

RETHINKING ASYLUM SEEKER DETENTION AT SEA: THE POWER TO DETAIN ASYLUM SEEKERS AT SEA UNDER THE *MARITIME POWERS ACT 2013* (CTH)

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I INTRODUCTION

Australian government policy locates asylum seekers¹ within a political and legal framework of border security. Successive Australian governments have adopted strict border control measures, aimed at deterrence, deflection and detention, to prevent unregulated boat arrivals.² This is exemplified by the Coalition's political promise to 'stop the boats',³ subsequently formalised in its Operation Sovereign Borders policy. This policy classifies the asylum seeker issue as a 'national emergency'⁴ and establishes a military-led framework to

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1 An 'asylum seeker' is a person seeking asylum from persecution who has yet to be recognised as a refugee as defined in art 1A(2) of the *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ('*Refugee Convention*'). Under the *Refugee Convention*, 'refugee' is a status that arises independently of any recognition of that status. Hence some, even all, asylum seekers may also be refugees, and recognition of that status serves a declaratory rather than a constitutive purpose.

2 The use of maritime interdiction as a deterrent strategy commenced in 2001 as part of 'Operation Relax'. As the 2002 report in relation to the *MV Tampa* noted:

As an operation aimed at preventing unauthorised vessels from crossing into Australia's so-called 'contiguous zone', Relax was fundamentally a forward deterrence strategy. This marked a shift in border protection strategy and the nature of previous operations, away from the more reactive posture associated with Operation Cranberry that sought to detect and intercept unauthorised boats *inside* Australian waters and escort them to Australian ports.

Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, *A Certain Maritime Incident* (2002) 14 [2.7] (emphasis in original).

3 See, eg, Tony Abbott, 'Address to the 2013 Federal Coalition Campaign Launch' (Speech delivered at the Federal Coalition Campaign Launch, Brisbane, 25 August 2013) <<http://www.liberal.org.au/latest-news/2013/08/25/tony-abbott-address-2013-federal-coalition-campaign-launch>>.

4 Liberal Party of Australia and National Party of Australia, *The Coalition's Operation Sovereign Borders Policy* (Policy Statement, July 2013) 2 <<http://www.nationals.org.au/Portals/0/2013/policy/The%20Coalition%E2%80%99s%20Operation%20Sovereign%20Borders%20Policy.pdf>>.

deal with boat arrivals.⁵ Under this policy, Australian defence forces will be authorised to turn back asylum seeker boats ‘where it is safe to do so’.⁶

Until recently, Australian policy has involved intercepting boats carrying asylum seekers at sea before they reach Australia, and towing them or otherwise compelling their return to Indonesia.⁷ However, in late June 2014, Australian authorities intercepted a boat from India carrying 157 Sri Lankan Tamil asylum seekers, and detained them on an Australian customs vessel for 29 days.⁸ The detention was carried out while the Australian government was negotiating with India to receive the asylum seekers.⁹ There was no agreement or informal understanding in place between Australia and India *prior* to the interception and detention,¹⁰ and the asylum seekers were eventually brought to Australia.¹¹

The legality of this detention was the subject of a High Court challenge in *CPCF v Minister for Immigration and Border Protection*.¹² In this litigation, the Commonwealth argued that the detention was authorised by the *Maritime Powers Act 2013* (Cth) (‘MPA’) and/or the executive power under section 61 of the *Constitution*. In its decision, handed down on 28 January 2015, the High Court held (by a 4:3 majority) that Australia’s detention of the 157 Tamil asylum

5 Ibid; see also Australian Customs and Border Protection Service, *Operation Sovereign Borders Organisational Chart* (Organisational Chart, June 2014) <<http://www.customs.gov.au/webdata/resources/files/OSBOrgChartJune2014.pdf>>.

6 Liberal Party of Australia and National Party of Australia, above n 4, 5.

7 Such as by placing the asylum seekers in lifeboats and directing those vessels back to Indonesia: see, eg, ‘Asylum Seekers Towed Back in Lifeboat: New Video Emerges as Defence Minister Criticises ABC’, *ABC News* (online), 18 March 2014 <<http://www.abc.net.au/news/2014-02-07/video-emerges-of-lifeboat-towback-operation/5245280>>; Michael Bachelard, “‘We Were All Sick’: Returned Asylum Seekers Tell of Lifeboat Ordeal to Java”, *The Sydney Morning Herald* (online), 2 March 2014 <<http://www.smh.com.au/federal-politics/political-news/we-were-all-sick-returned-asylum-seekers-tell-of-lifeboat-ordeal-to-java-20140301-33sol.html>>.

8 The defendant’s chronology filed by the Commonwealth Government as part of the High Court litigation indicates that a person on the asylum seeker vessel called the Australian Maritime Safety Authority and requested assistance on 26 or 27 June 2014. See Minister for Immigration and Border Protection, ‘Defendants’ Chronology’, Submission in *CPCF v Minister for Immigration and Border Protection*, S169/2014, 30 September 2014, 1–2. See also Minister for Immigration and Border Protection, ‘Submissions of the Defendants’, Submission in *CPCF v Minister for Immigration and Border Protection*, S169/2014, 30 September 2014, 1 [6]; *CPCF v Minister for Immigration and Border Protection* (2015) 89 ALJR 207, 243 [166]–[167] (Crennan J) (‘CPCF’).

