IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S195 of 2015

BETWEEN

Plaintiff S195/2015
Plaintiff

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Defendant

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COMMONWEALTH OF AUSTRALIA
Second Defendant

BROADSPECTRUM (AUSTRALIA) PTY LTD
Third Defendant

OUTLINE OF SUBMISSIONS OF THE THIRD DEFENDANT

Part I: Certification

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

Part II: Issues

20 2. The central issue raised by the questions stated for the opinion of the Full Court is whether the valid exercise of statutory and non-statutory executive power by the Commonwealth is predicated on the lawfulness of that exercise under the law of a foreign country.

3. The issue arises as a consequence of the decision of the PNG Supreme Court on 26 April 2016 in *Belden Norman Namah, MP Leader of the Opposition v Hon Rimbak Pato, Minister for Foreign Affairs & Immigration SCA No 84 of 2013* (SC 1497) (***Namah***) (Special Case Book (**SCB**), p 834), which determined that the "joint efforts" of the Australian and PNG governments in bringing asylum seekers to PNG and keeping them at the Manus Island Processing Centre
30 [**MIPC**] was contrary to PNG law.

Date of Document 21 April 2017

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Part III: Section 78B of the *Judiciary Act 1903* (Cth)

4. The plaintiff has given notices under s 78B of the *Judiciary Act 1903* (Cth). Broadspectrum (Australia) Pty Ltd (**Broadspectrum**) does not certify that those notices sufficiently specify the nature of the matters arising under the Constitution or involving its interpretation, at least not as ultimately agitated in the plaintiff's written submissions.

Part IV: Facts

5. The facts are set out in the Special Case.

Part V: Applicable Provisions

10 6. The versions of Part 2 of Division 8 of the *Migration Act 1958* (Cth): (a) as at 21 August 2013, which is 'Annexure A' to the submissions of the Commonwealth defendants; and (b) as at 25 October 2016, which is annexed to the plaintiff's submissions (**PS**), together contain the relevant legislative provisions.

Part VI: Argument

Special case questions

7. Questions 1-4 and 6 ask whether certain actions of the Commonwealth executive are beyond power "by reason of the *Namah* decision". Paragraph 45 of the Special Case clarifies that these questions do not raise any question
20 as to the validity of the actions referred to other than by reason of the *Namah* decision.

8. Question 5 asks whether the authority for the Commonwealth to undertake conduct in relation to regional processing arrangements in PNG conferred by s 198AHA of the *Migration Act 1958* (Cth) (***Migration Act***) is dependent on "whether those arrangements are lawful under the law of PNG".

9. The essential issue underlying each of the first six questions is: whether the authority for the conduct of the Commonwealth in relation to certain regional processing arrangements, both within and outside PNG, is predicated on the lawfulness of that conduct under the law of PNG.

30 10. What the questions stated do <u>not</u> call for is a determination as to whether the plaintiff's liberty is constrained, the extent of any such constraint, and the authority responsible for any such constraint (cf. PS, paras 13-14, 20-29, 47-58). This is evident from the questions themselves. It is also evident in the formulation of the special case, which was designed to deal with discrete

questions of law divorced from the factual contest that undergirds the plaintiff's claim for a writ of habeas corpus and mandatory injunction (Amended Application for an Order to Show Cause, 11 January 2017, SCB A1); questions which, if answered favourably to the defendants, would dispose of the matter.[1]

11. In the absence of such a determination, and for the reasons outlined by the Commonwealth at paragraph 7, the application to re-open *Al-Kateb v Godwin* (2004) 2019 CLR 562 has no foundation and does not arise in the special case.

12. The plaintiff also seeks declarations regarding his unlawful detention and the prospects of his removal from PNG (PS [12]-[13]) which are not sought in the Amended Application for an Order to Show Case (SCB A3-4).

13. It is submitted that each of questions 1-6 should be answered: No. In that event, the plaintiff should be ordered to pay the costs of the special case.

The Namah decision

14. The PNG Supreme Court in *Namah* (at [7(1)]) considered the question:[2]

> Whether the bringing into PNG by the Australian Government and detaining the asylum seekers at MIPC is contrary to their constitutional rights of personal liberty guaranteed by s 42 of the *Constitution*?

15. While objections were made by the respondents to a Statement of Facts filed at the direction of the Court, given that the respondents had failed to comply with orders and cooperate with the applicant to have the Statement of Facts settled, the Court overruled the respondents' objections and decided to proceed on the basis of the filed Statement (*Namah* at [13]). The Court took from the respondents' failure that there was no serious issue on the facts (*Namah* at [17]). As a consequence of the Court's ruling, "the relevant facts in this case became uncontested" (*Namah* at [20]; see also [25]). As the defendants in this proceeding were not a party to or otherwise represented in the proceeding that led to the *Namah* decision, they are not aware of all of the facts adopted by the PNG Supreme Court. In any event, they do not accept that all of the factual findings in that decision are correct (SC [25]).

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1 Transcript 21 December [2016] HCA Trans 315, pp 4.95 - 4.122, 5.172 - 6.197, 6.211 - 6.221, 8.291 - 8.295; Transcript 7 December [2016] HCA Trans 295, pp 8.289 - 9.347.

2 Judicial notice may be taken of the fact that the PNG Supreme Court is the highest court in PNG (applying *Holland v Jones* (1917) 23 CLR 149 at 153, Isaacs J). The decisions of the Court are final, in the sense that there is no higher court to which appeals can be made.

