HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

PERTH REGISTRY

BETWEEN: **MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS**

First Appellant

SECRETARY, DEPARTMENT OF HOME AFFAIRS

Second Appellant

10 **THE RELEVANT OFFICERS ACTING UNDER SECTION 198 OF THE *MIGRATION ACT* 1958**

Third Appellant

AND:

MZAPC

Respondent

SUBMISSIONS OF THE RESPONDENT

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PART I FORM OF SUBMISSIONS

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

PART II ISSUE

1. Does the Federal Court have power to grant an interlocutory injunction restraining officers of the Commonwealth from performing the duty to remove an unlawful non-citizen from Australia as soon as reasonably practicable, imposed by s 198(6) of the *Migration Act 1958* (Cth) (the **Act**), where no claim in the substantive proceedings directly impugns the satisfaction of the preconditions to that duty arising?

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

2. Sufficient notice has been given under s 78B of the *Judiciary Act 1903* (Cth): **CAB 101–106**.

PART IV MATERIAL FACTS

3. In circumstances where there is no appeal against the Full Court's conclusions as to the balance of convenience, there are no material facts in dispute.

4. However, the Respondent does not accept that the only final relief that could be granted to him would be a declaration that officers acted beyond power in not referring his requests to the Minister: cf **AS [10]**. He maintains his application for all of the relief sought by the originating application (**CAB 6–7**), including mandamus to require the Second Appellant (for brevity, the **Department**) to cause his requests to be referred to the Minister and a final injunction restraining the Appellants from removing him from Australia at least until that has occurred.

5. It is also necessary to be precise about the extent to which the statutory duty to remove is "undisputed": **AS [13]**, **[17]**; **J [115]**, **[130]**. The parties are in agreement that the preconditions to the existence of the duty imposed by s 198(6) (being the requirements of s 198(6)(a), (b), (c)(i) and (d)) are presently met. However, the very institution of the proceeding, with its claims for injunction restraining removal, demonstrate that the parties disagree as to whether the time for performance of that duty has crystallised (see also **J [42]–[43]**). Further, as recognised by Colvin and Jackson JJ at **J [84]** (see also **J [132]–[134]**), the Respondent contends that the relief he seeks in the substantive proceeding could lead to the

possibility that a valid visa application could be made such that there would no longer be a duty to remove him. In that sense, while there has been no direct challenge to the present existence of the duty to remove, the final relief sought, if obtained, would create the possibility that the duty to remove would cease to exist. The merits of the Respondent's claim, of course, have not yet been determined, but they fell to be considered in the context of whether the Respondent had a serious question to be tried and the primary judge considered that the Respondent's case met that threshold: *MZAPC v Minister for Immigration, Citizenship and Multicultural* Affairs [2023] FCA 989 at [14] (**CAB 20**) by reference to this Court's decision in *Davis v Minister for Immigration, Citizenship, Migrant* 10 *Services and Multicultural Affairs* (2023) 408 ALR 381; 97 ALJR 214. No challenge to the decision below as to the exercise of the primary judge's discretion (**J [136]–[137]**) has been made to this Court.

PART V ARGUMENT

A. INTRODUCTION

6. In *He v Minister for Immigration and Multicultural Affairs* [2001] FCA 1368, Sackville J considered a submission on behalf of the Minister that s 198(6) of the Act obliges the Minister to remove the applicant as an unlawful non-citizen and that that statutory obligation must prevail over any other principle of law that might otherwise be invoked to justify a temporary restraining order (in the context of a claim that did not seek final relief to restrain 20 removal): [12]. The correctness of that submission was "by no means obvious" to his Honour,[1] who expressed the view that "the construction of s 198(6) of the [Act], in the absence of an authoritative determination by the Full Court of this Court or the High Court, is an open question". For the reasons developed below, his Honour's misgivings were well-

[1] See also ***Kopiev*** *v Minister for Immigration and Multicultural Affairs* [2000] FCA 1831 at [23], [24] (Sackville J) endorsed by Mansfield J in ***Mastipour*** *v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 140 FCR 137 at [32]. Justice Sackville's reasons in *Kopiev* suggest that when, in *Li v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 667 at [20], his Honour said that it was not necessary to resolve the question raised by Emmett J in *Li v Minister for Immigration and Multicultural Affairs* [2001] FCA 1414 at [29], in which Sackville J understood Emmett J to be expressing doubt as to whether the juridical basis for the Court's power extends to restraining removal simply to ensure civil proceedings instituted could be effectively prosecuted, Sackville J was not necessarily expressing the same doubt: cf **AS n 20**.

founded. In the circumstances of this case, the Court did have power to make such an order, notwithstanding the terms of s198(6). The Full Court did not err in holding that was so.

B. THE COURT HAS POWER TO TEMPORARILY RESTRAIN PERFORMANCE OF A STATUTORY DUTY

General principles

7. It is implicit in the establishment of the Federal Court as a "superior court of record and … a court of law and equity"[2] (see s 5(2) of the *Federal Court of Australia Act 1976* (Cth) — **FCA**) that it has the "power to make an interlocutory order that is necessary to enable it to perform its function as such a court".[3] In ***Patrick*** *Stevedores Operations No 2 Pty Ltd v*
10 *Maritime Union of Australia*, the joint reasons expressed the power as being one to make such orders "as are needed to ensure the effective exercise of the jurisdiction invoked".[4] The authority cited for that proposition was *Tait v The Queen*, where this Court adjourned the special leave applications and stayed Mr Tait's execution "entirely so that the authority of [the] Court may be maintained".[5] The power has also been described as a power of the Court to "control its own process and proceedings",[6] "prevent the abuse or frustration of its process in relation to matters coming within its jurisdiction",[7] "protect the integrity of its processes once set in motion",[8] "preserve the subject matter of a dispute pending its final resolution"[9]

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2 As to the position of inferior Courts, see K Mason "The Inherent Jurisdiction of the Court" (1983) 57 *ALJ* 449 at 456–457 and *Minister for Immigration v* ***SZQRB*** (2013) 210 FCR 505 at [284].