9 The vessel had departed from the southern Indian city of Pondicherry: Minister for Immigration and Border Protection, ‘Defendants’ Chronology’, above n 8, 1; *CPCF* (2015) 89 ALJR 207, 243 [166] (Crennan J).

10 See below Part IV(B)(1).

11 The asylum seekers were brought by sea to the Cocos (Keeling) Islands, and then by air to the Australian mainland: *CPCF* (2015) 89 ALJR 207, 243 [167] (Crennan J); ‘First Plane Load of Asylum Seekers Arrives in Curtin, WA after Transfer from Cocos Islands’, *ABC News* (online), 28 July 2014 <<http://www.abc.net.au/news/2014-07-27/157-asylum-seekers-at-cocos-islands/5627440>>.

12 (2015) 89 ALJR 207.

seekers was authorised by section 72(4) of the *MPA*.¹³ This detention was lawful even though, prior to the commencement of the taking of the plaintiff to India, no arrangement existed between Australia and India concerning the reception of the plaintiff in India.¹⁴

After this challenge was initiated, but before the decision was handed down, Parliament passed the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) ('*Caseload Act*'), which made significant amendments to the *MPA*. This article will examine the High Court judgment in *CPCF* and the operation and effect of the *MPA* (both pre-amendment and post-amendment). The implementation of Operation Sovereign Borders raises questions about the conditions, the duration and the legality of the detention of asylum seekers who are interdicted at sea. There has been a significant volume of academic commentary on the interdiction of asylum seeker vessels,¹⁵ and on the detention of asylum seekers within Australia.¹⁶ This article adds to this literature by discussing a novel and (to date) under-analysed question about detention of asylum seekers outside national boundaries under the *MPA*, and thereby contributes to the clarification of the legal principles and constraints that govern detention at sea.

We commence this analysis by examining, in Part II, the statutory source of the Australian government's power to detain asylum seekers at sea. We then turn, in Part III, to consider the *MPA* from an international and comparative point of view. Finally, Part IV outlines our doubts about the constitutional validity of the *MPA* following its recent amendments, and then briefly discusses the extent of the executive power under section 61 of the *Constitution*.

II STATUTORY AUTHORITY FOR DETENTION AT SEA – THE *MPA*

The *Migration Act 1958* (Cth) ('*Migration Act*'), as it currently stands, permits the detention of asylum seekers who arrive without authorisation on

13 Ibid. The majority comprised of French CJ, Crennan, Gageler and Keane JJ, in separate judgments. The dissenting Justices were Hayne and Bell JJ, who delivered a joint judgment, and Kiefel J.

14 *CPCF* (2015) 89 ALJR 207, 223–5 [45]–[50] (French CJ); 247–8 [202]–[211] (Crennan J); 272–3 [379]–[382] (Gageler J); 278–9 [424]–[429] (Keane J).

15 See, eg, Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press, 2013) 44–99; Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23 *International Journal of Refugee Law* 174.

16 See, eg, Matthew Zagor, 'Uncertainty and Exclusion: Detention of Aliens and the High Court' (2006) 34 *Federal Law Review* 127; Alice Rolls, 'Avoiding Tragedy: Would the Decision of the High Court in *Al-Kateb* Have Been Any Different if Australia Had a Bill of Rights like Victoria?' (2007) 18 *Public Law Review* 119; Clare McKay, '*Plaintiff M47/2012 v Director-General of Security*: Where to Now for *Al-Kateb*?' (2013) 24 *Public Law Review* 3.

Australian land or in Australian ports on the basis that those who enter the Australian migration zone (which is roughly coextensive with Australia's land territory and ports) without a valid visa are 'unlawful non-citizens', and hence are to be detained pending either the grant of a visa or removal from Australia.¹⁷ The detention of asylum seekers at sea raises different legal issues, however, as such asylum seekers are not (or, at least, not yet) 'unlawful non-citizens'. An asylum seeker who arrives without a visa *becomes* an unlawful non-citizen upon entry into the migration zone. As the High Court has observed, '[o]n arrival at Christmas Island, the plaintiff *became* [under section 14] an "unlawful non-citizen" and what the Act then referred [section 5(1)] to as an "offshore entry person"'.¹⁸

To lawfully detain asylum seekers at sea, then, some different source of power must be adduced. The High Court, in *CPCF*, held that section 72(4) of the *MPA* sufficed for this purpose.¹⁹ We will first set out the background to the enactment of this legislation in 2013, and will then examine the nature of the powers that it confers. In doing this we will discuss both the *MPA* as originally enacted and the amendments made to it in December 2014 by the *Caseload Act*, and will draw upon the High Court's discussion of the *MPA*.

A The Background to the *MPA*

The *MPA* is a relatively new piece of legislation. It was introduced into Parliament and passed with very little public comment in 2012,²⁰ coming into effect in March 2014.²¹ The *MPA* may not have received a great deal of public attention as it was described as merely a consolidation of powers already given to the Minister for Immigration. For instance, the Replacement Explanatory Memorandum states that it 'consolidates and harmonizes the Commonwealth's existing maritime enforcement regime' and that '[t]he powers contained in the Bill are primarily based on powers currently available to operational agencies'.²²

17 *Migration Act* ss 5(1) (defining the 'migration zone' as, with certain exceptions concerning offshore installations, being constituted by Australian land, piers and ports), 13–14 (defining an unlawful non-citizen, subject to an exception concerning certain Papua New Guineans in the Torres Strait, as a non-citizen within the migration zone who does not hold a visa that is in effect), 189, 196, 198, 198AD (regulating the detention and removal of unlawful non-citizens).

