IN THE HIGH COURT OF AUSTRALIA **No. S195 of 2016**
REGISTRY: SYDNEY

BETWEEN **PLAINTIFF S195/2016**
Plaintiff

AND **MINISTER FOR IMMIGRATION AND BORDER PROTECTION (CTH)**
First Defendant

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COMMONWEALTH OF AUSTRALIA
Second Defendant

BROADSPECTRUM (AUSTRALIA) PTY LTD (ACN 000 484 417)
Third Defendant

THE PLAINTIFF'S REPLY

Part I: Certification

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1. The plaintiff certifies that this submission is suitable for publication on the internet.

Part II (a): Concise reply to the Commonwealth defendants

2. Behind the position of the first and second defendants, there may be an assumption that the asylum seekers were detained either by PNG or Australia, but not both. If so, there is no foundation for that. The law has long recognised joint responsibility, in the civil sphere of joint tortfeasors, and in the criminal sphere of participants in a joint criminal enterprise. By the criteria for either of these, Australia would easily be found liable for the detention
30 of the asylum seekers at the RPC. It is irrelevant whether the first and second defendants would themselves have sought to impose any restriction on the plaintiff's liberty, the short fact is that they agreed with PNG's doing so, and then took a major part in it (PS [15] to [19]).

3. The first and second defendants consider (at [37] to [44]) the 2013 Memorandum of Understanding (SCB92[9]) and the Regional Resettlement Arrangement (SCB86 [11]) separately, but not as part of the scheme they formed with other documents. Both documents recognised in clear terms that they were part of a broader scheme. Indeed, critically, at the time of their execution (respectively 6/8/13 and 31/7/13), the 2013
40 Administrative Arrangements, signed on 30/4/13, were already in effect, (SCB70). (Indeed, they were drafted before December 2012 – see the line struck out above the signatures). The Administrative Arrangements clearly provided for detention: transferees to be directed by the Minister to reside at the centre, (and so subject to being compelled by force to remain there, with criminal penalties if they did not), and allowed to leave only under escort for approved activities (PS [15] to [27]).

4. The insistence of Papua New Guinea on the detention of the asylum seekers is reflected not only in the 2013 Administrative Arrangements drafted before the end of 2012, but in

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the Statement of Arrangements attached to the Statement of Reasons by the Minister for Immigration laid before the Parliament in October 2012.That "Statement of Arrangements - Attachment B" is now included at (G5)[2(b)] of the supplementary special case book which states:

> b. Transferees will not be permitted to leave the processing centre until security and health assessments have been completed and they are assessed as not presenting a risk to public health and are security cleared. Thereafter, transferees in the process of having their claims to protection assessed, or who have been determined to be a refugee, will be permitted to leave the Centre with an escort for approved activities;

5. Clearly, the requirement for detention was there practically from the start. Details of its enforcement, such as the direction by the Minister to reside in the centre, may have come a little later. All of the documents from the time of the Minister's "statement of reasons", were signed with knowledge of, acceptance of, and agreement to the fact that Papua New Guinea required detention.

6. On the Papua New Guinea side, all of these agreements were also part of the scheme by which the asylum seekers were to be detained. Thus, they all had as an objective the activity declared unconstitutional and illegal by the Supreme Court of Papua New Guinea. As such, they too were necessarily beyond power in Papua New Guinea. These agreements are all void ab initio. The agreements between PNG and Australia being void ab initio, there is no scope for reliance on s 198AHA, because there is no "arrangement" as required by s. 198AHA(1).

7. The agreements being beyond power in Papua New Guinea, they were also beyond power in Australia. There is no power to make an agreement with a party that does not itself have power to make the agreement. There can be no power to perform an impossibility. Neither in a constitution or a person can there be power to make an agreement with a talking parrot, a statue, or someone yet to be born.

8. It is not to the point, as the first and second defendants state at (28[b]) that the Memoranda provided that PNG was to conduct its activities in accordance with the PNG constitution and PNG laws. What counts is that, despite this, one of the principal objectives was precisely the behaviour found to be unconstitutional and therefore illegal.