3 ***Williams*** *v Minister for the Environment and Heritage* (2003) 199 ALR 352 at [16]. See generally [16]–[19], cited with apparent approval in *SZQRB* (2013) 210 FCR 505 at [281]; **J [126]**.

4 ***Patrick*** *Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at [35] (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ).

5 *Tait v The Queen* (1962) 108 CLR 620 at 624 (Dixon CJ) – that was done "without giving any consideration to or expressing any opinion as to the grounds upon which [the applications] are to be based" (cf what may be suggested at **AS [12]**). See also his Honour's statement in argument at 623: "I have never had any doubt that the incidental powers of the Court can preserve any subject matter, human or not, pending a decision".

6 ***Jago*** *v District Court (NSW)* (1989) 168 CLR 23 at 74 (Gaudron J).

7 ***Jackson*** *v Sterling Industries Ltd* (1987) 162 CLR 612 at 623 (Deane J).

8 ***Cardile*** *v LED Builders Pty Ltd* (1999) 198 CLR 380 at [40] (Gaudron, McHugh, Gummow and Callinan JJ); see also *Mastipour* (2004) 140 FCR 137, at [15].

9 *Re Minister for Immigration and Multicultural Affairs; Ex parte* ***Fejzullahu*** (2000) 74 ALJR 830 at [7].

and variations thereof.[10] That is the power that the Full Court found was engaged in this case: **J [134]**.

8. Importantly, what is encompassed by a court's power to ensure the effective exercise of its jurisdiction "is not to be restricted to defined and closed categories" but may be "exercised when the administration of justice so demands".[11] Necessarily, that will depend upon the "circumstances of each case".[12] However, the obvious width of that power does not raise some spectre of "unrestrained" judicial discretion, let alone the erasure of the separation between judicial and legislative power: cf **AS [24]**, **[25]**,**[31]**. Whilst undoubtedly broad, the power must be exercised for the purpose it is conferred,[13] namely, "to ensure that the Court
10 can, at trial, do justice between the parties in the matter which is before it".[14] Using the language of s 23 of the FCA (which "reinforces", rather than codifies, the implied power)[15], the order must be capable of properly being seen as "appropriate" to the case in hand.[16]

9. Reflecting the breadth of those limitations, this Court has said (in the context of Mareva orders) that "[t]he power to make an interlocutory order is exercised by reference to the relief finally available but that is not, or is not necessarily, to say that the power to make the final order … confines the power to make an interlocutory order".[17] That is because the power to make such orders does "not involve the exercise of the power deriving from the Court of Chancery", which would bring with it the usual requirement to identify some "legal…or equitable rights which are to be determined at trial and in respect of which there is sought

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[10] See, eg, *SZQRB* (2013) 210 FCR 505 [279] and [282] "power to grant an injunction to preserve the subject matter of a proceeding until the proceeding is heard"; *In re Marks and Federated Ironworkers' Association* (1981) 55 ALJR 395 at 396 "preserve the subject matter of litigation".

[11] *CSR Ltd v Cigna Insurance Australia Ltd* at (1997) 189 CLR 345 at 392 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). See also *Jago* (1989) 168 CLR 23 at 74 (Gaudron J); *Jackson* (1987) 162 CLR 612 at 639 (Gaudron J).

[12] *Patrick* (1998) 195 CLR 1 at [35] (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ).

[13] *Patrick* (1998) 195 CLR 1 at [35], referring to *Jackson* (1987) 162 CLR 612 at 623 (Deane J).

[14] *CPK20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 825 at [80].

[15] *Williams* (2003) 199 ALR 352 at [18].

[16] *Cardile* (1999) 198 CLR 380 at [56] (Gaudron, McHugh, Gummow and Callinan JJ).

[17] *Patrick* (1998) 195 CLR 1 at [26].

final relief which may or may not be injunctive in nature".[18] The focus is rather upon what is demanded by the interests of justice in the context of the particular case.

10. Before addressing the manner in which that power was exercised in this case, it is necessary to say something further about the proper construction of s198(6), upon which the Commonwealth parties place considerable reliance.

The proper construction of section 198(6) of the Act

11. Section 198(6) of the Act provides that "[a]n officer must remove as soon as reasonably practicable an unlawful non-citizen if" the preconditions provided for in paragraphs (a)–(d) are met. The assumption seemingly made by the Commonwealth parties as the basis for their principal submission is that that gives rise to an immediate and absolute obligation to remove the Respondent, which the Court has "radical[ally]" instructed the officers of the Second Appellant to "disobey": **AS [15]**, **[17]**.