18 *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 88 ALJR 847, 851 [14] (The Court) ('*Plaintiff S4*') (emphasis added) (citations omitted).

19 *CPCF* (2015) 89 ALJR 207. As is discussed further below (n 84), the *Caseload Act* has amended the *MPA* so that the relevant power is now located in ss 72(4)–(4A).

20 Maritime Powers Bill 2012 (Cth).

21 The *MPA* was assented to on 27 March 2013 and its operative provisions (ss 3–122) commenced on 27 March 2014. This was to allow affected agencies to amend their operational procedures in line with the new legislation.

22 Replacement Explanatory Memorandum, Maritime Powers Bill 2012 (Cth) 1.

In relation to asylum seekers, those predecessor powers were set out in part 2 division 12A of the *Migration Act*.²³

Division 12A of the *Migration Act* was introduced by the *Border Protection Legislation Amendment Act 1999* (Cth). As originally enacted, the division permitted the commander of a Commonwealth ship to request to board certain foreign vessels, and then the detention of such vessels as well as those on board them.²⁴ For present purposes, the relevant categories of foreign vessels were: (i) those in Australian territorial waters in respect of which the crew of the Commonwealth vessel ‘reasonably suspects that the ship ... is or has been involved in a contravention, either in or outside Australia, of [the *Migration Act*]’;²⁵ and (ii) those in the contiguous zone,²⁶ in respect of which the crew of the Commonwealth vessel ‘reasonably suspects that the [foreign] ship is, will be or has been involved in a contravention, or an attempted contravention, in Australia of [the *Migration Act*]’.²⁷ Once detained, a ship could be brought to an Australian

23 The div 12A powers in respect of ships were repealed by the *Maritime Powers (Consequential Amendments) Act 2013* (Cth).

24 *Migration Act* ss 245B–245C, 245F, as inserted by *Border Protection Legislation Amendment Act 1999* (Cth) sch 1 item 2. These provisions also permitted boarding and detaining a vessel, and detaining those upon it, if the vessel had been chased and immediately before the chase commenced a request to board could have been made: *Migration Act* ss 245C(3), 245F(1)(b), as inserted by *Border Protection Legislation Amendment Act 1999* (Cth) sch 1 item 2. Provisions permitting the boarding of Australian vessels are not relevant to the current discussion, as such vessels do not carry significant numbers of asylum seekers.

25 *Migration Act* ss 245B(2), 245F(8)(c), as inserted by *Border Protection Legislation Amendment Act 1999* (Cth) sch 1 item 2.

26 The *United Nations Convention on the Law of the Sea* confers a limited right upon coastal states to ‘exercise control’ within the contiguous zone:

In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:

- (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
- (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art 33(1) (‘UNCLOS’). See below Part III(A)(1).

27 *Migration Act* ss 245B(4), 245F(8)(c), as inserted by *Border Protection Legislation Amendment Act 1999* (Cth) sch 1 item 2. The latter provision omits the disjunctive reference to ‘an attempted contravention’. In this case, the initial power to board requires that the commander of the Commonwealth vessel have the reasonable suspicion, whereas the subsequent exercise of the powers of detention require that the officer exercising them have the reasonable suspicion.

port or to another place considered appropriate by the officer,²⁸ and a person found on the ship could be detained and brought to the migration zone.²⁹

Subsequent amendments to the *Migration Act* clarified that the power to bring a ship to a port or another place could be exercised ‘even if it is necessary for the ship to travel on the high seas to reach the place’³⁰ and conferred an additional power to take a person found on a detained ship ‘to a place outside Australia’.³¹ This latter amendment also provided that, in exercising this additional power, it was permissible to remove a person from a ship, to place a person on a ship and to restrain a person on a ship.³² In 2003, the purported use of these powers was litigated in the Northern Territory Supreme Court.³³ Australian naval personnel had boarded and detained an Indonesian ship carrying asylum seekers after its arrival at Melville Island, around 30 kilometres off the coast of the Northern Territory; the boat was then towed back to Indonesia.³⁴ A detention notice pursuant to section 245F of the *Migration Act* was served on the master of the Indonesian vessel,³⁵ but the Court found that there was no evidence of the making of a request to board the ship so as to enliven the power to detain.³⁶ The Court nevertheless declined to issue a writ of habeas corpus ordering the release from detention of the asylum seekers, on the grounds that they had no lawful right to enter Australia.³⁷ The relationship between detention of asylum seekers at

28 *Migration Act* s 245F(8), as inserted by *Border Protection Legislation Amendment Act 1999* (Cth) sch 1 item 2. Alternatively, a ship that was hazardous or otherwise unseaworthy could be destroyed upon the order of the Secretary of the Department: *Migration Act* s 245H, as inserted by *Border Protection Legislation Amendment Act 1999* (Cth) sch 1 item 2.