9. The first and second defendants say that s.198 AHA(2) "authorises the Executive to engage in conduct which may be tortious" (at [47]), and "it is implicit in s. 198 AHA(3) that s. 198 AHA (2) may authorise conduct (in the manner explained above) as a matter of Australian law even if that conduct is unlawful in the place in which it is to occur" (at [49]). This cannot be correct.

10. S. 198AHA(3) refers to the "lawfulness" of conduct. That encompasses both civil and criminal aspects. The section applies both within and outside Australia. If the first and second defendant's argument is correct, it authorises deliberate breaches of the civil and criminal law anywhere, unlimited in their seriousness, restricted only to serving the purpose of the Act.

11. This alarming dimension of the circumstance passes unnoticed in the argument because the facts of the present case are sympathetic to the defendants, in that there is an implicit

notion that the illegality was not intended. (Though this must be qualified by the strong inference arising from the attempted constitutional amendment that they at least recognised that they were taking a risk of seriously breaching the law of PNG). But if their reading of the section is correct, it would apply equally to deliberate acts. If what really was intended by s. 198AHA(3) was such a licence, it must be said that it is framed in most curiously indirect terms for something of such grave consequence.

12. Indeed, if the liability for torts is nevertheless maintained, as the first and second defendants say, and the criminal penalties too, as they would have to allow, the "authorisation" is entirely paradoxical. Normally, if one is authorised to do something, the liability or penalty disappears. "Authorisation" is empty of meaning if the normal liabilities and penalties are maintained.

13. The answer to the paradox is that the defendants' interpretation is incorrect. The purpose of s. 198AHA(3) is divined if one considers the effect of s. 198AHA(2) standing without it. The subsection's reference to "any act" could be taken as entirely unrestricted, to extend literally to any act. The intent of subsection (3) is merely to make clear that it is limited to lawful acts.

14. The statement in s. 198AA(d) referred to by the first and second defendants at [35] is not the enactment of a rule, but merely one of several reasons recorded by the legislature for its actions.

15. The plaintiff's case in relation to the designation decision is not about the construction of Section 198AB, to which much of the defendants' arguments are directed. It is based on a supervening proposition, that the constitution does not empower a decision, though otherwise validly based, if it is made with the intention of assisting, achieving or taking part in activity in a foreign country that is illegal according to the law of that country. Limitations on what the Minister is required to consider to achieve a valid decision (in the absence of such an intention), and whether the section provides for what is to happen in the regional processing country are quite separate from the question of the effect of making the decision with the intention that it will serve an illegal purpose. On the defendants' argument, a decision would be valid even though it quite deliberately flouted the law of the other country. That is not the meaning or intention of the section.

Part II (b): Concise reply to the Third Defendant

The principle of comity

16. Broadspectrum suggests reservations about how the *Namah* decision (SCB835) should be approached. Just as Australian courts exercise restraint against deciding the validity of the laws of foreign states, the necessary corollary is that when foreign states decide their own law, Australian courts should also defer to their decisions. Despite the assertions at [18] by the Commonwealth defendants and [29] by Broadspectrum, that they were not parties to *Namah* and were not aware of the facts adopted and do accept all of the factual findings, they have not identified any of the accepted grounds for not deferring to the *Namah* decision.

17. *Namah* decided at [39] that "This arrangements were outside the Constitutional and legal framework in PNG" ("This" would appear to be a transcription error for "These"). The arrangements referred to are clearly "the joint efforts of the Australian and PNG

governments" discussed in the previous sentence. The agreements between the two governments are referred to consistently throughout the judgment as the "arrangement" or "arrangements" at [5], [20], [21], [22], [39], and [59]. The full context in [20] shows that the "arrangements" comprised the two MOUs entered into by the Australian and PNG governments. It is clear therefore that the two MOUs were held unconstitutional and illegal under PNG law.

18. It is not correct as Broadspectrum contends at [54] that the *Namah* decision provides that aspects of the MOU are still treated as having force. At [107] of *Namah,* the PNG Supreme Court is merely saying that the Minister may choose to exercise his discretion either in the way envisaged in the MOU or in the UNHCR guidelines mentioned in the two preceding paragraphs.

