Deane and Dawson JJ).

20 The provisions are set out in the judgment of Brennan, Deane and Dawson JJ: (1992) 176 CLR 1 at 16-19. Prior to the introduction of these provisions, the imprisonment of particular non-citizens (prohibited immigrants) was effected through offence-creating provisions and the criminal justice system: see *e.g. Chu Shao Hung v The Queen* (1953) 87 CLR 575.

Deane and Dawson JJ stated that ordinarily "the power to order that a citizen be involuntarily confined in custody is ... part of the judicial power of the Commonwealth entrusted exclusively to Ch III courts".[21] This was because, putting to one side exceptional cases, "the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt".[22]

24. A qualification to that proposition is that the Parliament has power to make laws for the expulsion and deportation of aliens and for their restraint in custody to the extent necessary to make their deportation effective and for the purpose of executive powers to receive, investigate and determine an application for permission to enter and remain in Australia.[23] Such an authority to detain does not offend the separation of judicial power because "it takes its character from the executive powers to exclude, admit and deport of which it is an incident".[24] Nevertheless, laws authorising Executive detention of aliens will be valid only "if the detention which they require and authorise is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered".[25]

25. The principle established in *Lim* has been repeatedly affirmed in recent decisions. In *Plaintiff M76-2013 v Minister for Immigration, Multicultural Affairs and Citizenship*,[26] Crennan Bell and Gageler JJ stated:

> The constitutional holding in *Lim* was therefore that conferring limited legal authority to detain a non-citizen in custody as an incident of the statutory conferral on the executive of powers to consider and grant permission to remain in Australia, and to deport or remove if permission is not granted, is consistent with Ch III if, but only if, the detention in custody is limited to such period of time as is reasonably capable of being seen as necessary for the completion of administrative processes directed to those purposes.

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21 *Chu Kheng Lim* (1992) 176 CLR 1 at 28.

22 *Chu Kheng Lim* (1992) 176 CLR 1 at 27.

23 *Chu Kheng Lim* (1992) 176 CLR 1 at 32-33 (Brennan, Deane and Dawson JJ).

24 *Chu Kheng Lim* (1992) 176 CLR 1 at 32 (Brennan, Deane and Dawson JJ).

25 *Chu Kheng Lim* (1992) 176 CLR 1 at 33 (Brennan, Deane and Dawson JJ); see also at 10 (Mason CJ), 65-66 (McHugh J).

26 (2013) 251 CLR 322 at [140]; see also *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [31], [40] (French CJ), [98] (Bell J), [184] (Gageler J), [378]-[386], [400]-[401] (Gordon J).

26. Further, in *Plaintiff S4/2014 v Minister for Immigration and Border Protection*, French CJ, Hayne, Crennan, Kiefel and Keane JJ said:[27]

> [D]etention under and for the purposes of the Act is limited by the purposes for which the detention is being effected. ... [W]hen describing and justifying detention as being under and for the purposes of the Act, it will always be necessary to identify the purpose for the detention. Lawfully, that purpose can only be one of three purposes: the purpose of removal from Australia; the purpose of receiving, investigating and determining an application for a visa permitting the alien to enter and remain in Australia; or ... the purpose of determining whether to permit a valid application for a visa.

27. Further, the detention must be limited to such period of time as is reasonably capable of being seen to be necessary to effectuate those purposes.[28] The duration of any form of detention, and thus its lawfulness, must be capable of being objectively determined at any time and from time to time.[29]

Characterising the purpose of detention

28. The facts of the present case may be contrasted with previous cases in which detention was characterised as being either for the purposes of considering an application for permission to enter, or for the purposes of removal.

29. In *Koon Wing Lau v Calwell*,[30] orders had been made for the deportation of the plaintiffs.[31] The statute in question relevantly permitted deportees to be held in custody pending their deportation, and there was provision for release upon certain security being given.[32] That was challenged on the basis that it permitted unlimited imprisonment, a challenge that failed by reason of the purpose of the detention.

29.1. Latham CJ (with whom McTiernan J and Webb J agreed), said:[33]

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27 (2014) 253 CLR 219 at 231 [26].

28 *Chu Kheng Lim* (1992) 176 CLR 1 at 33 (Brennan, Deane and Dawson JJ) and 65-66 (McHugh J); *Plaintiff M76-2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at [138]-[140]; *Plaintiff S4/2014* (2014) 253 CLR 219 at [26], [29].

29 *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at [29]; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [184]-[185] (Gageler J); *North Australian Aboriginal Justice Agency Limited v Northern Territory* [2015] HCA 41 at [99] (Gageler J).

30 (1949) 80 CLR 533.

31 (1949) 80 CLR 533 at 549.

32 (1949) 80 CLR 533 at 550-551.

33 (1949) 80 CLR 533 at 556.

> The power to hold him in custody is only a power to do so pending deportation and until he is placed on board a vessel for deportation... If it were shown that detention was not being used for these purposes the detention would be unauthorised and a writ of habeas corpus would provide an immediate remedy.

29.2. Dixon J said:[34]

> ... I think the words "pending deportation" imply purpose. The two provisions together mean that a deportee may be held in custody for the purpose of fulfilling the obligation to deport him until he is placed on the vessel. It appears to me to follow that unless within a reasonable time he is placed on board a vessel he would be entitled to his discharge on habeas.

30. In *Lim,* the plaintiffs had entered Australia without permission, and the process of determining their applications for refugee status was ongoing.[35] The challenged provisions authorising detention were subject to time limits that operated by reference to the making or determination of an entry application:[36]

30.1. Section 54P(2) required that a designated person be removed from Australia as soon as practicable after he or she has been in Australia for at least two months (or a longer prescribed period) without making an entry application.

30.2. Section 54P(3) required the removal of a designated person from Australia as soon as practicable after the refusal of an entry application and the finalisation of any appeals against, or reviews of, that refusal.

30.3. Further, s 54Q limited the total period during which a person could be detained under Div 4B to 273 days of active processing.[37]

30.4. Lastly, s 54P(1) provided that an officer must remove a designated person from Australia as soon as practicable if the designated person asks the Minister, in writing, to be removed.