29 *Migration Act* s 245F(9), as inserted by *Border Protection Legislation Amendment Act 1999* (Cth) sch 1 item 2.

30 *Migration Act* s 245F(8AA), as inserted by *Customs Legislation Amendment (Application of International Trade Modernisation and Other Measures) Act 2004* (Cth) sch 2 item 36.

31 *Migration Act* s 245F(9), as repealed and re-inserted by *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) sch 2 item 8.

32 *Migration Act* s 245F(9A), as inserted by *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) sch 2 item 8.

33 *Cox v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 13 NTLR 219 (‘Cox’). A recent attempt to argue these provisions in the context of a criminal appeal was rejected by on procedural grounds, without consideration of the merits: *Bin Sulaeman v The Queen* [2013] NSWCCA 283, [38], [118]–[119], [131]–[132], [143] (R A Hulme J, Beazley P and Bellew J agreeing).

34 *Cox* (2003) 13 NTLR 219. Justice Mildren set out the facts of the case: at 224–6 [12]–[21], and set out the circumstances of those on board the vessel as circumstances of detention: at 229 [36]. See also Amanda Lye, ‘The Crimes at Sea Act – Its Impact on ADF Operations’ (2005) 28 *University of New South Wales Law Journal* 538, 542–3; Colin Craig and Andreas Schloenhardt, ‘“Turning Back the Boats”: Australia’s Interdiction of Irregular Migrants at Sea’ (Research Paper, Migrant Smuggling Working Group, University of Queensland, October 2014) 12–14

<http://www.law.uq.edu.au/documents/humantrafficking/migrant-smuggling/policies/Craig-Schloenhardt_Turning-back-the-Boats-2014.pdf>.

35 *Cox* (2003) 13 NTLR 219, 225 [19] (Mildren J).

36 *Ibid* 230 [41] (Mildren J).

37 *Ibid* 230–1 [44]–[46] (Mildren J), applying *Ruddock v Vardalis* (2001) 110 FCR 491 (‘Tampa’). The Court also gave other reasons, but these are not relevant to the present discussion.

sea and the absence of a lawful right to enter Australia will be discussed in Part II(B)(2) below.

B The Authorisation of Detention under the *MPA*

The *MPA* establishes a more complex regime than its predecessor provisions discussed above. The exercise of powers under the *MPA* unfolds in two stages: first, the issuing of an authorisation to exercise powers by an official in charge of the maritime operation;³⁸ and secondly, the exercise of powers pursuant to such an authorisation.³⁹

1 Issuing Authorisations under the *MPA*

The *MPA* defines ‘authorising officer’ as including each of:

- (a) the most senior maritime officer who is in a position to exercise any of the maritime powers in person;
- (b) the most senior member or special member of the Australian Federal Police who is in [such a position];
- (c) the most senior maritime officer on duty in a duly established operations room;
- (d) the person in command of a Commonwealth ship or Commonwealth aircraft from which the exercise of powers is to be directed or coordinated;
- (e) a person appointed in writing by the Minister.⁴⁰

Authorisations issued by a person who was not an authorising officer, but who reasonably believed him or herself to be so, are also effective.⁴¹ The contrast with the predecessor provisions, which vested initial responsibility for electing to board a foreign vessel in the commander of a Commonwealth ship, is evident. This definition of ‘authorising officer’ constitutes a legislative recognition of the increased intensity and administrative sophistication of the Australian government’s efforts to prevent asylum seeker boats from reaching Australia. Indeed, the evidence that emerged in the course of the *CPCF* litigation established that the National Security Committee of Cabinet had been directly involved in decision-making over the fate of the 157 asylum seekers whose boat was interdicted.⁴²

38 *MPA* s 16(1), and more generally pt 2 divs 2–3.

39 *MPA* pt 2 div 4 pt 3.

40 *MPA* s 16(1).

41 *MPA* s 16(3).

42 Transcript of Proceedings, *CPCF* [2014] HCATrans 156 (28 July 2014) 284–7. The High Court was unanimous in holding that the *MPA* contemplated that the officers exercising powers under it would do so as members of a chain of command subject to ultimate civilian control in the form of the political executive: *CPCF* (2015) 89 ALJR 207, 222–3 [35]–[39] (French CJ), 236–7 [128]–[132] (Hayne and Bell JJ), 250 [222]–[225] (Crennan J), 259–60 [289]–[293] (Kiefel J), 269 [361], 270 [364] (Gageler J), 278 [423], 283–4 [471]–[474] (Keane J).

The *MPA* establishes two bases on which the exercise of powers may be authorised in relation to asylum seekers: to investigate a ‘contravention’ (which includes an ‘intended’ contravention)⁴³ of the *Migration Act*,⁴⁴ or to ‘administer or ensure compliance’ with the *Migration Act* (which is the most salient instance of the statutorily defined category of ‘monitoring law’).⁴⁵ An authorisation conferred under either of these provisions, in respect of asylum seekers outside Australia’s territorial waters, is then subject to certain further limitations,⁴⁶ including, most relevantly, those set out in section 41 of the *MPA*. Before discussing these limitations, we wish to first clarify the legal basis for linking maritime powers of interception with the *Migration Act*, which raises the question of lawfulness of entry into Australia.