16. Section 42 of the PNG Constitution, at the time of the decision, provided that no person shall be deprived of his personal liberty except in certain prescribed circumstances, which included at s 42(1)(g), "for the purpose of preventing the unlawful entry of a person into Papua New Guinea, or for the purpose of effecting the expulsion, extradition or other lawful removal of a person from Papua New Guinea, or the taking of proceedings for any of those purposes" (SCB 671). *Section 1 of Constitution Amendment (No 37) (Citizenship) Law 2014* added the following: "(ga) for the purposes of holding a foreign national under arrangements made by Papua New Guinea with another country or with an international organisation that the Minister responsible for immigration matters, in his absolute discretion, approves" (SCB 849).

17. The Respondents, namely, the Minister for Foreign Affairs and Immigration, the National Executive Council and the Independent State of Papua New Guinea, contended that s 42(1)(g) permitted a law to authorize the detention of the asylum seekers pending a processing of their asylum claims and thereafter their resettlement or deportation, and alternatively that s 42(1)(ga) was a valid amendment to the Constitution (*Namah* at [45]). The Australian Government was not a party to the proceeding.

18. The leading judgments were given by Kandakasi and Higgins JJ, with whose conclusions and proposed orders the other justices agreed. The PNG Supreme Court clarified (at [28]) that the question before the Court concerned the constitutionality of the two governments' actions under PNG law. The Court held that the PNG Minister and National Executive Council with the assistance of the Australian government are responsible for all of the decisions and actions that have led to the transfer and detention of the asylum seekers or transferees (at [73]).

19. The Court concluded that "[t]he asylum seekers or transferees brought to PNG by the Australian Government and detained at the relocation centre on Manus Island by the Respondents is contrary to their Constitutional right of personal liberty guaranteed by s 42 of the *Constitution* and also ultra vires the powers available under the *Migration Act [1978]*" (**PNG *Migration Act***) (at [39], [74(1)]); and that the 2014 amendment was unconstitutional and therefore invalid (at [53]-[54], [74(4)]; [97], [119]).

20. The Court ordered both the Australian and PNG governments to "forthwith take all steps necessary to cease and prevent the continued unconstitutional and illegal detention of the asylum seekers or transferees at the relocation centre on Manus Island and the continued breach of the asylum seekers or transferees Constitutional and human rights" (at [74(6)]).

21. The Court reasoned that, as the PNG's Foreign Affairs Minister had (validly) issued permits under s 20 of the PNG *Migration Act* for each of the

asylum seekers to enter PNG (at [108]), it could not be said that their entry was prohibited under s 3 of the Act, nor that their presence was unlawful under s 7 of the Act. The Court held further that there was no reason why the Minister could not choose to exercise his powers under the PNG *Migration Act*, so far as they are lawfully conferred upon him in accordance with the MOU with Australia (at [107]). Consequently, no situation had arisen justifying detention pursuant to s 13 of the Act, or the exception to the guarantee of liberty in s 42(1)(g) of the PNG Constitution (*Namah* at [39]).

22. Section 13 (1) of the PNG *Migration Act* provides that the Minister or an authorised officer (defined in s 2) may order that a person against whom a removal order has been made be detained until arrangements can be made for his removal from the country (SCB 580). Section 12(1)(a) gives the Minister the power to order the removal from the country of a person whose presence in the country is unlawful (SCB 579).

23. It was significant to the Court's determination that "no situation has arisen for the purposes of s 13 of the [Migration] Act or s 42(1)(g) of the *Constitution* to warrant the asylum seekers' detention" (*Namah* at [39]). It was not contended that the asylum seekers were being held pending deportation under the PNG *Migration Act* (at [77]): "It is contemplated that persons not found to be genuine refugees may well be deported and held in migration detention pending that deportation pursuant to that Act."

24. That situation is distinct from the present case. Here, the plaintiff claimed to be a refugee, and applied to the PNG authorities to be recognised as such under the PNG *Migration Act* (SC, para 33(a) and (b)). He was the subject of a negative initial assessment on 1 July 2016, in respect of which he did not seek review (SC, para 33(c) and (d)). On 12 December 2016, the PNG Minister made a final determination that the plaintiff was not a refugee (SC, para 34; SCB 868). On the same day, the PNG Minister ordered the removal of the plaintiff under s 12 of the PNG *Migration Act*, and directed that the plaintiff be kept in custody pending his removal from PNG pursuant to s 13 of the Act (SC, para 35; SCB 870, 871).

25. The decision in *Namah* has nothing to say about the plaintiff's current circumstances, being the subject of a direction as to custody pursuant to s 13 of the PNG *Migration Act* (SC, para 35(b)). Consequently, it cannot be said that the Commonwealth is precluded from assisting PNG to take action in relation to the plaintiff pursuant to the orders under ss 12 and 13 of the PNG *Migration Act*, by reason of the *Namah* decision. **The sixth question stated should be answered: No.**

26. While we do not submit that this Court should accept the facts relied upon in *Namah*, it is noted that the conclusions of the Supreme Court regarding the role played by the PNG Government is not consistent with the plaintiff's

submission that Australia alone undertook the management of the MIPC, with no participation by PNG, and that it was "in effect an Australian operation conducted in the territory of Papua New Guinea" (PS, paras 18-19).