31. These time limits and the ability of a designated person to bring his or her detention to an end together precluded a conclusion that the powers of detention conferred on the Executive exceeded what was reasonably capable of being seen

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34 (1949) 80 CLR 533 at 581.

35 (1992) 176 CLR 1 at 15-16.

36 (1992) 176 CLR 1 at 33.5.

37 (1992) 176 CLR 1 at 33.4.

as necessary for the purposes of deportation or for the making and consideration of an entry application.[38]

32. In *Al-Kateb v Godwin*,[39] the applicant, who had entered Australia without permission, had asked to be removed and the Executive had attempted – but failed – to secure the necessary international cooperation to permit his removal. There was a continuing statutory duty to remove the applicant from Australia, as soon as reasonably practicable. In those circumstances, it was said that Al-Kateb's continued detention was for the purpose of his subsequent removal, and to segregate him or her from the community until removal could be effected.[40]

The purpose of the plaintiffs' detention

33. In the present case, the plaintiffs' detention is not for any purpose connected with the executive power to permit non-citizens to enter and remain in Australia. This is because the plaintiffs have no right to make an application for a visa while they are in Australia, and have not at any time been the subject of any consideration whether to permit them to make a valid application for a visa. The Plaintiffs had express statutory permission to travel to Australia without a visa.

34. Nor is the plaintiffs' detention for the purpose of removing them from Australia. As the plaintiffs have needed and continue to need to be in Australia for the purposes for which they were brought under s 198B, no obligation to remove the plaintiffs from Australia has been enlivened. Unlike cases such as *Al-Kateb*, it is not a case in which there is a subsisting obligation to remove as soon as reasonably practicable, but where the circumstances are such that removal cannot be effected. Rather, there is not yet any obligation to remove the plaintiffs from Australia, and they are not being held in detention for the purposes of carrying out any such obligation.

35. If the plaintiffs are not held in detention for the purposes of their admission to Australia or their expulsion or deportation from Australia, the purposes for which they are being detained by the defendants can only be connected with the purposes for which they were brought to Australia under s 198B. In the present case, these purposes are directly related to the physical and mental health of the Plaintiffs. It cannot be said that administrative detention for such purposes satisfies the *Lim* principle. To keep the plaintiffs in detention is not conducive

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38 (1992) 176 CLR 1 at 34 (Brennan, Deane and Dawson JJ).

39 (2004) 219 CLR 562.

40 *Al-Kateb v Godwin* (2004) 219 CLR 562 at [231], [247] (Hayne J); see also at [45]-[46] (McHugh J).

to the purpose of medical treatment, and is highly likely to be inimical to the fulfilment of that purpose (as is demonstrated by the deterioration in the second plaintiff's health, as a result of her detention, while she has been detained at the MITA). Detention in such circumstances is not for any of the three purposes identified by the plurality in *Plaintiff S4/2014*, and there is no warrant to extend the *Lim* principle to create a new category of permissible purposes for which the Executive may detain a non-citizen which would cover the present case.

36. It is critical to the determination of the constitutional validity of the plaintiffs' detention that they were brought to Australia by Commonwealth officers and entered both lawfully and with permission under the Migration Act: see s 42(2A)(ca). This is not a case involving a person "who presents uninvited and unheralded at the border"[41] or who makes landfall without permission to do so.[42] In this regard, it is immaterial that the plaintiffs may retain the statutory status as an "unauthorised maritime arrival" for the purposes of the *Migration Act* based on the manner and circumstances of their entry to Australia on a previous occasion. It remains the case that the plaintiffs entered and are present in Australia because they were brought here by the Commonwealth.

37. In this regard, it is pertinent to note that the purposes for which a transitory person may be brought to Australia under s 198B are not limited to purposes connected with the person's medical treatment. A transitory person may be brought to Australia by Commonwealth officers for any temporary purpose, including a purpose of the Commonwealth itself. An example provided in the Explanatory Memorandum was bringing a person to Australia for the purpose of giving evidence in a criminal trial (such as a prosecution of a people smuggler). The power conferred by s 198B is not expressly conditioned on the consent of the person who is brought to Australia; nor is it clear whether that person has any entitlement to require his or her return to the regional processing country.

38. The executive powers to exclude, expel or deport aliens are of limited, if any, relevance when it is the Commonwealth which has brought about the non-citizen's entry and continued presence in Australia. Thus, to the extent that the *Lim* principle accommodates detention for the purpose of segregation from the Australian community pending the exercise of powers to exclude (*i.e.* to admit or prevent entry) or expel (*i.e.* remove or deport),[43] this has no bearing on the

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41 *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 385 [207] (Kiefel and Keane JJ).

42 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 650 [266].

43 See e.g. *Al-Kateb v Godwin* (2004) 219 CLR 562 at [255]-[256].

validity of the detention of a transitory person brought to Australia under s 198B. As Gummow J noted in *Re Woolley; Ex parte Applicants M276/2003*:[44]

> *Lim* is authority at least for the proposition that, putting the defence power to one side, a law cannot be upheld under the aliens power if it provides for the segregation by incarceration of aliens, without their commission of any offence requiring adjudication, and for a purpose which, in the conclusive opinion of the executive branch, is sufficiently connected with the entry, investigation, admission and deportation of aliens. Still less can the purpose of the incarceration, which is identified in such a law and determined in each case by the opinion of the Executive, be unconnected with any of the above matters and rather be concerned solely with the prevention of aliens becoming "de facto citizens" or members of the "Australian community".