2 *How Do Asylum Seekers outside Australian Territory Contravene the Migration Act?*

The power to intercept and detain an asylum seeker vessel and its occupants is only enlivened by a contravention of Australian law or compliance action linked to the *Migration Act*. However, it is arguable that if an asylum seeker is in the contiguous zone or beyond it, such a person is only *attempting* to enter Australia and has not *in fact* entered. This raises questions about whether the presence of persons outside Australian territorial waters can provide the necessary link to a contravention of Australian law, including the *Migration Act*.⁴⁷

There are two key principles in Australian law applicable to lawfulness of entry into Australia. First, neither legislation nor jurisprudence has recognised a right of persons to lawfully enter Australia simply by virtue of the fact that they

43 *MPA* s 9.

44 ‘An authorising officer may authorise the exercise of maritime powers in relation to a vessel ... if the officer suspects, on reasonable grounds, that the vessel ... is involved in a contravention of an Australian law’: *MPA* s 17(1). Section 31 permits the exercise of such powers to investigate the contravention.

45 ‘An authorising officer may authorise the exercise of maritime powers in relation to a vessel ... for the purposes of administering or ensuring compliance with a monitoring law’: *MPA* s 18. The definition of ‘monitoring law’ includes the *Migration Act*: *MPA* s 8.

46 *MPA* pt 2 div 5.

47 This is an important factual point about the detention of the Sri Lankan asylum seekers in July 2014. Their vessel did not enter Australian territory prior to its interdiction. Compare this to the situation in 2001, litigated in *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452, and *Tampa* (2001) 110 FCR 491, in which the vessel *MV Tampa* did in fact enter Australian waters carrying asylum seekers without the permission of the Australian government.

are asylum seekers.⁴⁸ While there are international instruments which recognise the right to seek asylum,⁴⁹ Australian law has not recognised such a right. Indeed, persons seeking to enter Australia by boat to claim asylum are not permitted to make a valid application for a protection visa unless the Minister for Immigration decides it is in the public interest for the applicant to do so.⁵⁰

Secondly, as discussed above, the *Migration Act* establishes a clear demarcation between ‘lawful’ and ‘unlawful’ non-citizens, which is dependent on the holding of a visa. The object of the *Migration Act*, stated in section 4(1), is to ‘regulate, in the national interest, the coming into, and presence in, Australia of non-citizens’. Following on from this, section 4(2) gives primacy to the visa system as the only source of lawfulness of entry and stay in Australia: ‘To advance its object, this Act provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain’.

Section 42(1) of the *Migration Act* specifically provides that subject to certain exceptions not generally applicable to asylum seekers, ‘a non-citizen must not *travel to* Australia without a visa that is in effect’ (emphasis added).⁵¹ Although the act of entering Australia without permission is not a criminal offence (unlike the *Migration Act* provisions which applied before 1992),⁵² ‘contravention’ is defined in the *MPA* as *including* ‘an offence against the law’ but is not *limited* to an offence against the law. This suggests that a non-citizen on a vessel sailing in the contiguous zone towards Australia is in contravention of the *Migration Act* prior to any entry into Australian territorial waters, as section 42(1) refers to ‘travel to Australia’, not ‘entry into Australia’; and even if that

48 See, eg, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (*‘Chu Kheng Lim’*). Justices Brennan, Deane and Dawson stated: ‘The power to exclude ... even a friendly alien is recognized by international law as an incident of sovereignty over territory’: at 29.

Justice Gaudron stated: ‘Aliens, not being members of the community that constitutes the body politic of Australia, have no right to enter’: at 57. See also *Tampa* (2001) 110 FCR 491. In this case, Black CJ stated: ‘It cannot be doubted that a nation state has a sovereign power to exclude illegally entering aliens from its borders, and to legislate for this purpose’: at 495. Justice French stated: ‘the executive power of the Commonwealth, absent statutory extinguishment or abridgement, would extend to a power to prevent the entry of non-citizens and to do such things as are necessary to effect such exclusion’: at 543. Justice Beaumont stated: ‘It follows, in my view, that the occupants [of the *MV Tampa*] had no legal right at common law enforceable in a court to enter Australia’: at 521.

49 Although the *Refugee Convention* does not contain a specific right to seek asylum, such a right is set out in art 14 of the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) (*‘UDHR’*) which provides that ‘[e]veryone has the right to seek and to enjoy in other countries asylum from persecution’.

50 *Migration Act* ss 46A(1)–(2).

51 The exceptions primarily concern certain citizens of Papua New Guinea and New Zealand. There are also exceptions for those who are brought to Australia by Australian authorities, which will be discussed further below.