This Court's approach to the Namah decision

27. To the extent that the plaintiff suggests otherwise (PS at [30]), it cannot be said that the legality of Australia's actions was "a preliminary" to the decision whether the actions of the PNG Government in relation to the transferees was contrary to their constitutional right of liberty guaranteed by s 42 of the PNG Constitution.[3] That, of course, does not constrain the PNG Supreme Court from considering the conduct of a foreign State insofar as the subject-matter may incidentally disclose that a state has acted unlawfully.[4]

28. However, it is a different matter for this Court to draw inferences from that decision, in circumstances where the defendants in this proceeding, including the Commonwealth, were not parties to the proceeding that led to the *Namah* decision, and where the defendants are not aware of the facts adopted by the PNG Supreme Court (which were contested) and do not accept that all of the factual findings in that decision are correct, let alone pertain to the circumstances of the plaintiff in this proceeding. On that basis, it cannot be said that the *Namah* decision established that the circumstances of the plaintiff's transfer to, and residence at, the MIPC was unconstitutional and illegal under PNG law (PS [30]). Those circumstances were not before that Court. Furthermore, it is not for this Court to infer the same on the basis of a partial knowledge of the facts in the *Namah* proceeding, and a partial knowledge of the circumstances that pertain to the question in this proceeding.

29. Caution should be exercised in showing deference to the *Namah* decision, let alone the factual findings of the Court, in those circumstances. It is not incumbent on this Court to do so. Judicial acts are not regarded as acts of

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3 In the sense explained by this Court in *Moti v The Queen* (2011) 245 CLR 456 at [51]-[52] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). Cf. *Habib v Commonwealth* (2010) 183 FCR 62, where a determination as to the legality of the actions of Commonwealth officials (on an allegation of aiding and abetting the commission of a crime) required the Court to determine whether the applicant's treatment by agents of foreign states within the territories of those states was unlawful under Commonwealth law. Cf. *Belhaj & Ors v Straw & Ors* [2017] UKSC 3 (17 January 2017) at [247] (Lord Sumption, with whom Lord Hughes agrees).

4 *Belhaj & Ors v Straw & Ors* [2017] UKSC 3 (17 January 2017) at [240] (Lord Sumption, with whom Lord Hughes agrees).

state for the purpose of the act of state doctrine.[5] The Court is entitled to ask and adjudicate on the question whether a decision of a foreign court should be recognised, enforced, or otherwise accepted.[6]

30. It is certainly not incumbent on this Court to recognise any rights or liabilities arising from the order of the PNG Supreme Court directing the Australian Government to "take all steps necessary" to cease and prevent the continued violation of the asylum seekers' constitutional rights (*Namah* at [74(6)]). It is not for this Court to vindicate the interests of a foreign State.[7] Furthermore, the Australian Government was not impleaded in the action,[8] in which case the question of foreign state immunity would arise in respect of the State and its officials.[9]

31. It is not clear what assistance the plaintiff gains from his reliance on "the principles of international comity" (PS at [31]-[33]). Under Australian domestic law, it is not employed as a self-standing principle giving rise to rights and obligations,[10] but rather as a rationale that informs the exercise of judicial restraint and the content of the act of state doctrine.[11]

Exercise of statutory executive power

32. Insofar as the questions stated implicate the exercise of power pursuant to ss 19AB, 19AD & 19AHA of the *Migration Act 1958* (Cth), the task for the Court is essentially one of statutory construction. The central question is whether the exercise of statutory power pursuant to those provisions is predicated on compliance with foreign law.

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5 *Dicey, Morris & Collins on The Conflict of Laws* (15th ed., 2012), § 5-045 (p 122); Third Cumulative Supplement to the 15th edition (2016) (***Dicey Third Supplement***), §5-048; *Altimo Holdings and Investments Ltd v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 (PC) (***Altimo Holdings***) at [95]-[102]; *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2014] QB 458 (CA) (***Yukos***) at [73]-[91]. Cf. *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 559; *Mokbel v Attorney-General (Cth)* (2007) 162 FCR 278 at [59]-[60] (Gordon J).

6 *Dicey Third Supplement,* §5-048 (p 13); see *Altimo Holdings*; *Yukos*.

7 *Attorney-General (UK) v Heinemann Publishers Australia Pty* (1988) 165 CLR 30 (***Heinemann***) at 46-47 (Mason CJ, Wilson Deane, Dawson, Toohey and Gaudron JJ), where the "governmental interest" was the maintenance of national security.

8 *The Cristina* [1938] AC 485 at 490; *The Phillipine Admiral* [1977] AC 373; *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529 (CA).

9 *Jones v Ministry of Interior for the Kingdom of Saudi Arabia & Ors* [2007] 1 AC 270; *Jones & Ors v The United Kingdom* [2014] ECHR 176.

10 *Nielson v Overseas Projects Corp of Victoria Ltd* (2005) 223 CLR 331 at [90] (Gummow & Hayne JJ).

11 *Heinemann* at 40-41; *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors* (2016) 257 CLR 42 (***Plaintiff M68***) at [250] (Keane J).

(a) Designation of PNG as a regional processing country under s 198AB

33. Subsection 198AB(1) provides the Minister with the power to designate that a country is a regional processing country. The terms of the provision indicate that the power is not qualified by the necessity of compliance with foreign law.

34. The only mandatory condition for the exercise of power of designation under s 198AB is that the Minister thinks that it is in the national interest to designate the country to be a regional processing country.[12] What is in the national interest is largely a political question, as s 198AA(c) recognises.[13] In stating his reasons for considering that it is in the national interest to designate PNG to be a regional processing country, the Minister stated that:

a) even if the designation were inconsistent with Australia's international obligations, he would nevertheless consider that it is in the national interest to designate PNG to be a regional processing country (para 36; SCB 69); and

b) he chose "not to have regard to the international obligations or domestic law of PNG" (para 37; SCB 69).

35. That choice is supported by the context and purpose of s 198AB, as evident in the reasons for subdivision B (s 198AA), which includes Parliament's consideration that "the designation of a country to be a regional processing country need not be determined by reference to the international obligations or domestic law of that country" (s 198AA(d)).