39. The detention of transitory persons brought into Australia by the Commonwealth is also difficult to reconcile with the statutory objects set out in s 4 of the *Migration Act*. The object set out in s 4(1) is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens. Subsections 4(2) to (5) identify the means by which the Act seeks to advance that object, including by providing for visas permitting non-citizens to enter or remain in Australia, to provide for the removal or deportation of non-citizens whose presence in Australia is not permitted by the Act, and to provide for the taking of unauthorised maritime arrivals from Australia to a regional processing country. While s 198B itself might be seen as falling with the principal object of regulating the coming into and presence in Australia of non-citizens, the detention of persons brought to Australia under s 198B is not connected with any of the specified means by which the Act seeks to achieve that principal object. In such circumstances, it may be doubted whether the plaintiffs' detention can be properly described as being "under and for the purposes of the Act".[45]

The duration of the detention

40. The plaintiffs have been held in detention in Australia for over two years. No statutory time limit is applicable to their detention. The length of the plaintiffs' detention was unknown when they were brought to Australia and remains incapable of being objectively determined. They will remain in detention for such time as they "need" to be in Australia for the purposes for which they were brought here by the Commonwealth. There is no requirement for those purposes

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44 (2004) 225 CLR 1 at [150].

45 See *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at [26].

to be recorded or communicated to a transitory person, and they may not necessarily even be articulated in any definite form or uniformly understood at the time of their transfer. The determination whether a person needs to be in Australia for the relevant purpose or purposes may depend, at least in the first instance, on an opinion formed by the Executive Government. As the Court observed in *Plaintiff M61/2010 v Commonwealth of Australia*, "[i]t is not readily to be supposed that a statutory power to detain a person permits continuation of that detention at the unconstrained discretion of the Executive".[46]

41. The extension of the mandatory detention provisions in ss 189 and 196 of the Migration Act to cover transitory persons brought to Australia under s 198B means that the period for which such persons are detained is no longer bounded by the grant of a visa or the effectuation of removal from Australia, or the associated performance of duties to consider a visa application within a reasonable time or to remove a person as soon as reasonably practicable. Rather, the period of detention is governed only by the question whether and when the person "no longer needs to be in Australia" for the relevant purpose and this threshold is divorced from the achievement of that purpose. Such a period is not readily capable of objective determination by a court at any time and from time to time;[47] nor are the temporal limits connected with the limited permissible purposes of administrative detention such that the power to detain is not unconstrained.

42. On the facts as alleged in the present case, the problem is compounded by the fact that the plaintiffs' continued detention may itself frustrate or impede the purposes of their medical treatment, thereby prolonging the period for which they need to be in Australia for such purposes.

43. Further or alternatively, the duration of the plaintiffs' detention will be governed by the medical treatment and their response to that treatment, which are not entirely within the power or control of the Commonwealth. Even accepting that s 198(1A) and s 198AH contemplate the possible removal of a transitory person in circumstances where the purpose has not been achieved, it remains a pre-

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46 (2010) 243 CLR 319 at 348 [64] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Plaintiff M76-2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at [93] (Hayne J); *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 199 at [84] (Hayne and Kiefel JJ).

47 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [184] (Gageler J); *Plaintiff M76-2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at [139] (Crennan, Bell and Gageler JJ).

condition of the removal obligation that the person no longer needs to be in Australia for the relevant purpose.

The plaintiffs' detention is beyond power

44. Accordingly, to the extent that ss 189 and 196 of the Migration Act purport to authorise the detention of a transitory person who has been brought to Australia for a temporary purpose under s 198B of the *Migration Act*, and who needs to be in Australia for that purpose, those provisions are beyond power and invalid.[48]

45. The balance of authority would suggest that ss 189 and 196, including in their application to the plaintiffs, can be characterised as laws with respect to the subject matter of "aliens" within s 51(xix) of the Constitution.[49] However, the legislative power under s 51(xix) is "subject to this Constitution", including the limitations derived from Chapter III and the *Lim* principle.

46. The detention of the plaintiffs in such circumstances is not for a permissible purpose under the *Lim* principle, that is, it is not reasonably capable of being seen as necessary for the purposes of deportation or removal or to enable an application for a visa to be made and considered. As a consequence, the power to detain the plaintiffs in such circumstances should be characterised as punitive in nature, and incapable of being conferred on the defendants without contravening the separation of judicial power under Chapter III of the Constitution. In this regard, the separation of powers is fundamental to the rule of law, and the protection of the right to liberty and the freedom from being deprived of liberty other than by due process of law.

PART VII LEGISLATIVE PROVISIONS

47. See attachment.

PART VIII ORDERS

48. The plaintiffs seek an order that the defendants' demurrer be overruled.

49. The proceeding should be listed for further directions before a single Justice.

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48 The provisions may be read down accordingly, either under general principles or pursuant to s 3A of the *Migration Act*.

49 However, *cf. Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [402] (Gordon J).

PART IX TIME ESTIMATE

50. It is estimated that the Plaintiffs will require 1.5 hours for the presentation of oral argument.

Dated: 25 November 2016

.....
Chris Horan
Telephone: (03) 3 9225 8430
Facsimile: (03) 9225 8668
chris.horan@vicbar.com.au

.....
Frances Gordon
Telephone: (03) 9225 6809
Facsimile: (03) 9225 7293
francesgordon@vicbar.com.au

ANNEXURE A
Sections 4, 5, 5AA, 42, 46, 46B, 189, 196, 198, 198AD, 198AH, 198B of the Migration Act 1958 (Cth) as at 25 November 2016
Section 198C, immediately before its repeal by the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013 (Cth)

Migration Act 1958

No. 62, 1958

Compilation No. 133

Compilation date:	17 November 2016
Includes amendments up to:	Act No. 67, 2016
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This compilation is in 2 volumes

Volume 1:	**sections 1–261K**
Volume 2:	sections 262–507
	Schedule
	Endnotes

Each volume has its own contents

Prepared by the Office of Parliamentary Counsel, Canberra

4 Object of Act

(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 provides for non-citizens and citizens to be required to provide personal identifiers for the purposes of this Act or the regulations.

(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.

(5) To advance its object, this Act provides for the taking of unauthorised maritime arrivals from Australia to a regional processing country.

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.