12. However, in ***Mastipour*** *v Secretary, Department of Immigration and Multicultural and Indigenous Affairs*,[19] Mansfield J held that there was "not … a clear clash between the [making of such an order] in appropriate circumstances and the duty which s 198(6) imposes".[20] His Honour's reasoning drew upon the decision in ***M38****/2002 v Minister for Immigration and Multicultural and Indigenous Affairs*,[21] where the Full Court observed that the duty to remove imposed by s 198(6), while mandatory, is not absolute: it does not require removal as soon as the conditions in paragraphs (a) to (d) are satisfied, but as soon thereafter as is "reasonably practicable" for the officer to remove the non-citizen.[22] The word "reasonably" limits or qualifies what would otherwise be an almost absolute obligation: "[t]he removal may be practicable in the sense that it is feasible, but not 'reasonably practicable' as required by s 198(6) of the Act".[23] Whether the removal of a non-citizen is "reasonably practicable" may direct attention to a range of considerations. In *M38*, the Full Court referred to factors relating to the person facing removal and the interests of third parties

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[18] *Australian Broadcasting Commission v Lenah Game Meats Pty Limited* (2001) 208 CLR 199 at [91] and [94] (Gummow and Hayne JJ), see also Gleeson CJ at [12].
[19] *Mastipour* (2004) 140 FCR 137 at [17]–[28].
[20] *Mastipour* (2004) 140 FCR 137 at [33].
[21] (2003) 131 FCR 146 at [64]–[69].
[22] ***M38****/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at [64].
[23] *M38* (2003) 131 FCR 146 at [65].

who may be directly affected, such as the country to which the person is to be removed.[24] Referring to that decision with apparent approval, Gageler J observed that the question of whether the duty to remove is triggered is "separate from, and anterior to, the question of what is required of an officer to remove the person from Australia as soon as reasonably practicable in the performance of the duty once triggered".[25]

13. Similar reasoning to that adopted in *M38* was applied by another Full Court of the Federal Court in *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[26] where Kenny and Mortimer JJ stated that the use of the statutory phrase "as soon as reasonably practicable" in s 198 is to be understood as allowing for the duties in s 198 to be performed in a way that accommodates other relevant exercises of statutory and non-statutory executive power, including consideration of the exercise of the Minister's personal powers (which the Respondent sought to invoke in this case).

14. The term "reasonably practicable" was selected by Parliament so as to provide for precisely those contingencies, as well as the (equally obvious) possibility that a Court might make an interlocutory order enjoining a person's removal. The accommodation of the Court's processes is not a novel approach to provisions requiring attention to what is "reasonable" in the context of the time for exercising public powers.[27] That is the textual basis for the conclusion that the Act does not require removal for the period of any valid invocation of the judicial power of the Commonwealth that directly impugns that removal.[28] And, properly construed, the Act equally accommodates deferral of removal for the duration of an order made in exercise of the court's power to ensure the effective exercise of its jurisdiction.[29] That construction is reinforced by reference to context: in that regard, section 153(1) relevantly provides that, subject to subsection (2), if the Act requires removal of a non-citizen and there is no criminal justice stay certificate or warrant about the non-citizen, anything

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[24] *M38* (2003) 131 FCR 146 at [66], [68]–[69].

[25] *Plaintiff M96A/2016 v The Commonwealth* (2017) 261 CLR 582 at [38] (Gageler J).

[26] (2021) 285 FCR 463 at [115], [151] (Kenny and Mortimer JJ).

[27] See, by way of analogy, *Thornton v Reparation Commission* (1981) 52 FLR 285 at 291–293 (Fisher J), where the respondent deferred a decision pending the handing down of a decision of this Court, which was likely to be relevant to the exercise of power. See also, as to the authority of *Thornton*, *ASP15 v Commonwealth of Australia* (2016) 248 FCR 372 at [21]–[23].

[28] As to which see, eg, *Tchoylak v Minister for Immigration and Multicultural Affairs* (2001) 111 FCR 302 at [53].

[29] *Mastipour* (2004) 140 FCR 137 at [33]. See also *Kopiev* [2000] FCA 1831 at [24].

done under any law of the Commonwealth does not prevent the removal. Section 153(2) relevantly provides that subsection (1) does not permit removal "if that removal … would be in breach of an order of …the Federal Court".

15. Indeed, authority indicates that the duty of removal is qualified by reference to the *possibility* of the making of such orders, even *prior* to the making of any claim for relevant interlocutory relief.[30]

16. It follows from the above that the Minister's submission that the order of the primary judge "directs officers of the Commonwealth not to comply with a legal duty imposed upon them by legislation" (**AS [15]**) is wrong. Properly construed, s 198(6) accommodates the deferral of the performance of that duty for the duration of the order – removal is not "reasonably practicable" until that time. As such, no occasion arises to consider the propositions said to be derived from the authorities at **AS [16]**.[31]

Restraining the performance of a statutory duty

17. In any event, the Court's power to make orders to protect the integrity of its processes extends to the making of an order restraining the performance of a statutory duty, even where no claim in the substantive proceeding directly impugns the existence of that duty.

18. As the Commonwealth parties accept at **AS [11]**, an interlocutory injunction may restrain the performance of a statutory duty where the existence of that duty is impugned in the substantive proceedings.[32] Indeed, albeit in rare cases, an interlocutory injunction may also restrain the enforcement of a law where the validity of that law is impugned in the substantive proceedings.[33] As the Commonwealth parties observe of the latter kind of case at **AS [29]**, the principle that the Court will not make such an order in the absence of "compelling

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[30] See ***SZSPI*** *v Minister for Immigration and Border Protection* (2014) 233 FCR 279 at [40], [46]; ***Moana*** *v Minister for Immigration and Border Protection* (2019) 265 FCR 337 at [42], [44], [47].

[31] In response to the argument by the Minister that to grant the injunction would be to order an officer not to comply with the law, both at first instance and in the Full Court the Respondent argued that s 198(6), by the words "as soon as reasonably practicable", accommodated the granting of an injunction such that an injunction would not have the effect contended for by the Minister. The Full Court did not deal with that argument. The Respondent relied on the argument in his Response to the special leave application (at [10]), but omitted to file a notice of contention in that regard and accordingly seeks leave to rely on a further Notice of Contention in the form annexed to these submissions.

[32] For examples, see the cases cited in *Mastipour* (2004) 140 FCR 137 at [34].