36. That consideration is evident in s 198AB(3)(a), which provides for two mandatory considerations (in considering the national interest for the purpose of s 198AB(2)) by way of regard to whether or not the country has given certain assurances. Those assurances do not include compliance with the country's domestic law.

37. There is nothing in the text or scope of Subdivision B of Division 8, Part 2, that supports the implication of a further condition for the exercise of power under s 198AB. Such a condition certainly cannot be implied on the basis of an assumption regarding Australia's compliance with the foreign country's domestic laws.[14]

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12 *Plaintiff S156/3013 v Minister for Immigration and Border Protection & Anor* (2014) 254 CLR 28 (***Plaintiff S156***) at [40].

13 *Plaintiff S156* at [40].

14 The point was made in *Plaintiff S156* at [44] in relation to an assumption respecting the fulfilment by Australia of its international obligations.

38. The plaintiff's reliance on the principle that courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms unless such an intention is clearly manifested by unambiguous language, is inapt (PS at [40]). The power or authority in question pertains to the act of designation, and not any interference with "fundamental rights".

39. The plaintiff maintains that the decision to designate PNG as a regional processing country is invalid if the decision has an "illegal purpose" (PS at [42]). The basis of that submission appears to be the proposition that the purpose of the designation was declared illegal by the Supreme Court of PNG in the *Namah* decision. That is not so. The PNG Supreme Court made no declaration or observation in relation to the designation by the Minister. Nor is there any basis to construe the power in s 198AB as being subject to an implied prohibition on making a designation where it facilitates conduct that is unlawful under foreign law (whether or not such facilitation is known to the Minister when making the designation). Further, and in any event, there is no factual basis to infer that the Minister had the purpose of breaching foreign law when making the designation (or at any other time). As indicated in the submissions of the Commonwealth, the evidence points decidedly in the opposite direction.

40. The plaintiff also impugns the designation on the basis that the arrangements with PNG, to which the Minister's statement of reasons makes reference, "envisaged detention" (PS [35]). Even if this were sufficient to demonstrate the "purpose" of the designation, it would not thereby demonstrate that the purpose was illegal. A subsequent decision by the PNG Supreme Court declaring the detention of transferees in PNG unconstitutional and therefore illegal, does not retrospectively impute knowledge to the Minister.

41. Accordingly, it cannot be said that the designation of PNG as a regional processing country on 9 October 2012 was beyond the power conferred by s 198AB(1) of the *Migration Act*, by reason of the *Namah* decision, or, more particularly, by reason of the determination by the PNG Supreme Court that the transferees on Manus Island were detained contrary to their right of personal liberty under s 42 of the PNG Constitution. **The first question stated should be answered: No.**

(b) Direction and transfer to PNG under s 198AD

42. Similarly, and contrary to the submissions of the plaintiff (at [42]), the PNG Supreme Court made no comment on the purpose of the exercise of power by the Minister under s 198AD of the *Migration Act*.

43. Subsection 198AD(2) provides that 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. In circumstances where there are two or more regional processing countries, subsection (5) provides that the Minister must, in writing, **direct** an officer to take an unauthorised maritime arrival, or a class thereof, under subsection (2) to the regional processing country specified by the Minister in the direction.

44. Section 198AD is concerned with directing an officer to take, and the taking of, an unauthorised maritime arrival to a regional processing country. It is not concerned with detention (or any other conduct) within the regional processing country.[15] Without limitation, the "taking" includes the power to place and restrain the transferee on a vehicle or vessel, as well as remove the transferee from the place at which they are detained or from a vessel or vehicle (s 198AD(3)).

45. There is nothing in the terms, context or purpose of s 198AD to suggest that the operation of the section is qualified by the legality of any detention of transferees in a regional processing country, or of conduct more broadly within the regional processing country. The authority in s 198AD(3), for the purposes of subsection (2), is provided without reference to the domestic law of PNG, which does not operate as a constraint on the power under that section. Rather, the officers are empowered to "use such force as is necessary and reasonable".

46. Furthermore, to the extent that s 198AD(2) is intended to operate in relation to acts done outside Australia, the question whether or not that action is lawful in the place where it is done is of no relevance.[16] To deny the Commonwealth Parliament the power to legislate in circumstances where the action is unlawful in the place where it is done would "expose a substantial weakness in Australia's capacity to exercise to the full the powers associated with sovereignty".[17] There is no basis for a limitation on the power to legislate with respect to extraterritorial matters beyond that resulting from the limitations that the Constitution expressly or impliedly imposes.

47. Accordingly, it cannot be said that the direction made by the Minister on 29 July 2013 (SCB 87),[18] or the taking of the plaintiff to PNG on 21 August

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15 See *Plaintiff M68* at [361] (Gordon J). See also *Plaintiff S156* at [32].

16 *Meyer Heine Pty Ltd v the China Navigation Co Ltd* (1966) 115 CLR 10 at 37 (Taylor J); 42 (Menzies J).

17 *XYZ v The Commonwealth* (2006) 227 CLR 532 at [16]-[17] (p 542) (Gleeson CJ); *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 599, 602-603 (Deane J); 638 (Dawson J).

18 This direction was determined to be valid in *Plaintiff S156* at [50(4)] (the terms of which are stated at [16]).

2013, was beyond the power conferred by s 198AD of the *Migration Act*, by reason of the *Namah* decision, or, more particularly, by reason of the determination by the PNG Supreme Court that the transferees on Manus Island were detained contrary to their constitutional right of personal liberty under s 42 of the PNG Constitution. **The third and fourth questions stated should be answered: No.**

48. It may be observed that there is no suggestion that employees of Broadspectrum are "officers" for the purposes of s 198AD, nor that any such employees have undertaken any function under or purportedly under s 198AD. Broadspectrum performs a range of functions *within* the regional processing country pursuant to the Contract in relation to the Provision of Garrison and Welfare Services at Regional Processing Countries (**Broadspectrum contract**: SCB 112), including transport and escort services pursuant to its contract with the Commonwealth (Schedule 1, Part 3, 1.1.1(j); SCB 172). A requirement of that contract is for Broadspectrum to perform its obligations under the contract in compliance with laws applicable in the regional processing country (para 3.3; SCB 124-125).