4A Application of the *Criminal Code*

Chapter 2 of the *Criminal Code* (except Part 2.5) applies to all offences against this Act.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

5 Interpretation

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

AAT Act migration decision: see section 474A.

absorbed person visa has the meaning given by section 34.

adjacent area means an adjacent area in respect of a State, of the Northern Territory, of Norfolk Island, of the Territory of Ashmore and Cartier Islands, of the Territory of Cocos (Keeling) Islands or of the Territory of Christmas Island, as determined in accordance with section 5 of the Sea Installations Act.

adoption has the same meaning as in the regulations.

allowed inhabitant of the Protected Zone means an inhabitant of the Protected Zone, other than an inhabitant to whom a declaration under section 16 (presence declared undesirable) applies.

applicable pass mark, in relation to a visa of a particular class, means the number of points specified as the pass mark for that class in a notice, under section 96, in force at the time concerned.

applicable pool mark, in relation to a visa of a particular class, means the number of points specified as the pool mark for that class in a notice under section 96 in force at the time concerned.

appointed inspector has the meaning given by section 140V.

approved form, when used in a provision of this Act, means a form approved by the Minister in writing for the purposes of that provision.

approved sponsor means:

(a) a person:

(i) who has been approved by the Minister under section 140E in relation to a class prescribed by the regulations for the purpose of subsection 140E(2); and

ticket includes a travel document in respect of the conveyance of a person from one place to another place.

Torres Strait Treaty means the Treaty between Australia and the Independent State of Papua New Guinea that was signed at Sydney on 18 December 1978.

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

(a) for the purpose of obtaining from the person or from a third person information or a confession; or

(b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or

(c) for the purpose of intimidating or coercing the person or a third person; or

(d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or

(e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

traditional activities has the same meaning as in the Torres Strait Treaty.

traditional inhabitants has the same meaning as in the *Torres Strait Fisheries Act 1984*.

transitory person means:

(a) a person who was taken to another country under repealed section 198A; or

(aa) a person who was taken to a regional processing country under section 198AD; or

(b) a person who was taken to a place outside Australia under paragraph 245F(9)(b) of this Act, or under Division 7 or 8 of Part 3 of the *Maritime Powers Act 2013*; or

(c) a person who, while a non-citizen and during the period from 27 August 2001 to 6 October 2001:

(i) was transferred to the ship *HMAS Manoora* from the ship *Aceng* or the ship *MV Tampa*; and

(ii) was then taken by *HMAS Manoora* to another country; and

(iii) disembarked in that other country; or

(d) the child of a transitory person mentioned in paragraph (aa) or (b), if:

(i) the child was born in a regional processing country to which the parent was taken as mentioned in the relevant paragraph; and

(ii) the child was not an Australian citizen at the time of birth; or

(e) the child of a transitory person mentioned in paragraph (aa) or (b), if:

(i) the child was born in the migration zone; and

(ii) the child was not an Australian citizen at the time of birth.

Note 1: For who is a child, see section 5CA.

Note 2: A transitory person who entered Australia by sea before being taken to a place outside Australia may also be an unauthorised maritime arrival: see section 5AA.

Note 3: Paragraphs (d) and (e) apply no matter when the child was born, whether before, on or after the commencement of those paragraphs. See the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*.

Tribunal means the Administrative Appeals Tribunal.

unauthorised maritime arrival has the meaning given by section 5AA.

unlawful non-citizen has the meaning given by section 14.

5AAA Non-citizen's responsibility in relation to protection claims

(1) This section applies in relation to a non-citizen who claims to be a person in respect of whom Australia has protection obligations (however arising).

(2) For the purposes of this Act, it is the responsibility of the non-citizen to specify all particulars of his or her claim to be such a person and to provide sufficient evidence to establish the claim.

(3) The purposes of this Act include:

(a) the purposes of a regulation or other instrument under this Act; and

(b) the purposes of any administrative process that occurs in relation to:

(i) this Act; or

(ii) a regulation or instrument under this Act.

(4) To remove doubt, the Minister does not have any responsibility or obligation to:

(a) specify, or assist in specifying, any particulars of the non-citizen's claim; or

(b) establish, or assist in establishing, the claim.

5AA Meaning of *unauthorised maritime arrival*

(1) For the purposes of this Act, a person is an ***unauthorised maritime arrival*** if:

(a) the person entered Australia by sea:

(i) at an excised offshore place at any time after the excision time for that place; or

(ii) at any other place at any time on or after the commencement of this section; and

(b) the person became an unlawful non-citizen because of that entry; and

(c) the person is not an excluded maritime arrival.

(1A) For the purposes of this Act, a person is also an ***unauthorised maritime arrival*** if:

(a) the person is born in the migration zone; and

(b) a parent of the person is, at the time of the person's birth, an unauthorised maritime arrival because of subsection (1) (no matter where that parent is at the time of the birth); and

(c) the person is not an Australian citizen at the time of birth.

Note 1: For who is a ***parent*** of a person, see the definition in subsection 5(1) and section 5CA.

Note 2: A parent of the person may be an ***unauthorised maritime arrival*** even if the parent holds, or has held, a visa.

Note 3: A person to whom this subsection applies is an ***unauthorised maritime arrival*** even if the person is taken to have been granted a visa because of section 78 (which deals with the birth in Australia of non-citizens).

Note 4: For when a person is an Australian citizen at the time of his or her birth, see section 12 of the *Australian Citizenship Act 2007*.

Note 5: This subsection applies even if the person was born before the commencement of the subsection. See the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*.

(1AA) For the purposes of this Act, a person is also an ***unauthorised maritime arrival*** if:

(a) the person is born in a regional processing country; and

(b) a parent of the person is, at the time of the person's birth, an unauthorised maritime arrival because of subsection (1) (no matter where that parent is at the time of the birth); and

(c) the person is not an Australian citizen at the time of his or her birth.

Note 1: A parent of the person may be an ***unauthorised maritime arrival*** even if the parent holds, or has held, a visa.

Note 2: This Act may apply as mentioned in subsection (1AA) even if either or both parents of the person holds a visa, or is an Australian citizen or a citizen of the regional processing country, at the time of the person's birth.