[33] See ***Castlemaine*** *Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 155–156.

grounds" was explained by Mason ACJ in *Castlemaine Tooheys Ltd v South Australia* as involving the "duty of the Court to respect, indeed, to defer to, the enactment of the legislature until that enactment is adjudged ultra vires".[34] That passage has been criticised, on the basis that "[i]f a statute is invalid, a duty to defer to it cannot arise",[35] apparently invoking the established proposition that (like an invalid exercise of executive power) a law made in excess of power is not and never has been a law at all.[36] The Commonwealth parties seemingly rely upon a similar point to eke out a distinction between cases such as the present and cases in which the substantive proceedings do impugn the existence of the relevant duty: see eg **AS [15]** ("…nothing in the proceedings can cast doubt on the existence of that duty…"); **AS [27]** (referring to decisions that, "if invalid, would mean there was never a duty to remove"); and **AS [28]** ("the requirement to remove would no longer exist").

19. That proposed distinction may explain cases where the exercise of power is ultimately held *invalid*. However, where that is not so, the Court will have made orders excusing compliance with obligations deriving from a statute, which are (and by definition always have been)[37] *validly* imposed. There is in such cases (albeit to a far lesser degree than an injunction restraining the enforcement of an impugned law) an inevitable tension in ascertaining "the best method of ensuring that our society will continue to respect the law at the same time as it [or its application] is being challenged in an orderly way in the courts".[38] In those cases, no less than the current case, the Court resolves such tensions by the application of what the Commonwealth parties pejoratively label a "discretion" to decide whether the law should be obeyed: **AS [19]**. Accordingly, an appeal to the lingering echoes of nullity is no more useful

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[34] *Castlemaine* (1986) 161 CLR 148 at 156.

[35] Spry, *The Principles of Equitable Remedies*, 9th ed (2014) LawBookCo, p 492.

[36] *South Australia v Commonwealth* (1942) 65 CLR 373 at 408. See also Herzfeld, "Injunctions in Public Law" in Griffiths and Stellios, *Issues in Australian Constitutional Law: Tributes to Leslie Zines, Volume 2* (2024) The Federation Press, p 143.

[37] *New South Wales v Kable* (2013) 252 CLR 118 at [51] (Gageler J).

[38] See the passage from *Morgentaler v Ackroyd* (1983) 42 OR (2d) 659 at 668 (Linden J) cited by Mason ACJ in *Castlemaine* (1986) 161 CLR 148 at 155. See more generally, as to the position in Canada, R Sharpe "*Injunctions and Specific Performance"* 5th ed (2017) Thomson Reuters at 3-83 and 3-84 and the authorities there referred to. There, as here, considerations of the public interest in the "application of laws enacted by democratically elected legislatures for the common good" are considered as an important aspect of the balance of convenience in cases where interlocutory injunctions are sought in constitutional cases.

here than in other areas of public law[39] as a complete explanation for the making of such orders.

20. As will be developed below, the basis for the power to make the orders in issue in the present case rather ultimately lies in deeper constitutional considerations concerning the essential characteristics of a court. In contexts not far removed from the present case, that power has supported orders to preserve the court's ability to conduct its processes by restraining removal of a person until the person has given evidence in a proceeding,[40] or has been tried for an offence.[41] Rather than a requirement that the existence of the duty be directly impugned by a claim for final relief, the criterion that governs the court's power to grant an interlocutory injunction restraining the performance of a statutory duty lies in the limitations identified at [8]–[9] above: that is, the order must be capable of properly being seen as "appropriate" to the case in hand.[42]

21. The Full Court engaged in an inquiry of that nature – asking whether "restraint of the performance of [the] statutory duty has a reasonable justification in the substantive claim": **J [123]**, see also **J [129]**. In the Respondent's case, their Honours found the reasonable justification in his substantive claim to be this: success in his substantive claim would give rise to the future possibility that the duty the subject of the interlocutory relief, being the duty to remove him, would no longer exist. That rested upon the analysis of the Respondent's claims at **J [133]**, which gave rise to an arguable claim to the relief he claimed. Yet, the Court's ability to grant the relief he seeks stands to be frustrated if the statutory duty is performed in the interim: **J [134]**. An additional (and related) justification was the fact that removal from the migration zone would have the result that some of the potential outcomes that might be obtained if he was successful would no longer be available: see the terms of s 48A(1) and s 195A(1).

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39 *New South Wales v Kable* (2013) 252 CLR 118 at [21] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), [52] (Gageler J).

40 *Mastipour* (2004) 140 FCR 137 at [35].

41 *Attorney-General (NSW) v Ray (No 3)* (1989) 90 ALR 263 at 277–278.

42 See again *Cardile* (1999) 198 CLR 380 at [56] (Gaudron, McHugh, Gummow and Callinan JJ).

22. Justices Colvin and Jackson derived that approach from the following chain of reasoning of Mortimer J, as her Honour then was, in ***CPK20*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*:[43]

22.1. Any grant of interlocutory relief by the Court will interrupt and override the course envisaged and required by the Act.

22.2. There must be a reasonable justification for the Court's orders to interrupt the course which Parliament intends to occur.

22.3. The purpose of the grant of interlocutory relief is to ensure that the Court can, at trial, do justice between the parties.

22.4. The facts of *CPK20* did not involve an application for interlocutory orders the nature and extent of which might depend on what the controversy is between the parties, because the interlocutory relief sought (injunction restraining removal) had no substantive connection with the controversy (lawfulness of consideration of a request for ministerial intervention).

22.5. Rather, it involved a "*Tait* kind of application" (which her Honour correctly understood as an application for interlocutory orders to preserve the subject matter of the proceeding).

22.6. But *CPK20* was not the kind of *Tait* application where the subject matter of the proceeding would be at further risk if an injunction is not granted (her Honour had already made those *factual* findings at [71] and [78]).