(c) Power to take action under s 198AHA

49. Subsection 198AHA(1) provides that the section applies if the Commonwealth enters into an arrangement with a person or body in relation to the regional processing functions of a country. The reference to "person or body" has been taken to include the executive government of a country,[19] and applies where the Commonwealth has entered into an arrangement with another country with respect to the regional processing functions of that country.[20] By reason of the Commonwealth entering into arrangements with PNG, including the Regional Resettlement Arrangement Between Australia and Papua New Guinea (**Regional Resettlement Arrangement**: SCB 85); the 2013 Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to, and Assessment and Settlement in, Papua New Guinea of Certain Persons, and Related Issues (**2013 MOU**: SCB 89); the 2014 Administrative Arrangements for Regional Processing and Settlement in Papua New Guinea (PNG) (**2014 Administrative Arrangements**: SCB 95), the section applies.

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19 *Plaintiff M68* at [44] (French CJ, Kiefel and Nettle JJ); [73]-[74] (Bell J); [177] (Gageler J); [246] (Keane J); [363]-[364] (Gordon J).

20 *Plaintiff M68* at [45] (French CJ, Kiefel and Nettle JJ). See *Migration Amendment (Regional Processing Arrangements) Bill 2015*, House of Representatives, Second Reading Speech, 24 June 2015, p 7488.

50. Subsection 198AHA(2) provides that the Commonwealth may take, or cause to be taken, any action, or make payments or cause payments to be made, in relation to the arrangement or regional processing functions of the country (whether or not those functions occur in that country or another country: s 198AHA(5)), and anything else that is incidental or conducive to the taking of such action or the making of such payments. That subsection retrospectively conferred authority on the Executive Government to enter into the Broadspectrum contract, and to make payments thereunder.[21]

51. Subsection 198AHA(3) clarifies that subsection (2) is intended to ensure that the Commonwealth has capacity and authority to take action (which is defined in subsection (5) to include exercising restraint over the liberty of a person, and action in a regional processing country or another country) "without otherwise affecting the lawfulness of that action". As the Explanatory Memorandum to the *Migration Amendment (Regional Processing Arrangements) Bill 2015* makes clear (at [16]), s 198AHA(2) does not purport to provide the legal authority to detain a person taken to a regional processing country as any authority to exercise restraint over the liberty of a person arises under the law of the regional processing country.

52. This is critical, as it expressly leaves open the question of legality of the conduct that is authorised under s 198AHA. That is to say: (a) it envisages that the conduct may or may not be lawful; and (b) it does not purport to render lawful conduct that is unlawful. It is, thus, nonsensical to suggest that the authority conferred by such a provision is denied in the circumstance where the action is unlawful.

53. This Court in *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors* (2016) 257 CLR 42 observed that, while the plaintiff in that case did not articulate any basis to conclude that s 198AHA depends for its operation upon the constitutional validity of the laws of a regional processing country under which regional processing functions are undertaken, s 198AHA "tends to point the other way". In that regard, the Court referred to the power to implement the laws of the foreign country (by virtue of s 198AHA(2) and (5)), which authority is not further qualified by a requirement that such laws be construed as valid according to the Constitution of that country.[22] As Gageler J observed (at [181]), just as the section has no effect on the civil or criminal liability of the Executive Government or its officers or agents under Australian law or under the law of a foreign country, the lawfulness or unlawfulness of Executive Government action under Australian law or under the law of the foreign country conversely does not determine whether or not

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21 See *Plaintiff M68* at [180] (Gageler J).

22 *Plaintiff M68* at [51]-[52] (French CJ, Kiefel and Nettle JJ).

that action falls within the scope of the statutory capacity or authority conferred by that section. Similarly, Keane J observed that s 198AHA contains textual indications that the operation of s 198AHA(2) does not depend on the constitutional validity of the law of the foreign country (at [249], [258]).

54. The plaintiff contends that it was beyond the power of the Commonwealth to enter into or take action pursuant to the "agreements" with PNG or Broadspectrum (PS at [41]). This contention is made on the basis that those agreements "were declared 'unconstitutional' or 'illegal' in PNG". It is not evident that this is so. Such declarations were not made at paragraph 74 of the decision, and the "arrangements" to which the Court refers at paragraph 39 are not identified. Moreover, aspects of those arrangements are still treated as having force: see *Namah* at [107].

55. The plaintiff contends that no authority could allow the Commonwealth to engage in illegal conduct in a foreign state. The basis of that (broader) assertion is unclear. The principle of construction called in aid by the plaintiff at [40] in relation to s 198AHA does not assist (for the reasons explained above at paragraph 38). Further, it is evident that the capacity and authority of the Commonwealth under s 198AHA, which is expressed to encompass action that includes a restraint over liberty and which occurs outside Australia, operates notwithstanding the lawfulness of the action.

56. The plaintiff contends that a law that authorises action to be taken pursuant to an agreement, "being illegal in PNG", bears "no lawful connection" with any head of power under s 51 of the Australian Constitution (PS at [44]-[46]). In response, Broadspectrum submits that, to the extent that s 198AHA is characterised as a law with respect to the aliens power under s 51(xix) or the external affairs power under s 51(xxix),[23] if the conduct which the provision authorises is unlawful under the law of a foreign state, that would not thereby deprive s 198AHA of its character as a law with respect to "aliens" or "external affairs".