Note 3: This subsection applies even if the person was born before the commencement of the subsection. See the *Migration and Maritime*

Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014.

Entered Australia by sea

(2) A person ***entered Australia by sea*** if:

(a) the person entered the migration zone except on an aircraft that landed in the migration zone; or

(b) the person entered the migration zone as a result of being found on a ship detained under section 245F (as in force before the commencement of section 69 of the *Maritime Powers Act 2013*) and being dealt with under paragraph 245F(9)(a) (as in force before that commencement); or

(ba) the person entered the migration zone as a result of the exercise of powers under Division 7 or 8 of Part 3 of the *Maritime Powers Act 2013*; or

(c) the person entered the migration zone after being rescued at sea.

Excluded maritime arrival

(3) A person is an ***excluded maritime arrival*** if the person:

(a) is a New Zealand citizen who holds and produces a New Zealand passport that is in force; or

(b) is a non-citizen who:

(i) holds and produces a passport that is in force; and

(ii) is ordinarily resident on Norfolk Island; or

(c) is included in a prescribed class of persons.

Definitions

(4) In this section:

aircraft has the same meaning as in section 245A.

ship has the meaning given by section 245A (as in force before the commencement of section 69 of the *Maritime Powers Act 2013*).

vessel has the same meaning as in the *Maritime Powers Act 2013*.

Note: An unauthorised maritime arrival who has been taken to a place outside Australia may also be a transitory person: see the definition of ***transitory person*** in subsection 5(1).

5A Meaning of *personal identifier*

(1) In this Act:

personal identifier means any of the following (including any of the following in digital form):

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

(b) a measurement of a person's height and weight;

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

(d) an audio or a video recording of a person (other than a video recording under section 261AJ);

(e) an iris scan;

(f) a person's signature;

(g) any other identifier prescribed by the regulations, other than an identifier the obtaining of which would involve the carrying out of an intimate forensic procedure within the meaning of section 23WA of the *Crimes Act 1914*.

(2) Before the Governor-General makes regulations for the purposes of paragraph (1)(g) prescribing an identifier, the Minister must be satisfied that:

(a) obtaining the identifier would not involve the carrying out of an intimate forensic procedure within the meaning of section 23WA of the *Crimes Act 1914*; and

(b) the identifier is an image of, or a measurement or recording of, an external part of the body; and

(c) obtaining the identifier will promote one or more of the purposes referred to in subsection (3).

(3) The purposes are:

such conditions as are permitted by the regulations for the purposes of this subsection.

42 Visa essential for travel

(1) Subject to subsections (2), (2A) and (3), a non-citizen must not travel to Australia without a visa that is in effect.

Note: A maritime crew visa is generally permission to travel to Australia only by sea (see section 38B).

(2) Subsection (1) does not apply to an allowed inhabitant of the Protected Zone travelling to a protected area in connection with traditional activities.

(2A) Subsection (1) does not apply to a non-citizen in relation to travel to Australia:

(a) if the travel is by a New Zealand citizen who holds and produces a New Zealand passport that is in force; or

(c) if:

(i) the non-citizen is brought to the migration zone under subsection 245F(9) of this Act or under Division 7 or 8 of Part 3 of the *Maritime Powers Act 2013*; and

(ii) the non-citizen is a person who would, if in the migration zone, be an unlawful non-citizen; or

(ca) the non-citizen is brought to Australia under section 198B; or

(d) if:

(i) the non-citizen has been removed under section 198 to another country but has been refused entry by that country; and

(ii) the non-citizen travels to Australia as a direct result of that refusal; and

(iii) the non-citizen is a person who would, if in the migration zone, be an unlawful non-citizen; or

(e) if:

(i) the non-citizen has been removed under section 198; and

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(ii) before the removal the High Court, the Federal Court or the Federal Circuit Court had made an order in relation to the non-citizen, or the Minister had given an undertaking to the High Court, the Federal Court or the Federal Circuit Court in relation to the non-citizen; and

(iii) the non-citizen's travel to Australia is required in order to give effect to the order or undertaking; and

(iv) the Minister has made a declaration that this paragraph is to apply in relation to the non-citizen's travel; and

(v) the non-citizen is a person who would, if in the migration zone, be an unlawful non-citizen.

(3) The regulations may permit a specified non-citizen or a non-citizen in a specified class to travel to Australia without a visa that is in effect.

(4) Nothing in subsection (2A) or (3) is to be taken to affect the non-citizen's status in the migration zone as an unlawful non-citizen.

Note: Section 189 provides that an unlawful non-citizen in the migration zone must be detained.

43 Visa holders must usually enter at a port

(1) Subject to subsections (1A) and (3) and the regulations, a visa to travel to and enter Australia that is in effect is permission for the holder to enter Australia:

(a) at a port; or

(b) on a pre-cleared flight; or

(c) if the holder travels to Australia on a vessel and the health or safety of a person or a prescribed reason, make it necessary to enter in another way, that way; or

(d) in a way authorised in writing by an authorised officer.

(1A) Subject to the regulations, a maritime crew visa that is in effect is permission for the holder to enter Australia:

(a) at a proclaimed port; or

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45C Regulations about visa application charge

(1) The regulations may:

(a) provide that visa application charge may be payable in instalments; and

(b) specify how those instalments are to be calculated; and

(c) specify when instalments are payable.

(2) The regulations may also:

(a) make provision for and in relation to:

(i) the recovery of visa application charge in relation to visa applications; or

(ii) the way, including the currency, in which visa application charge is to be paid; or

(iii) working out how much visa application charge is to be paid; or

(iv) the time when visa application charge is to be paid; or

(v) the persons who may be paid visa application charge on behalf of the Commonwealth; or

(b) make provision for the remission, refund or waiver of visa application charge or an amount of visa application charge; or

(c) make provision for exempting persons from the payment of visa application charge or an amount of visa application charge; or

(d) make provision for crediting visa application charge, or an amount of visa application charge, paid in respect of one application against visa application charge payable in respect of another application.