22.7. Accordingly, the preservation of the subject matter of the proceeding did not require interlocutory relief to be granted. That is what led to her Honour's conclusion at [81], where her Honour said that there was "an insufficient prospect of injustice being caused to the applicant to justify interference with the lawful operation of the legislative scheme under the Migration Act".

23. There was no error in the manner in which the Full Court relied upon that reasoning: contra **AS [17(a)]**. Necessarily implicit in her Honour's reasoning is the proposition that the

[43] [2020] FCA 825 at [80].

preservation of the subject matter of the proceeding *would* be a "reasonable justification" for the Court's orders to interrupt the course which Parliament intends to occur, notwithstanding the absence of any substantive connection with the final relief.

24. A similar point was made by Lander and Gordon JJ in *Minister for Immigration v SZQRB*, where their Honours said this:[44]

> There are circumstances where it would be appropriate to make an interlocutory injunction where no final order of that kind is sought. An interlocutory injunction could be made to preserve the subject matter of the proceeding pending the hearing of the proceeding.

25. Their Honours went on to say that the jurisdiction to make such an order "derives from the Court's inherent or implied jurisdiction to enable it to discharge its duties as a Court by preserving its processes and by preserving the subject matter of the proceeding before the Court".[45]

26. That approach is also consistent with *Re Minister for Immigration and Multicultural Affairs; Ex parte Fejzullahu*,[46] in which Gleeson CJ refused applications for interlocutory injunctions restraining removal where the applicants sought, on a final basis, mandamus and an injunction in respect of the Minister's consideration of non-compellable powers but not an injunction to restrain removal. The Chief Justice did not refuse the injunctions as a matter of absence of power, but on the basis that "the applicants must show that there is a serious question to be tried in the principal proceedings, and that the balance of convenience favours the granting of an injunction",[47] and that the applicants failed to show that there was a serious question to be tried in the principal proceedings.[48]

Whether an injunction would restrain the performance of a statutory duty is a factor to be weighed in the balance of convenience

27. In cases that proceeded on the basis that an injunction restraining removal would conflict with the duty imposed by s 198(6), the interaction between the statutory duty and the

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44 *SZQRB* (2013) 210 FCR 505 at [279] (Lander and Gordon JJ, Flick J agreeing). See also [276].
45 *SZQRB* (2013) 210 FCR 505 at [280] (Lander and Gordon JJ, Flick J agreeing).
46 (2000) 74 ALJR 830.
47 (2000) 74 ALJR 830 at [7]
48 (2000) 74 ALJR 830 at [40].

injunction was considered not as a matter of power, but as part of the analysis of the balance of convenience. In those cases, the court did not deny the power existed. Properly understood, the two cases referred to by the Commonwealth parties in their submission to the contrary in **AS [18]** provide examples.

28. In ***P1/2003*** *v Minister for Immigration and Multicultural Affairs*,[49] Gaudron J had granted an interlocutory injunction until the applicant turned 18 and, the matter having been remitted to the Federal Court, an application for the extension of the injunction came before French J. In this context, his Honour "assumed for present purposes, that this Court has power to extend that interlocutory order beyond the minority of the plaintiff, as it had done as an incident of the hearing and determination of the present motion".[50] Given that assumption, his Honour's acceptance of the submission that the mandatory terms of the Act leave no room for transitory persons or unlawful non-citizens to remain in Australia merely for the purpose of pursuing legal proceedings here[51] is properly read as going to his Honour's consideration of the balance of convenience, as indicated by the opening words of the previous paragraph.

29. In *NAEX v Minister for Immigration and Multicultural and Indigenous Affairs*,[52] after considering whether there was a serious question to be tried (and concluding there was not)[53] and whether the balance of convenience favoured the grant of the injunction (and concluding it did not),[54] Lindgren J remarked that he could not "presently conceive of circumstances in which it would be right to make an order, the effect of which would be to require an officer not to discharge such a clear statutory obligation".[55] His Honour's use of "right", which suggests an element of discretion rather than absence of power, and the part of the judgment in which the remark appears indicate that his Honour was not making a statement as to any absence of power.

30. The judgment below provides a further example. Justices Colvin and Jackson held that the seriousness of restraining the enforcement of a valid law was a matter to be recognised and

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[49] [2003] FCA 1029.
[50] [2003] FCA 1029 at [45], see also [52].
[51] [2003] FCA 1029 at [52].
[52] [2002] FCA 1633.
[53] [2002] FCA 1633 at [15]–[16].
[54] [2002] FCA 1633 at [22].
[55] [2002] FCA 1633 at [28].

accorded great weight in the weighing of the balance of convenience: **J [127]**, see also **J [123], [130]**. Their Honours expressly there recognised that the mere fact that the person seeking interlocutory relief is a litigant in Australian courts would not be enough (at **J [126],** referring to, inter-alia, *P1/2003*). But, as submitted at [21] above, the facts of the current matter went beyond that and grounded a conclusion that the Court's ability to grant the relief sought stood to be frustrated if the statutory duty of removal were performed.

The power must be exercised in accordance with established principle

31. There can be no doubt that the grant of an interlocutory injunction to ensure the effective exercise of its jurisdiction must be done in accordance with the law.[56] Indeed, so much was stated by Colvin and Jackson JJ at **J [123]**. The content of the "law" that governs the grant of such an interlocutory injunction is well-settled and rests on two principles: there must be a serious question to be tried and the balance of convenience must favour granting the injunction.[57] The principles are no different where what is sought to be restrained is the performance of a statutory duty. It is the assessment of the balance of convenience that accommodates the Commonwealth parties' concerns as to an interlocutory injunction that would postpone, or restrain, the performance of a statutory duty.