57. This submission is made by analogy with the unanimous decision of this Court in *Horta v Commonwealth* (1994) 181 CLR 183, where a challenge to an Act on the ground that it would exceed the Commonwealth's legislative power conferred by s 51(xxix) if the treaty was unlawful under international law, was rejected (at 195) on the basis that there was simply no basis either in s 51(xxix) or in any other provision of the Constitution for the submission that the legislative power conferred by s 51(xxix) must be confined within the limits of Australia's legislative competence as recognized by international law. The cases relied upon by the Court in support of this view (at 195,

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[23] *Plaintiff M68* at [77] (Bell J), [182] (Gageler J); [259] (Keane J); [407] (Gordon J).

fn 23) showed that the same view had been taken in relation to other Commonwealth heads of power. That is a necessary view in order to avoid the not infrequent possibility that a law could be characterised as both a law with respect to external affairs, not subject to the limitation which the plaintiff propounds, and also a law with respect to some other power, which would not be subject to such a limitation.

58. To attribute to the Commonwealth Parliament the power to legislate inconsistently with international or foreign law does not affront the sovereignty of States, nor does it seriously undermine the peaceful co-existence between nations (contrary to the plaintiff's prescriptive argument at PS [37]-[38]), and in fact recognises an authority claimed by the legislatures of other countries. As Lord Watson recognised in *Dobie v The Temporalities Board* (1882) 7 AC 136 at 146, in relation to the British parliament, there is really no practical limit to its authority except the lack of executive power to enforce its enactments. Of course, in the case of the Commonwealth Parliament, which does not enjoy the same supreme legislative authority, the law would still have to be characterised as otherwise coming within its legislative powers.[24]

59. Furthermore, to the extent that the plaintiff seeks to impugn the law on the basis of an ulterior motive or purpose (PS at [40]), as Dixon J observed in *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79:[25]

> Speaking generally, once it appears that a federal law has an actual and immediate operation within a field assigned to the Commonwealth as a subject of legislative power, that is enough. It will be held to fall within the power unless some further reason appears for excluding it. That it discloses another purpose and that the purpose lies outside the area of federal power are considerations which will not in such a case suffice to invalidate the law.

60. Accordingly, it cannot be said that the authority to take action in respect of regional processing arrangements in PNG conferred by s 198AHA of the *Migration Act* is dependent on whether those arrangements are lawful under the law of PNG. **The fifth question stated should be answered: No.**

Exercise of non-statutory executive power

61. The second question stated asks whether entry into certain arrangements with PNG and Broadspectrum, respectively, was beyond the power

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[24] See *New South Wales v The Commonwealth (Seas and Submerged Lands Act Case)* (1975) 135 CLR 337 at 497-498 (Jacobs J).

[25] Cited with approval by the Court in *Plaintiff S156* at [25], in determining that ss 198AB and 198AD of the *Migration Act* were laws within s 51(xix) of the Constitution (at [38]).

conferred by s 61 of the Constitution and/or s 198AHA of the *Migration Act*, by reason of the *Namah* decision.

62. Section 198AHA applies *if* the Commonwealth enters into a relevant arrangement: s 198AHA(1). The section authorises action in relation to the arrangement (or the regional processing functions of the country). It does not, nor does it purport to, authorise entering into such an arrangement.[26] Consequently, the question regarding the validity of entry into such "arrangements" with PNG is addressed below only in terms of the non-statutory executive power of the Commonwealth.

(a) Arrangements with PNG

63. The relevant arrangements with PNG comprise the 2013 MOU, which supports the Regional Resettlement Arrangement, both of which are supported by the 2014 Administrative Arrangements. These arrangements represent non-binding commitments; each signed by counterparts of the Australian and PNG Governments.

64. The making of such commitments is the quintessential exercise of executive power. As Latham CJ stated in *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 643, the regulation of relations between Australia and other countries is the substantial subject-matter of external affairs, and includes negotiation which may lead to an agreement binding the Commonwealth in relation to other countries, the actual making of such an agreement as a treaty or convention *or in some other form*, and the carrying out of such an agreement. As his Honour explained further (at 644), under s 61 of the Constitution, the Executive Government can deal administratively with the external affairs of the Commonwealth. His Honour explained that the execution and maintenance of the Constitution, particularly when considered in relation to other countries, involves the establishment of relations at any time with other countries, including the acquisition of rights and obligations upon the international plane (the most obvious example being the negotiation and making of treaties with foreign countries).

65. On that basis, Mason J in *Barton v Commonwealth* (1974) 131 CLR 477 at 498, concluded that the making of a request to a foreign State, in the absence of a treaty with that State, for the surrender of a fugitive offender alleged to have committed an offence against the laws or Australia, as well as the making of a request for the detention of that offender as a preliminary to his extradition to Australia, were acts which fell within the executive power of the Commonwealth.

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[26] *Plaintiff M68* at [45], per French CJ, Kiefel and Nettle JJ.