46 Valid visa application

Validity—general

(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 any provision of this Act, or of any other law of the Commonwealth, including, without limitation, the following provisions of this Act:

(i) section 48 (visa refused or cancelled earlier);

(ii) section 48A (protection visa refused or cancelled earlier);

(iii) section 161 (criminal justice visa holders);

(iv) section 164D (enforcement visa holders);

(v) section 195 (detainee applying out of time);

(vi) section 501E (earlier refusal or cancellation on character grounds); and

(e) it is not invalid under any provision of this Act, or of any other law of the Commonwealth, including, without limitation, the following provisions of this Act:

(i) section 46AA (visa applications, and the grant of visas, for some Act-based visas);

(ii) section 46A (visa applications by unauthorised maritime arrivals);

(iii) section 46B (visa applications by transitory persons);

(iv) section 91E or 91G (CPA and safe third countries);

(v) section 91K (temporary safe haven visas);

(vi) section 91P (non-citizens with access to protection from third countries).

(1A) Subject to subsection (2), an application for a visa is invalid if:

(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.

Provision of personal identifiers

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

(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 to provide one or more personal identifiers under section 257A for the purposes of this subsection; 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).

Prescribed criteria for validity

(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.

(5) To avoid doubt, subsections (3) and (4) do not require criteria to be prescribed in relation to the validity of visa applications, including, without limitation, applications for visas of the following classes:
  (a) special category visas (see section 32);
  (b) permanent protection visas (see subsection 35A(2));
  (c) temporary protection visas (see subsection 35A(3));
  (ca) safe haven enterprise visas (see subsection 35A(3A));
  (d) bridging visas (see section 37);
  (e) temporary safe haven visas (see section 37A);
  (f) maritime crew visas (see section 38B).

46AA Visa applications, and the grant of visas, for some Act-based visas

Visa classes covered by this section

(1) The following classes of visas are covered by this section:
  (a) special category visas (see section 32);
  (b) permanent protection visas (see subsection 35A(2));
  (c) temporary protection visas (see subsection 35A(3));
  (ca) safe haven enterprise visas (see subsection 35A(3A));
  (d) bridging visas (see section 37);
  (e) temporary safe haven visas (see section 37A);
  (f) maritime crew visas (see section 38B).

Applications invalid if no prescribed criteria

(2) An application for a visa of any of the classes covered by this section is invalid if, when the application is made, both of the following conditions are satisfied:
  (a) there are no regulations in effect prescribing criteria that must be satisfied for a visa of that particular class to be a valid application;
  (b) there are no regulations in effect prescribing criteria that must be satisfied for a visa of that particular class to be granted.

(4) If the Minister makes, varies or revokes a determination under this section, the Minister must cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination, the determination as varied or the instrument of revocation; and

(b) sets out the reasons for the determination, variation or revocation, 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 unauthorised maritime arrival; or

(b) any information that may identify the unauthorised maritime arrival; 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) or (2C) in respect of any unauthorised maritime arrival whether the Minister is requested to do so by the unauthorised maritime arrival or by any other person, or in any other circumstances.

46B Visa applications by transitory persons

(1) An application for a visa is not a valid application if it is made by a transitory person who:

(a) is in Australia; and

(b) either:

(i) is an unlawful non-citizen; or

(ii) holds a bridging visa or a temporary protection visa, or a temporary visa of a kind (however described) prescribed for the purposes of this subparagraph.

Note: Temporary protection visas are provided for by subsection 35A(3).

(2) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a transitory person, determine that subsection (1) does not apply to an application by the person for a visa of a class specified in the determination.

(2A) A determination under subsection (2) may provide that it has effect only for the period specified in the determination and, if it does so, the determination ceases to have effect at the end of the specified period.

(2B) The period specified in a determination may be different for different classes of transitory persons.

(2C) The Minister may, in writing, vary or revoke a determination made under subsection (2) if the Minister thinks that it is in the public interest to do so.

(3) The power under subsection (2) or (2C) may only be exercised by the Minister personally.

(4) If the Minister makes, varies or revokes a determination under this section, the Minister must cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination, the determination as varied or the instrument of revocation; and

(b) sets out the reasons for the determination, variation or revocation, 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 transitory person; or
  (b) any information that may identify the transitory 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) or (2C) in respect of any transitory person whether the Minister is requested to do so by the transitory person or by any other person, or in any other circumstances.

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.

Division 7—Detention of unlawful non-citizens

Subdivision A—General provisions

188 Lawful non-citizen to give evidence of being so

Officer may require evidence

(1) An officer may require a person whom the officer knows or reasonably suspects is a non-citizen to:

(a) present to the officer evidence (which might include a personal identifier) of being a lawful non-citizen; or

(b) present to the officer evidence (which might include a personal identifier) of the person's identity.

(2) The person must comply with the requirement within a period specified by the officer, being a prescribed period or such further period as the officer allows.

(3) Regulations prescribing a period for compliance may prescribe different periods and the circumstances in which a particular prescribed period is to apply which may be:

(a) when the requirement is oral; or

(b) when the requirement is in writing.

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 may detain the person.

(3) If an officer knows or reasonably suspects that a person (other than a person referred to in subsection (3A)) in an excised offshore place is an unlawful non-citizen, the officer must detain the person.

(3A) If an officer knows or reasonably suspects that a person in a protected area:

(a) is a citizen of Papua New Guinea; and

(b) 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:

(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), (3A) 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).

190 Non-compliance with immigration clearance or requirement to provide personal identifier

(1) For the purposes of section 189, an officer suspects on reasonable grounds that a person in Australia is an unlawful non-citizen if, but not only if, the officer knows, or suspects on reasonable grounds, that the person:

(a) was required to comply with section 166; and

(b) did one or more of the following:

(i) bypassed, attempted to bypass, or appeared to attempt to bypass, immigration clearance;

(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.

196 Duration of detention

(1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until:

(a) he or she is removed from Australia under section 198 or 199; or

(aa) an officer begins to deal with the non-citizen under subsection 198AD(3); or

(b) he or she is deported under section 200; or

(c) he or she is 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 as referred to in paragraph (1)(a), (aa) or (b)) 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).