32. **Serious question to be tried**: To grant an interlocutory injunction, the Court must be satisfied that there is "a serious question to be tried in the principal proceedings".[58] This refers to whether there is a serious question to be tried as to whether the applicant is entitled to any of the final relief sought.

33. Contrary to **AS [17](c)**, Stephen J in *Simsek v MacPhee* did not require the applicant to establish a prima facie case that there was not a present duty to remove him from Australia. Rather, his Honour required the applicant to "make out a prima facie case for injunctive relief in accordance with the principles referred to in *Beecham Group Ltd v Bristol Laboratories Pty Ltd*".[59] Those principles are "whether the plaintiff has made out a prima facie case, in

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[56] See, eg, in addition to the authorities cited in **AS [24]** and **AS [25]**, *Rizeq v Western Australia* (2017) 262 CLR 1 at [52] (Bell, Gageler, Keane, Nettle and Gordon JJ).

[57] See, eg, *Castlemaine* (1986) 161 CLR 148 at 153–154; *Fejzullahu* (2000) 74 ALJR 830 at [7].

[58] *Fejzullahu* (2000) 74 ALJR 830 at [7].

[59] *Simsek v MacPhee* (1982) 148 CLR 636 at 641, referring to ***Beecham*** *Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618.

the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief"[60] (ie, a serious case to be tried in the principal proceeding) and "whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction is granted"[61] (ie, the balance of convenience). His Honour went on to consider the application of those principles and held that there was no serious case to be tried on the application for final relief.[62] This case is, accordingly, not authority for any greater connection between the application for interlocutory relief and the substantive claim than is required by the principles identified above. It does not establish that there must a serious question to be tried as to whether what is sought to be temporarily restrained could be restrained on a final basis, as is suggested by **AS [28]**.

34. **Balance of convenience**: Where, on the proper construction of a statutory duty, that duty would be restrained by the grant of an interlocutory injunction, the interruption of the legislative scheme that would result is a significant factor to weigh in the balance of convenience. This was the approach taken by Mortimer J in *CPK20*.[63] Significantly for present purposes, those factors included that the applicant could continue to prosecute the proceeding from the United Kingdom.[64] Her Honour also noted that the applicant was not being removed to a country where there is a real risk to his life, liberty or personal safety or where there is a real risk he may not have access to adequate means of subsistence, or adequate access to health care: "These are all matters which otherwise might also be of some considerable weight in determining where the balance of convenience lies".[65] As we have noted above, Her Honour ultimately concluded that "the preservation of the subject matter of the proceeding does not require interlocutory relief to be granted": [80]. As Colvin and Jackson JJ recognised, it may take "exceptional" circumstances to justify a grant of relief where the effect is to restrain the enforcement of a valid law: **J [127]–[128]**. However, findings that an applicant *was* being removed to a place where their life or health would be

[60] *Beecham* (1968) 118 CLR 618 at 622.
[61] *Beecham* (1968) 118 CLR 618 at 623.
[62] *Simsek v MacPhee* (1982) 148 CLR 636 at 643 and 645.
[63] [2020] FCA 825 at [80].
[64] [2020] FCA 825 at [71].
[65] [2020] FCA 825 at [78].

at risk and would be unlikely to be able to maintain an application if removed would constitute such circumstances. Unlike *CPK20*, those findings were part of the reasons of Feutrill J in the present matter: see **[54], [57]–[67]** (**CAB 30–33**).

Other authorities relied upon by the Commonwealth parties

35. None of the cases referred to at **AS [16]** is inconsistent with the foregoing propositions. None of them is concerned with the granting of interlocutory relief to ensure the effective exercise of a court's jurisdiction that would postpone the performance of a statutory duty by an officer of the executive branch, or cause such an officer to be in breach of the law. The only case that went so high as to suggest that the Court would not have *power* to make an order with such an effect, as opposed to the Court having a practice of avoiding the making of an order that imposes an obligation on a person to do something which is unlawful,[66] is *Reid v Howard* (1995) 184 CLR 1 where the remark quoted at **AS [16](c)** and repeated at **(d)** was made in the distinguishable context of an appeal against a final order made by the NSW Court of Appeal for the production of privileged information and an order limiting how that information could be used.

36. Of more relevance is the decision of Mansfield J in *Mastipour*, in which his Honour expressly considered the very principles that this Court is asked to reconcile.[67] In that case, after conducting a thorough survey of the relevant authorities,[68] his Honour held that the jurisdiction of the Federal Court to ensure that its processes are not frustrated authorised the making of an order, notwithstanding s 198(6) of the Act, that a non-citizen remain in Australia until he had been given the opportunity to provide evidence in his civil proceedings[69] (which involved a claim for damages for breach of duties of care said to be owed arising out of his detention and other matters).[70] As we have noted above (and as Colvin and Jackson JJ recognised at **J [125]**), this conclusion was, at least in part, based on his

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66 See, eg, *Pride of Derbyshire and Derbyshire Angling Association Ld v British Celanese Ld* [1952] Ch 149 at 181 (Lord Evershed MR), 192 (Denning LJ)

67 *Mastipour* (2004) 140 FCR 137 at [15].

68 *Mastipour* (2004) 140 FCR 137 at [17]–[28].

69 *Mastipour* (2004) 140 FCR 137 at [32]–[35].

70 *Mastipour* (2004) 140 FCR 137 at [4].

Honour's view of the proper construction of s 198(6). But the broader point of principle made by his Honour at [32] concerning the powers of the Court is correct.

The implied power is an essential characteristic of a Court

37. At **J [126]**, the Full Court made a further important point — doubting that the Parliament could, by legislation, "deprive the Court of its inherent jurisdiction to ensure that its processes are not frustrated by granting interlocutory relief to preserve the subject matter in dispute and to enable it to perform its function as a court". The Full Court there seemingly had in mind a deeper constitutional basis for the power it found to be engaged (reflecting earlier remarks made by Lindgren J in *Williams v Minister for the Environment and Heritage*,[71] in a passage to which the Full Court referred).