66. More recently, this Court has held that it is within the scope of the non-statutory executive power of the Commonwealth with respect to aliens to enter into such arrangements in order to facilitate regional processing arrangements.[27]

67. The plaintiff seeks to negate the power of the Commonwealth to enter into the MOU and supportive administrative arrangements on the basis that each had "as an inherent part of its purpose the illegal transfer of the plaintiff to PNG and his illegal detention at the RPC" (PS at [34]). It should be clarified that the PNG Supreme Court did not determine that the transfer *per se* of the asylum seekers to PNG was contrary to PNG law. Rather, it was the fact that they were brought into PNG and detained at the MIPC (see, for example, paragraphs 39 and 73-74). Even if it were demonstrated that "an inherent part" of the Commonwealth's purpose in concluding arrangements with PNG was the transfer and detention of asylum seekers, the subsequent decision of the PNG Supreme Court declaring their transfer to PNG and detention in MIPC unconstitutional and therefore illegal, does not thereby render the purpose illegal. A purpose of engaging in unlawful conduct is difficult to reconcile with the provisions of the 2013 MOU, which provide that the Governments of Australia and PNG will conduct all activities in respect of the MOU in accordance with their respective Constitutions and their respective relevant domestic laws (Guiding Principles 4 & 5: SCB 91).

68. While this Court is yet to rule on whether the exercise of the executive power of the Commonwealth under s 61 of the Constitution must conform to the rules of international and/or foreign law, the suggestion that such rules constrain the exercise of executive power promotes a lack of symmetry in circumstances where the exercise of the legislative powers in s 51 and 52 of the Constitution are not similarly constrained.

69. **Crown Act of State**: Furthermore, to the extent that the plaintiff asks this Court to examine the propriety of the Commonwealth entering into regional processing arrangements with PNG, the plaintiff is asking this Court to adjudicate an 'act of State'. In that regard, the distinction between "certain acts of high policy, which by their very nature are not subject to judicial review, and other actions taken in pursuant of that policy, which are",[28] is significant. The second question stated is concerned with the former acts.

70. This is to be distinguished from the acts of transfer or detention pursuant to such arrangements, although recently, in the context of foreign military

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27 *Plaintiff M68* at [45] (French CJ, Kiefel and Nettle JJ); [68] (Bell J); [178] (Gageler J); [365], [370] (Gordon J).

28 *Rahmatullah (No 2) & Ors v Ministry of Defence* [2017] UKSC 1 (17 January 2017) (***Rahmatullah (No 2)***) at [15](Lady Hale, with whom Lord Wilson and Lord Hughes agree).

operations, those acts (specifically the transfer of persons from British custody by Her Majesty's forces to the United States) have been held to constitute acts of state (so far as they were authorised by the United Kingdom's detention policy or required by the United Kingdom's agreements with the United States).[29]

71. Acts which are by their nature sovereign acts, which are inherently governmental, and committed in the conduct of the foreign relations of the Crown, are beyond the purview of judicial consideration.[30] As Lord Summer explained in *Johnstone v Pedlar* [1921] 2 AC 262 at 290: "Municipal Courts do not take it upon themselves to review the dealings of State with State or of Sovereign with Sovereign."[31] This is because the "transactions of independent states between each other are governed by other laws than those which Municipal Courts administer; such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make".[32] To the extent that there are no judicial or manageable standards by which to judge the issue, the court does not have jurisdiction to adjudicate the claim.[33]

72. The plaintiff's reliance on *A v Hayden* (1984) 156 CLR 532 (***Hayden***) is misplaced. By exercising its power to enter into arrangements with the PNG Government, the Commonwealth executive has neither authorised a breach of the law, nor dispensed its servants from obedience to laws made by Parliament (cf PS [36]). Nor can it be said that the Commonwealth has authorised the commission in another country of conduct which is an offence against the laws of that country (and not authorised by international

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29 *Rahmatullah (No 2)* at [46] Lady Hale (with whom Lord Wilson and Lord Hughes agree); [75] Lord Mance (with whom Lord Hughes agrees); [95] (Lord Sumption); [106] Lord Neuberger (with whom Lord Hughes agrees); [109] Lord Clarke.

30 *Rahmatullah (No 2)* at [36]-[37] (Lady Hale, with whom Lord Wilson and Lord Hughes agree); [90] (Lord Sumption).

31 See also *Dicey, Morris & Collins on The Conflict of Laws* (15th ed., 2012), § 5-045 (p 121), and the authorities cited at footnote 177.

32 *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 7 Moo Ind App 476 at 529 (Lord Kingsdown), cited in *Rahmatullah (No 2)* at [85] (Lord Sumption, with whom Lord Hughes agrees). See also *Cook v Sprigg* [1899] AC 572 at 578; *Salaman v Secretary of State for India* [1906] 1 KB 613 at 625 (Vaughan Williams LJ), 635 (Stirling LJ); *Secretary of State for India v Sadar Rustam Khan* [1941] AC 356 at 369-370 (Atkin LJ); *Buttes Gas & Oil Co v Hammer* [1982] AC 888 (***Buttes Gas***) at 938B-C (Lord Wilberforce), although the absence of "judicial or manageable standards" by which to judge the issue, does not represent "the definitional limit of non-justiciability": *Rahmatullah (No 2)* at [53] (Lord Mance, with whom Lord Hughes agrees); [79] (Lord Sumption); *Queensland v Commonwealth* (1989) 167 CLR 232 at 239.

33 *Buttes Gas* at 932, 938 (Lord Wilberforce); *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 at 971-972; *Petrotimor Companhia de Petroleos Sarl v Commonwealth of Australia* (2003) 126 FCR 354 at [48], [50], [52] (Black CJ and Hill J); *Gamogab v Akiba* (2007) 159 FCR 578 at [31], [34], [40] (Kiefel J).

law): cf. *Hayden* at 562 (Murphy J). To suggest otherwise is curious in circumstances where those arrangements provide for the management of the regional processing centre by PNG under PNG law (Regional Resettlement Arrangements, para 4; SCB 85); the conduct of activities by the Governments of Australia and PNG in accordance with their respective constitutions and domestic laws (2013 MOU, paras 4-5; SCB 91); and the necessity of compliance by centre staff with the laws of PNG (2014 Administrative Arrangements, para 2.1(1); SCB 99). As the plaintiff acknowledges (PS at [39]), the question whether Parliament could empower such authorisation was left open (*Hayden* at 562, per Murphy J).