52 *Al-Kateb v Godwin* (2004) 219 CLR 562, 635 (Hayne J): ‘Under the legislation which operated between 1901 and the 1992 amendments, the act of entering or being found within Australia without permission was made a criminal offence’. See, eg, *Migration Act* s 27(1), as enacted.

construction is not preferred, if such a non-citizen is intending to enter Australia, an intended contravention is occurring. In *CPCF*, the High Court was near unanimous in identifying contravention of section 42(1) of the *Migration Act* as a sufficient basis for enlivening powers under the *MPA*, despite the fact that an asylum seeker had not yet entered Australian territory. Chief Justice French noted that the initial destination of the vessel was Christmas Island,⁵³ however it is not clear whether he regarded the contravention to consist simply in non-citizens travelling, without a visa, having Christmas Island as an intended destination. The other judges who discussed this issue made it clear that they regarded the contravention as an intended, rather than an actual, one.⁵⁴

It may also be argued that a contravention of the *Migration Act* arises out of the attempted entry into Australia of an asylum seeker vessel, in breach of the offences in part 2, division 12, subdivision A of the *Migration Act*.⁵⁵ For instance, section 229(1)(a) provides that, subject to the same exceptions as are provided for in section 42, each of the ‘master, owner, agent, charterer and operator of a vessel on which a non-citizen is brought into Australia’ is guilty of an offence ‘if the non-citizen, when entering Australia ... is not in possession of evidence of a visa that is in effect and that permits him or her to travel to and enter Australia’. Furthermore, section 228B(1)(a) reiterates that ‘a non-citizen has, at a particular time, no lawful right to come to Australia if, at that time ... the non-citizen does not hold a visa that is in effect’. This provision is then drawn upon to constitute one of the elements of the offence of ‘people smuggling’ established by section 233A(1):

- (1) A person (the first person) commits an offence if:
 - (a) the first person organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of another person (the second person); and
 - (b) the second person is a non-citizen; and
 - (c) the second person had, or has, no lawful right to come to Australia.

Section 228B(2) clarifies that this offence is committed even though the non-citizen in question is seeking asylum:

- (2) To avoid doubt, a reference ... to a non-citizen includes a reference to a non-citizen seeking protection or asylum (however described), whether or not Australia has, or may have, protection obligations in respect of the non-citizen:
 - (a) under the *Refugees Convention* as amended by the *Refugees Protocol*;
or

53 *CPCF* (2015) 89 ALJR 207, 223 [44] (French CJ).

54 *Ibid* 227 [65] (Hayne and Bell JJ), 244 [180] (Crennan J), 268 [354] (Gageler J), 277 [413] (Keane J).

55 *Migration Act* ss 229, 233A–233C. In *CPCF*, French CJ made reference to s 229; Hayne, Bell and Keane JJ made reference to ss 229, 233A and 233C; and Crennan J made reference to ss 229 and 233A–233B: *CPCF* (2015) 89 ALJR 207, 223 [44] (French CJ), 227 [65] (Hayne and Bell JJ), 244 [180] n 139 (Crennan J), 285 [485] (Keane J).

(b) for any other reason.

A range of aggravated offences are also established under this subdivision.⁵⁶

In a recent criminal appeal in relation to a predecessor version of one of the aggravated offences,⁵⁷ the appellant argued that he did not commit the offence if his intention was simply ‘to bring the passengers to somewhere off Australia that was not part of Australian land or territorial sea to be rescued by an Australian ship which would then take the passengers to Australia’.⁵⁸

The basis for this contention was that, in such circumstances, the arrival of the asylum seekers in Australia would be lawful, because the *Migration Act* exempts from the requirement to have a valid visa those unlawful non-citizens who are brought into the migration zone by Australian authorities following interdiction of their vessel.⁵⁹ The Queensland Court of Appeal rejected this argument on the grounds that the appellant nevertheless

would be facilitating the bringing of passengers to a destination that was Australia knowing that the ultimate destination was to be Australia. It would not matter that the final leg of that journey was to be undertaken lawfully ... in a vessel belonging to the Australian authorities.⁶⁰

In the context of the *MPA*, this implies that it is not open to the master and crew of a vessel outside Australian waters (but carrying asylum seekers towards Australia) to argue that they are not contravening the *Migration Act*, simply because they anticipate that their vessel will be interdicted prior to reaching Australia, and hence anticipate that any arrival of their asylum seeker passengers in Australia would be achieved by the lawful conduct of the Australian authorities.

Because these offences are directed at the organisers of unlawful entry rather than at would-be unlawful non-citizens themselves, it might seem that any exercise of maritime powers under the *MPA* linked to the division 12 people smuggling offences must be limited to the master and operator of the asylum seeker vessel, and not the asylum seeker occupants themselves. However, even if an authorisation to exercise powers under the *MPA* was issued on such a basis, once the authorisation is in force the powers may be exercised not only in relation to the initially authorised purposes,⁶¹ but also ‘to investigate or prevent any contravention of an Australian law that the [exercising] officer suspects, on

56 *Migration Act* ss 233B–233C.

57 *Migration Act* s 232A, which has subsequently been repealed and re-inserted in a technically modified form as s 233C by *Anti-People Smuggling and Other Measures Act 2010* (Cth) sch 1 item 8.

58 *R v Alif* (2012) 274 FLR 1, 14 [53] (McMurdo P).

59 *Migration Act* s 42(2A)(c), exempting from the visa requirement those unlawful non-citizens brought into the migration zone under s 245F(9). Item 5 of sch 4 of the *Maritime Powers (Consequential Amendments) Act 2013* (Cth) amended this exception to also include those unlawful non-citizens brought into the migration zone under s 72(4) of the *MPA*.

60 *R v Alif* (2012) 274 FLR 1, 14 [54] (McMurdo P), 19 [75] (Holmes JA agreeing), 19 [76] White JA agreeing).