38. That understanding of the power is correct. It flows from the proposition that the judicial power of the Commonwealth may only be exercised by a body that is a "court" created or invested with jurisdiction pursuant to Ch III of the Constitution.[72] The exclusive vesting of the judicial power of the Commonwealth in such "courts" has the result that grants of legislative power contained in s 51 of the Constitution do not "extend to the making of a law which requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power".[73] Nor does the legislative power of State Parliaments extend to the making of a law which purports to confer upon a State or Territory "court" a "power or function which substantially impairs the court's institutional integrity".[74]

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[71] *Williams* (2003) 199 ALR 352 at [17]: "the power derives from the nature of a "court" and the unique role of courts in our society as the repositories of judicial power".

[72] *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 355 (Griffiths CJ); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); see also, eg, *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at [80] (Gageler and Gordon JJ); ***SDCV** v Director-General of Security* (2022) 96 ALJR 1002 at [171] (Gordon J).

[73] *Chu Kheng Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ); see also *SDCV* (2022) 96 ALJR 1002 at [50] (Kiefel CJ, Keane and Gleeson JJ), [172], [175] (Gordon J).

[74] *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), summarising the effect of *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. See also ***Forge** v Australian Securities and Investments Commission* (2006) 228 CLR 45 at), [41] (Gleeson CJ), [63] (Gummow, Hayne and Crennan JJ) and [192] (Kirby J).

39. Those limitations on legislative power "share a common foundation in constitutional principle".[75] Both limitations are founded on "Ch III's requirement that the judicial power of the Commonwealth be invested only in institutions sufficiently distinct from other arms of government to answer the description of 'courts'".[76] Thus, in order for a body — whether Commonwealth, State or Territory — to answer the constitutional expression "court", it must possess certain essential characteristics.[77] And if a body is a "court", no Parliament — Commonwealth, State or Territory — can legislate so as to deprive it of an essential characteristic.[78]

40. The essential characteristics of courts are "not attributes plucked from a platonic universe of ideal forms".[79] They are used to describe limits, which limits are "rooted in the text and structure of the Constitution informed by the common law, which carries with it historically developed concepts of courts and the judicial function".[80] And those concepts are "deeply rooted in a tradition within which judicial protection of individual liberty against legislative or executive incursion has been a core value".[81] History may therefore be highly relevant to an analysis of whether a law has the effect of depriving a court of an essential characteristic.[82]

41. Drawing, in part, upon such historical considerations, this Court has said:

> [h]aving regard both to the antiquity of the power and its institutional importance, there is much to be said for the view that in Australia the inherent power to control abuse of process should be seen, along with the contempt power, as an attribute of the judicial power provided for in Ch III of the Constitution. [83]

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75 Compare *Wainohu v New South Wales* (2011) 243 CLR 181 at [105] (Gummow, Hayne, Crennan and Bell JJ).

76 ***Vella*** *v Commissioner of Police (NSW)* (2019) 269 CLR 219 at [140] (Gageler J).

77 See ***Burns*** *v Corbett* (2018) 265 CLR 304 at [70], [96] (Gageler J). See also *Harris v Caladine* (1991) 172 CLR 84 at 92 (Mason CJ and Deane J).

78 See ***K-Generation*** *Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), quoted in *Burns* (2018) 265 CLR 304 at [54] (Kiefel CJ, Bell and Keane JJ).

79 *Condon v* ***Pompano*** (2013) 252 CLR 38 at [68] (French CJ).

80 *Pompano* (2013) 252 CLR 38 at [68], see also at [2]–[3] (French CJ); *South Australia v Totani* (2010) 242 CLR 1 at [47], [50]–[51] (French CJ). As to the history of "courts", see Owens, "The Judicature" in Saunders and Stone (eds), *The Oxford Handbook of the Australian Constitution* (2018) Oxford University Press, p 646–651.

81 *Vella* (2019) 269 CLR 219 at [141] (Gageler J), quoted in *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at [139] (Gordon J).

82 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531. Though see *Palmer v Ayres* (2017) 259 CLR 478 at [37] (Kiefel CJ, Keane, Nettle and Gordon JJ); cf at [42], [61], [75]–[93] (Gageler J).

83 *Dupas v the Queen* (2010) 241 CLR 237 at [15] (the Court), a passage that was later extracted in *Hogan v Hinch* (2011) 243 CLR 506 at [86] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). See also *Batistatos v*

42. The "institutional importance" of such powers lies in the recognition that they can be characterised as a 'power of self-protection or a power incidental to the function of superintending the administration of justice'.[84] Such powers of "self-protection" are at the heart of the systemic arrangements ensuring a court's impartiality and independence. They are essential to ensure that the courts are not "required to act at the dictation of the Executive".[85] They exist to "enable courts to protect themselves and thereby safeguard the administration of justice".[86]

43. As this Court has also recognised, "the counterpart of the power of a court to *prevent* the abuse of its processes was the power of the court to *protect* the integrity of those processes once set in motion".[87] Similarly, the power to restrain a contempt that has "a real and definite tendency to prejudice or embarrass pending proceedings"[88] is the complement of the power to protect the integrity of the court's processes, in that exercise of the latter is a preventive step to avoid the need for the former. All are powers that deal with conduct involving "as a matter of practical reality, a tendency to interfere with the due course of justice in a particular case".[89]

44. The Full Court was correct to apprehend that a statute that was properly construed so as to deprive a Court of such powers would imperil its capacity to perform its function as a Court. That same point underlay what was said by the Full Court in *SZSPI v Minister for Immigration and Border Protection*,[90] referring to the possible "deep questions of a constitutional character" that may arise from the "intersection" between the exercise of the

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Roads and Traffic Authority of New South Wales (2006) 226 CLR 256 at [13] (Gleeson CJ, Gummow, Hayne and Crennan JJ); *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [38] (French CJ and Crennan J); *Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325 at [257] (Edelman J).