73. The plaintiff also contends that Australia had no power to enter into any of the arrangements with PNG on the "separate basis" of a self-fashioned principle of reciprocity, whereby one cannot enter into an agreement with another party who has no power to enter into the agreement (PS at [29]). There is nothing in the *Namah* decision that says or suggests that PNG could not enter into arrangements with Australia. This is separate from the question whether conduct pursuant to that arrangement was lawful according to PNG law. In any event, PNG's capacity to enter into arrangements says nothing about Australia's capacity as a matter of Australian domestic law.

74. Furthermore, the plaintiff's argument ignores a longstanding principle of customary international law, codified in Article 27 of the 1969 Vienna Convention on the Law of Treaties [1974] ATS 2 (**VCLT**), that a party may not invoke provisions of its internal law as a justification for its failure to perform a treaty. This principle relates to a presumption as to the validity and continuance in force of the treaty.[34] The law of treaties covers both formal agreements (treaties, conventions, protocols, etc) and informal agreements (exchange of notes or letters, memorandum of agreement, agreed minutes, etc).[35] However, it does not govern the question of competence of the State to enter into these arrangements.[36] As such, there is no basis in international law for the submission (at [29]) that PNG has no power to enter into these arrangements, and that they are therefore "void *ab initio*".[37]

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34 Crawford, J., *Brownlie's Principles of Public International Law* (8th ed., 2012) (***Brownlie's***), p 377.

35 See Article 2(1)(a) of the VCLT; *Brownlie's*, p 369.

36 See *Brownlie's*, pp 370-372. Cf. Article 46 of the VCLT.

37 A treaty is void if its conclusion has been procured by the threat or use of force, or it conflicts with a peremptory norm of general international law: articles 52, 53 & 64 VCLT.

(b) Broadspectrum contract

75. The plaintiff has failed to demonstrate either: (a) a relevant limitation on the power of the Commonwealth conferred by s 198AHA(2) to enter into the Broadspectrum contract; or (b) that it is beyond the executive power of the Commonwealth to enter into that contract.

76. To the extent that the Commonwealth's entry into the Broadspectrum contract is considered an "action" taken in relation to the arrangements with PNG or the regional processing functions of the country, or otherwise incidental to it (s 198AHA(a) or (c)),[38] the plaintiff fails to demonstrate that the declaration in the *Namah* decision at [39] implicates that action, let alone declares it to be unconstitutional and illegal (cf. PS [43(b)]). The PNG Supreme Court refers (at [39]) to "[t]his arrangements [sic]" following a reference to "the joint efforts of the Australian and PNG governments that has seen the asylum seekers brought into PNG and kept at the MIPC against their will". Those "arrangements" do not include the Broadspectrum contract, which is not an arrangement between the Australian and PNG governments, and which does not provide for the transfer or detention of the plaintiff or other transferees at the MIPC.

77. The plaintiff submits that the Broadspectrum contract "serves the purpose of the detention of the plaintiff and others at the RPC, and thus has among its purposes a breach of the law of Papua New Guinea" (PS at [28]). Accordingly, the plaintiff concludes, it was beyond the power of the Commonwealth to enter into such a contract.

78. The plaintiff cites no authority for the conclusion that it is beyond the power of the Commonwealth to **enter into** a contract that requires *inter alia* performance in a foreign country of an act that is unlawful in that country. This is distinct from the question whether a provision of a contract is enforceable insofar as it requires an act to be done in a foreign country that is illegal by the law of that country.[39]

79. In any event, the Broadspectrum contract did not cause transferees to be detained, but rather services (including the provision of food, recreational programs and internal security) were required to be provided whether or not transferees were detained. The services were to be provided within the parameters of offshore processing, which included host country legislation (cl 1.1.5 of Schedule 1; SCB 149). However, Broadspectrum's responsibilities

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[38] The operation of the contract with Transfield Services (Australia) Pty Ltd, including payment of appropriated funds under the contract, has been held to be authorised by s 198AHA(2): *Plaintiff M68* at [180], per Gageler J.

[39] See Commonwealth's Submissions at [55], and authorities cited at fn 41.

in relation to processing were not predicated on the detention of transferees (cl 4.2.1 of Schedule 1; SCB 164).

80. Furthermore, the premise of the plaintiff's argument is difficult to reconcile with the requirement imposed on Broadspectrum to perform its obligations under the contract in compliance with laws applicable in the regional processing country (para 3.3; SCB 124-125).[40] The plaintiff simply fails to demonstrate that a purpose of the Broadspectrum contract is to breach PNG law. An *ex post facto* determination in the regional processing country that the transfer and detention of asylum seekers by the Australian and PNG Governments is unlawful, does not make it so. The direction of the Minister under s 198AD(5) directing "officers" to take certain classes of unauthorised maritime arrivals to PNG (SCB 87) does not speak to Broadspectrum staff. Furthermore, the fact that Broadspectrum performs "garrison and welfare services" in the MIPC does not mean that it detains the plaintiff or others at the MIPC. The facts stated in the special case are not (and do not purport to be) sufficient to determine that question. It is not necessary to answer that question in order to determine any of the questions stated.

81. **The second question stated should be answered: No.**

Part VII: Estimate

82. Broadspectrum estimates that it will require 45 minutes for the presentation of oral argument.

Dated: 21 April 2017

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[40] This is distinct from the law governing the contract, which is the law of the Australian Capital Territory (cl 17.12.1, SCB 146).