19. Broadspectrum says (at [28]), that "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." There is no doubt on the evidence in the Special Case that the plaintiff was transferred to and detained at the MIPC. Whatever the precise facts before the PNG Supreme Court, there can be no doubt that on the basis and breadth of its decision, the detention to which the plaintiff was subjected was declared unconstitutional.

The doctrine of foreign state immunity

20. The doctrine of foreign state immunity has no application in this matter. First it did not prohibit the Supreme Court of PNG from ruling on the legality of the agreements by PNG with the Commonwealth under PNG law. Second, even if the Commonwealth had been interpleaded and objected as suggested by Broadspectrum at [30], there is significant international jurisprudence supporting the proposition that the doctrine of foreign state immunity is no longer a bar in circumstances where there are serious allegations of human rights abuses and where a state is acting extraterritorially and exercising effective control in another state, see *Habib v Commonwealth of Australia* [2010] FCR 62 per Jagot J., from [91]-[136], which provides recent juridical developments in this field.

Act of State

21. Broadspectrum asserts at [69] that the regional processing arrangement with PNG was an act of state. The regional processing arrangement does not have the characteristics of any of the accepted categories of an act of state, namely the power to declare war and peace, enter treaties with foreign sovereigns, annexations and cessions of territory.[1] The key criterion of a lack of judicial or manageable standards to judge the issue is not made out. The submission by Broadspectrum at [74] that the MOU may have the status of a treaty should be rejected. It is clear that the PNG Supreme Court did not consider the MOUs as an act of state. The common law "does not recognise that there is an indefinite class of acts concerning matters of high policy or public security which may be left to the uncontrolled discretion of the Government and which are outside the jurisdiction of the courts", see H. Street, *Governmental Liability, A Comparative Study,* Oxford University Press, 1953, p 50. The "application of the act of state doctrine to preclude judicial determination of the plaintiff's claims would be inconsistent with the Australian constitutional framework and with Chapter III of the Constitution, which confers

[1]The obvious examples were given by Lord Pearson in *Nissan v Attorney General* [1970] AC 179 at 237.

jurisdiction on federal courts to review the legality of acts of Commonwealth officials under Commonwealth law", *Habib v Commonwealth of Australia* [2010] FCR 62 per Black CJ at [1], Perram J., [24]-[29], [37]-[43], and Jagot J., at [129]-[132].

Other Issues

22. Broadspectrum refers at [57] to *Horta v Commonwealth* (1994) 181 CLR 183, where the issue was the effect on the external affairs power of a treaty's being unlawful under international law. That is a radically different question from the direct affront to a sovereign state by engaging in illegal activity in its own territory. Broadspectrum on a number of occasions takes issue with points that the plaintiff did not make. At [39], "the PNG Supreme Court made no declaration or observation in relation to the designation by the Minister." True, but the plaintiff did not say that it did. What the plaintiff says is that the Court held unconstitutional and illegal conduct which the Minister at the time of making his decision intended that decision to serve. At [40], that the *Namah* decision does not retrospectively impute knowledge to the Minister. True, but it declared unconstitutional and therefore illegal ab initio conduct which the Minister at the time of making his decision intended that decision to serve. At [73], that there is nothing in the *Namah* decision that suggests that PNG could not enter into arrangements with Australia. True, but it is a necessary consequence of the *Namah* decision that PNG could not enter into an arrangement with Australia for the purpose of detention.

Scope and purpose of the special case

23. Contrary to the submission at [6] by the Commonwealth defendants and at [10] by Broadspectrum, the plaintiff's submissions are within the scope and purpose of the special case. Order 2 made on 21st December 2016, (SCBD1) granted "leave to file an amended application for an order to show cause comprising the prayers for relief and the grounds set out in one to thirteen of the document filed 15 November 2016." The plaintiff's submissions are within that scope. On 9 February 2017, there was a material change to the plaintiff's circumstances in PNG, when he was served with a removal order and various notices. The facts were accepted by the defendants and included in the special case from [33]-[38] and at [42] and question six was amended to directly address whether the Commonwealth defendants are precluded from assisting PNG with regard to the removal order at [35] of the special case by reason of the *Namah* decision. The plaintiff's submissions are therefore within the special case.

Date: 28 April 2017

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