197 Effect of escape from immigration detention

If a non-citizen:

(a) was in immigration detention; and

(b) escaped from that detention; and

(c) was taken back into that detention;

then, for the purposes of sections 194 and 195, the non-citizen is taken not to have ceased to be in immigration detention.

Division 8—Removal of unlawful non-citizens etc.

Subdivision A—Removal

197C Australia's non-refoulement obligations irrelevant to removal of unlawful non-citizens under section 198

(1) For the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.

(2) An officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen.

198 Removal from Australia of unlawful non-citizens

Removal on request

(1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.

Removal of transitory persons brought to Australia for a temporary purpose

(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).

Note: Some unlawful non-citizens are transitory persons. Section 198B provides for transitory persons to be brought to Australia for a temporary purpose. See the definition of ***transitory person*** in subsection 5(1).

(1B) Subsection (1C) applies if:

(a) an unlawful non-citizen who is not an unauthorised maritime arrival has been brought to Australia under section 198B for a temporary purpose; and

(b) the non-citizen gives birth to a child while the non-citizen is in Australia; and

(c) the child is a transitory person within the meaning of paragraph (e) of the definition of ***transitory person*** in subsection 5(1).

(1C) An officer must remove the non-citizen and the child as soon as reasonably practicable after the non-citizen no longer needs to be in Australia for that purpose (whether or not that purpose has been achieved).

Removal of unlawful non-citizens in other circumstances

(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

(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

(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.

(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) neither applied for a substantive visa in accordance with subsection 195(1) nor applied under section 137K for revocation of the cancellation of a substantive visa;

regardless of whether the non-citizen has made a valid application for a bridging visa.

(5A) Despite subsection (5), an officer must not remove an unlawful non-citizen if:

(a) the non-citizen has made a valid application for a protection visa (even if the application was made outside the time allowed by subsection 195(1)); and

(b) either:

(i) the grant of the visa has not been refused; or

(ii) the application has not been finally determined.

(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;
(ii) 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.

(11) This section does not apply to an unauthorised maritime arrival to whom section 198AD applies.

(4) The sole purpose of laying the documents referred to in subsection (2) before the Parliament is to inform the Parliament of the matters referred to in the documents and nothing in the documents affects the validity of the designation. Similarly, the fact that some or all of those documents do not exist does not affect the validity of the designation.

(5) A failure to comply with this section does not affect the validity of the designation.

(6) In this section, ***agreement*** includes an agreement, arrangement or understanding:

(a) whether or not it is legally binding; and

(b) whether it is made before, on or after the commencement of this section.

198AD Taking unauthorised maritime arrivals to a regional processing country

(1) Subject to sections 198AE, 198AF and 198AG, this section applies to an unauthorised maritime arrival who is detained under section 189.

Note: For when this section applies to a transitory person, see section 198AH.

(2) An officer must, as soon as reasonably practicable, take an unauthorised maritime arrival to whom this section applies from Australia to a regional processing country.

(2A) However, subsection (2) does not apply in relation to a person who is an unauthorised maritime arrival only because of subsection 5AA(1A) or (1AA) if the person's parent mentioned in the relevant subsection entered Australia before 13 August 2012.

Note 1: Under subsection 5AA(1A) or (1AA) a person born in Australia or in a regional processing country may be an unauthorised maritime arrival in some circumstances.

Note 2: This section does not apply in relation to a person who entered Australia by sea before 13 August 2012: see the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*.

Powers of an officer

(3) For the purposes of subsection (2) and without limiting that subsection, an officer may do any or all of the following things within or outside Australia:

(a) place the unauthorised maritime arrival on a vehicle or vessel;

(b) restrain the unauthorised maritime arrival on a vehicle or vessel;

(c) remove the unauthorised maritime arrival from:

(i) the place at which the unauthorised maritime arrival is detained; or

(ii) a vehicle or vessel;

(d) use such force as is necessary and reasonable.

(4) If, in the course of taking an unauthorised maritime arrival to a regional processing country, an officer considers that it is necessary to return the unauthorised maritime arrival to Australia:

(a) subsection (3) applies until the unauthorised maritime arrival is returned to Australia; and

(b) section 42 does not apply in relation to the unauthorised maritime arrival's return to Australia.

Ministerial direction

(5) If there are 2 or more regional processing countries, the Minister must, in writing, direct an officer to take an unauthorised maritime arrival, or a class of unauthorised maritime arrivals, under subsection (2) to the regional processing country specified by the Minister in the direction.

(6) If the Minister gives an officer a direction under subsection (5), the officer must comply with the direction.

(7) The duty under subsection (5) may only be performed by the Minister personally.

(8) The only condition for the performance of the duty under subsection (5) is that the Minister thinks that it is in the public interest to direct the officer to take an unauthorised maritime arrival, or a class of unauthorised maritime arrivals, under subsection (2) to the regional processing country specified by the Minister in the direction.

(9) The rules of natural justice do not apply to the performance of the duty under subsection (5).

(10) A direction under subsection (5) is not a legislative instrument.

Not in immigration detention

(11) An unauthorised maritime arrival who is being dealt with under subsection (3) is taken not to be in ***immigration detention*** (as defined in subsection 5(1)).

Meaning of officer

(12) In this section, ***officer*** means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

198AE Ministerial determination that section 198AD does not apply

(1) If the Minister thinks that it is in the public interest to do so, the Minister may, in writing, determine that section 198AD does not apply to an unauthorised maritime arrival.

Note: For specification by class, see the *Acts Interpretation Act 1901*.

(1A) The Minister may, in writing, vary or revoke a determination made under subsection (1) if the Minister thinks that it is in the public interest to do so.

(2) The power under subsection (1) or (1A) may only be exercised by the Minister personally.

(3) The rules of natural justice do not apply to an exercise of the power under subsection (1) or (1A).