61 *MPA* s 31.

reasonable grounds, the vessel ... to be involved in' and 'to administer or ensure compliance with [the *Migration Act*]'.⁶² Hence, assuming that it is correct to say that the asylum seekers upon such a vessel are also contravening the *Migration Act*, they would become liable to the exercise of powers once an exercising officer suspected upon reasonable grounds that they lacked a valid visa.

Let us now turn to the limitations to maritime powers outside Australian waters, which are established by section 41 of the *MPA*. We will then examine the content of the detention powers in the *MPA*.

3 Limitations – Section 41 of the *MPA*

Where maritime actions are to be carried out in the contiguous zone and beyond, the authorisation for maritime powers set out in sections 17 and 18 of the *MPA* must be read together with the limitations expressed in section 41. Section 41 sets out certain limitations on maritime powers dealing with 'foreign vessels between countries' (that is, vessels outside Australian territorial waters, either in or beyond the contiguous zone).

Section 41 clearly states that the *MPA* does *not* authorise the exercise of powers in relation to a foreign vessel at a place between Australia and another country *unless* the powers are exercised for the listed purposes. Paragraphs (c) and (d) are relevant to our discussion. These state that maritime powers can be exercised:

- (c) in the *contiguous zone* of Australia to:
 - (i) investigate a contravention of a customs, fiscal, immigration or sanitary law prescribed by the regulations that occurred in Australia; or
 - (ii) prevent a contravention of such a law occurring in Australia; or
- (d) to administer or ensure compliance with a monitoring law that applies to foreign vessels, or persons on foreign vessels, *in that place*.⁶³

In March 2014, the *Migration Act* was prescribed by regulation for the purposes of section 41(1)(c),⁶⁴ and it is this provision which is of particular relevance to detention of asylum seeker vessels as it is the provision most likely to be used as justification of maritime detention.⁶⁵

62 *MPA* ss 32(1)(a)–(b). Justices Hayne and Bell, in the minority in *CPCF*, held that the purpose of *investigating* a contravention of the law was not engaged in that case, but pointed to the authorisation of the exercise of powers in order to *prevent* a reasonably suspected contravention in s 13: *CPCF* (2015) 89 ALJR 207, 227 [63]–[64].

63 *MPA* s 41(1)(c)–(d) (emphasis added).

64 *Maritime Powers Regulation 2014* (Cth) reg 8.

65 The contravention of the *Migration Act* was cited by the Commonwealth as the legal basis for the detention of the 157 Sri Lankan asylum seekers which were the subject of High Court litigation in *CPCF*: see Minister for Immigration and Border Protection, 'Submissions of the Defendants', above n 8, 1 [6]. See also *CPCF* (2015) 89 ALJR 207, 227 [63]–[64] (Hayne and Bell JJ), 244 [181] (Crennan J), 254 [250] (Kiefel J), 268 [352], 270 [365] (Gageler J). Chief Justice French and Keane J made reference to both paragraphs (c) and (d) of s 41(1): at 227 [29] nn 47–8 (French CJ), 277 [415] (Keane J).

We note a number of things about these provisions. First, they reflect the international legal status of the seas beyond each state's territorial waters as a place where the pre-eminent principle of freedom of navigation applies.⁶⁶ Secondly, section 41(1)(c) is reflective of article 33 of the *United Nations Convention on the Law of the Sea*, which confers a limited power upon coastal states to conduct interdiction operations outside their territorial waters. Article 33 permits a coastal state to exercise such 'control' within the contiguous zone – that is, a zone extending no further than '24 nautical miles from the baselines from which the breadth of the territorial sea is measured'⁶⁷ – as is necessary to 'prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea'.⁶⁸

Thirdly, section 41(1)(d) also places a limitation on the administration and compliance authorisation set out in section 18 of the *MPA*. Section 18 is framed very generally in that it permits the exercise of maritime powers 'for the purposes of administering or ensuring compliance with a monitoring law'. Section 41(1)(d) limits this outside Australian territorial waters by stating that the monitoring law that applies must apply to 'foreign vessels, or persons on foreign vessels, *in that place*' (emphasis added). This means that in order to justify maritime interdiction and detention of asylum seekers under section 41(1)(d) outside Australian waters, the *Migration Act* or other relevant monitoring law must apply to that vessel in the contiguous zone or beyond. Because the *Migration Act* does not apply outside Australian territory, the maritime detention of an asylum seeker vessel cannot be sourced in section 41(1)(d).

However, while section 41 does set out these limitations, we note that it has now become possible for the Minister for Immigration to make a determination that section 41 does not apply to an exercise of maritime power. As noted above, significant amendments were made to the *MPA* by the enactment of the *Caseload Act* in December 2014. One common theme of these amendments, which changed many aspects of Australian refugee law, is that they have further expanded the role of executive discretion in border protection and refugee law matters. In particular, the personal powers of the Minister for Immigration have been significantly enhanced. The newly enacted sections 75D and 75F of the *MPA* are illustrative of this general trend. The first of these provides that the

66 *UNCLOS* arts 58(1), 87.

67 *Ibid* art 33(2).