84 See, regarding the power to deal with contempt, *Re Colina; Ex parte Tomey* (1999) 200 CLR 386 at [16] (Gleeson CJ and Gummow J).

85 *Pompano Pty Ltd* (2013) 252 CLR 38 at [125] (Hayne, Crennan, Kiefel and Bell JJ).

86 *Dupas v The Queen* (2010) 241 CLR 237 at [14] (the Court). See also *Moti v The Queen* (2011) 245 CLR 456 at [11] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

87 *CSR Ltd v Cigna Insurance Australia Ltd* at (1997) 189 CLR 345 at 391 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) (emphasis in original), referred to in *Cardile* (1999) 198 CLR 380 at [25] (Gaudron, McHugh, Gummow and Callinan JJ).

88 ***Lee*** *v NSW Crime Commission* (2013) 251 CLR 196 at [320] (Gageler and Keane JJ), quoting from *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 370, 372, see also [319].

89 *Lee* (2013) 251 CLR 196 at [320] (Gageler and Keane JJ), quoting from *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 370, 372.

90 (2014) 233 FCR 279 at [40] (Allsop CJ, Mansfield and Besanko JJ).

judicial power of the Commonwealth, on the one hand, and the exercise of executive power through the performance of the duty imposed by s 198(6) of the Act on officers of the Commonwealth to remove the Respondent from Australia as soon as reasonably practicable, on the other.

45. The Commonwealth parties are coy as to those issues, asserting that they do not arise: **AS [22]**. The Respondent agrees, albeit for the two different, alternative reasons identified above, being that:

45.1. the words "as soon as reasonably practicable" qualify the duty imposed by s 198(6) and in fact accommodate a deferral of the performance of the duty during the confined period in which an order of the kind made below operates (see [11]– [16]); or

45.2. in any event, on established principles, the Court has the power to restrain the performance of a statutory duty in the circumstances of this case (see [17]–[34]).

46. But to the extent that it is open to construe s 198(6) as preventing the Court from exercising its power to grant an interlocutory injunction to prevent the frustration of its processes in the circumstances that arose below (as the Commonwealth parties appear to contend), the Court would not adopt that construction for a further reason: that is, if there is a constructional choice to be made "between reading a statutory provision in a way that will invalidate it and reading it in a way that will not, a court must always choose the latter course when it is reasonably open".[91] The question of validity requires further explanation.

47. The Respondent accepts that, like procedural fairness, the inherent jurisdiction of the Court to protect the integrity of the court's processes does not have an immutably fixed content.[92] Some legislative modification or regulation is therefore permissible. However, where the institutional integrity of the Court is substantially impaired by such legislative innovation,[93] or where the legislated departure exceeds what is reasonably necessary to protect a

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[91] *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[92] See eg *Pompano* (2013) 252 CLR 38 at [116]–[120] (Hayne, Crennan, Kiefel and Bell JJ) and *SDCV* (2022) 96 ALJR 1002 at [137], [138] (Gageler J), [231], [237] (Edelman J).

[93] *SDCV* (2022) 96 ALJR 1002 at [237] (Edelman J).

compelling public interest,[94] the line will be crossed. Notwithstanding what is said at **AS [22]**, **[23]** the construction of s 198(6) advanced by the Commonwealth parties is of that nature. True it is that that provision does not expressly deal with the circumstances in which the court can grant relief. But the gravamen of the entire case of the Commonwealth parties is that the existence of that duty means that the Federal Court *cannot* exercise its (established) jurisdiction to protect the integrity of its processes in a case such as the present, *unless* there is a challenge to the existence of the duty of removal: eg **AS [27]**.

48. If correct, that would involve an impairment of the Court's important powers of self-protection, which are essential to ensuring the Court's independence. Such an impairment is "substantial". No compelling public interest is served by any such impairment, let alone a compelling interest that would prevail over a court order restricted to what is "reasonably necessary". The public interest that weighs against the enforcement of a valid law is already accommodated in the consideration of the balance of convenience in exactly the manner identified by the Full Court: **J [127]**.For those reasons, the construction of s198(6) advanced by the Respondent should be preferred. Alternatively, that provision is to be read down or disapplied by force of s 3A(1) of the Act.

49. The appeal should be dismissed. The appellants accept that they ought to pay the Respondent's costs of, and incidental to, the appeal (**AS [33]**), that having been a condition of the grant of special leave (**CAB 94**).

PART VII ESTIMATED TIME

50. The Respondent estimates that up to 2 hours will be required for his oral argument.

Dated: 11 July 2024

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[94] *SDCV* (2022) 96 ALJR 1002 at [138] (Gageler J).

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN: **MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS**
First Appellant

SECRETARY, DEPARTMENT OF HOME AFFAIRS
Second Appellant

THE RELEVANT OFFICERS ACTING UNDER SECTION 198 OF THE *MIGRATION ACT* 1958
Third Appellant

AND:

MZAPC
Respondent

ANNEXURE TO THE SUBMISSIONS OF THE RESPONDENT

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the Respondent sets out below a list of the constitutional provisions and statutes referred to in his submissions.

No	Description	Version	Provision(s)
1.	*Constitution*	Current	Ch III
2.	*Federal Court of Australia Act 1976* (Cth)	Current	ss 5(2), 23
3.	*Migration Act 1958* (Cth)	Current	ss 3A, 48A, 153, 195A, 198, 481