198AF No regional processing country

Section 198AD does not apply to an unauthorised maritime arrival if there is no regional processing country.

198AG Non-acceptance by regional processing country

Section 198AD does not apply to an unauthorised maritime arrival if the regional processing country, or each regional processing country (if there is more than one such country), has advised an officer, in writing, that the country will not accept the unauthorised maritime arrival.

Note: For specification by class, see the *Acts Interpretation Act 1901*.

198AH Application of section 198AD to certain transitory persons

(1) Section 198AD applies, subject to sections 198AE, 198AF and 198AG, to a transitory person if, and only if, the person is covered by subsection (1A) or (1B).

(1A) A transitory person is covered by this subsection if:

(a) the person is an unauthorised maritime arrival who is brought to Australia from a regional processing country under section 198B for a temporary purpose; and

(b) the person is detained under section 189; and

(c) the person no longer needs to be in Australia for the temporary purpose (whether or not the purpose has been achieved).

(1B) A transitory person (a ***transitory child***) is covered by this subsection if:

(a) a transitory person covered by subsection (1A) gives birth to the transitory child while in Australia; and

(b) the transitory child is detained under section 189; and

(c) the transitory child is a transitory person because of paragraph (e) of the definition of ***transitory person*** in subsection 5(1).

(2) Subsection (1) of this section applies whether or not the transitory person has been assessed to be covered by the definition of ***refugee*** in Article 1A of the Refugees Convention as amended by the Refugees Protocol.

198AHA Power to take action etc. in relation to arrangement or regional processing functions of a country

(1) This section applies if the Commonwealth enters into an arrangement with a person or body in relation to the regional processing functions of a country.

(2) The Commonwealth may do all or any of the following:
  (a) take, or cause to be taken, any action in relation to the arrangement or the regional processing functions of the country;
  (b) make payments, or cause payments to be made, in relation to the arrangement or the regional processing functions of the country;
  (c) do anything else that is incidental or conducive to the taking of such action or the making of such payments.

(3) To avoid doubt, subsection (2) is intended to ensure that the Commonwealth has capacity and authority to take action, without otherwise affecting the lawfulness of that action.

(4) Nothing in this section limits the executive power of the Commonwealth.

(5) In this section:

action includes:
  (a) exercising restraint over the liberty of a person; and
  (b) action in a regional processing country or another country.

arrangement includes an arrangement, agreement, understanding, promise or undertaking, whether or not it is legally binding.

(c) the number of unauthorised maritime arrivals determined in those countries in the financial year to be covered by the definition of ***refugee*** in Article 1A of the Refugees Convention as amended by the Refugees Protocol.

(2) However, a report under this section need deal with a particular regional processing country in accordance with subsection (1) only so far as information provided by the country makes it reasonably practicable for the report to do so.

(3) A report under this section must not include:

(a) the name of a person who is or was an unauthorised maritime arrival; or

(b) any information that may identify such a person; or

(c) the name of any other person connected in any way with any person covered by paragraph (a); or

(d) any information that may identify that other person.

Subdivision C—Transitory persons etc.

198B Power to bring transitory persons to Australia

(1) An officer may, for a temporary purpose, bring a transitory person to Australia from a country or place outside Australia.

(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) In this section, ***officer*** means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

199 Dependants of removed non-citizens

(1) If:

Migration Act 1958

No. 62, 1958 as amended

Compilation start date: 21 May 2013

Includes amendments up to: Act No. 35, 2013

This compilation has been split into 2 volumes

Volume 1: **sections 1–261K**
Volume 2: sections 262–507
Schedule
Endnotes

Each volume has its own contents

Prepared by the Office of Parliamentary Counsel, Canberra

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(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) In this section, ***officer*** means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

198C Certain transitory persons entitled to assessment of refugee status

(1) If a transitory person is brought to Australia under section 198B and remains in Australia for a continuous period of 6 months, then the person is entitled to make a request under this section.

(2) The person may make a request to the Refugee Review Tribunal for an assessment of whether the person is covered by the definition of ***refugee*** in Article 1A of the Refugees Convention as amended by the Refugees Protocol.

(3) On receiving such a request, the Tribunal must notify the Secretary. The Tribunal cannot commence the assessment earlier than 14 days after notifying the Secretary.

(4) The Tribunal cannot commence, or continue, the assessment at any time when a certificate by the Secretary is in force under section 198D.

(5) Divisions 4, 6, 7 and 7A of Part 7 apply for the purposes of the assessment in the same way as they apply to a review by the Tribunal under Part 7.

(6) Subject to section 441G, the Tribunal must notify the person and the Minister of its decision on the request.

(7) The decision of the Tribunal is final and cannot be challenged in any court. However, this is not intended to affect the jurisdiction of the High Court under section 75 of the Constitution.

(8) If the Tribunal decides that the person is covered by the definition of ***refugee*** in Article 1A of the Refugees Convention as amended by the Refugees Protocol:

(a) the Minister must determine a class of visa in relation to the person for the purposes of this subsection; and

(b) if the person later makes an application for a visa of that class, then section 46B does not apply to the application.

(9) A person who has made a request under this section is not entitled to make any further request under this section while the person remains in Australia.

198D Certificate of non-cooperation

(1) If the Secretary is satisfied that a transitory person has engaged in uncooperative conduct, either before or after the person was brought to Australia, then the Secretary may issue a certificate to that effect to the Tribunal.

(2) A decision of the Secretary to issue, revoke or vary a certificate is final and cannot be challenged in any court. However, this is not intended to affect the jurisdiction of the High Court under section 75 of the Constitution.

Note: Subsection 33(3) of the *Acts Interpretation Act 1901* allows the certificate to be revoked or varied.

(3) In this section:

uncooperative conduct means refusing or failing to cooperate with relevant authorities in connection with any of the following:

(a) attempts to return the person to a country where the person formerly resided;

(b) attempts to facilitate the entry or stay of the person in another country;

(c) the detention of the person under section 189;

(d) the taking of the person to a regional processing country under section 198AD;

(e) the detention of the person in a regional processing country.