68 *Ibid* art 33(1)(a). Outside the contiguous zone, art 87 of *UNCLOS* emphasises the freedom of the high seas, stating that '[t]he high seas are open to all States'; and art 90 sets out a right of navigation on the high seas. Article 92(1) also provides that ships on the high seas are subject to the exclusive jurisdiction of their flag state unless an exception applies.

Minister for Immigration may make a written determination that section 41 does not apply to an exercise of power under certain key provisions of the *MPA*.⁶⁹

The second provides that the Minister may issue written directions requiring, or relating to, the exercise of power under those same provisions,⁷⁰ and section 41 does not apply to the carrying out of such a direction.⁷¹ The condition for the making of a determination or the giving of a direction is very broad: 'that the Minister thinks that it is in the national interest to make or vary the determination' or 'to give or vary the direction'.⁷² In either case, however, the exemption from the operation of section 41 applies only to an exercise of power that is 'part of a continuous exercise of powers that commenced in accordance with any applicable requirements of Division 5 of Part 2',⁷³ which include section 41. Hence, these provisions permit the Minister to suspend the requirement that the exercise of power in the contiguous zone comply with international law as stated by *UNCLOS* once an interdiction has commenced in a manner that is compliant. The legal significance of this possibility will be returned to below.

C The Content of Detention Powers under the *MPA*

The *MPA* establishes two detention powers, corresponding roughly to those in its predecessor provisions in the *Migration Act*: the detention of a vessel,⁷⁴ and the detention of a person on a detained vessel.⁷⁵ However, there is no requirement that a request to board precedes the detention of a vessel. Rather, these powers must be exercised in the course of 'investigating the contravention' or 'administering or ensuring compliance with the monitoring law' that triggered the authorisation;⁷⁶ or 'to investigate or prevent' a reasonably suspected contravention;⁷⁷ or 'to administer or ensure compliance with any monitoring law'.⁷⁸

A detained vessel may be taken to any place, even if that requires travelling outside Australia. In the *MPA* as originally enacted, this was expressed as a power to take the vessel 'to a port, airport or other place that the officer considers appropriate ... even if it is necessary for the vessel ... to travel outside Australia

69 *MPA* ss 75D(1)(a)(i), (2). The relevant provisions that become exempted from the s 41 limitation are ss 69, 69A, 71, 72 and 72A, which (as will be discussed further below) confer powers to detain vessels and persons and to take them to other places.

70 *MPA* ss 75F(1)–(2).

71 *MPA* s 75D(1)(a)(ii).

72 *MPA* ss 75D(4), 75F(5).

73 *MPA* s 75D(1)(b).

74 *MPA* s 69(1).

75 *MPA* s 72(4).

76 *MPA* ss 31(a)–(b).

77 See above Part II(B)(2).

78 *MPA* ss 32(1)(a)–(b). There are further powers under these sections that may be exercised by an officer acting under an authorisation, but they have less immediate relevance to the case of asylum seekers.

to reach the port, airport or other place'⁷⁹ and to retain control until the vessel is 'released or disposed of'.⁸⁰ The *Caseload Act* has amended the *MPA* to state this power in more explicit terms, as a power to 'take the vessel ... to a place ... [which] may be: (a) in the migration zone; or (b) outside the migration zone (including outside Australia)'.⁸¹

When a vessel is detained, a person on the vessel may be placed and kept in a particular place on the vessel.⁸² If the vessel is being taken somewhere, a person may be required to remain on the vessel until control is relinquished.⁸³ Finally, a person may be detained and taken to any place, whether inside or outside the migration zone or even outside Australia,⁸⁴ and for that purpose may be removed from a vessel or aircraft, placed upon one and/or restrained upon one.⁸⁵ When the *MPA* was originally enacted, section 97 provided that detention ends when a person has been taken to the place to which they were being taken. This provision was repealed by the *Caseload Act*.⁸⁶

D The Power To Take to 'a Place'

At the centre of the litigation in *CPCF* was the proper construction of section 72(4) of the *MPA*, which confers the power to detain a person and take them to a place, and in particular the proper construction of the phrase 'a place'. The two main questions were: whether or not 'a place' encompasses the possibility of refoulement of an asylum seeker; and whether or not 'a place' must be one where the person who is taken may be disembarked, either as of right (because a national of the country to where the person has been taken) or in virtue of a prior agreement or arrangement between Australia and that country. As was noted above, there was no such agreement or arrangement between Australia and India concerning the reception of the plaintiff in *CPCF*.

The *MPA* makes no express reference to Australia's international legal obligation of non-refoulement of refugees. However, section 74 does provide that '[a] maritime officer must not place or keep a person in a place, unless the officer is satisfied, on reasonable grounds, that it is safe for the person to be in that place'. A majority of the High Court appeared to accept that this may encompass

79 *MPA* ss 69(2)–(3), as enacted.

80 *MPA* s 69(2)(b), as enacted.

81 *MPA* ss 69(2)–(3). The amendments also restate the 'until released or disposed of' condition with greater technicality.

82 *MPA* s 71.

83 *MPA* s 72(3). Prior to the enactment of the *Caseload Act*, this section was stated more narrowly, as permitting a person to be required to stay on the detained vessel 'until it is: (a) taken to a port, airport or other place (see s 69); or (b) permitted to depart from the port, airport or other place': *MPA* s 72(3), as enacted.

84 *MPA* ss 72(4)–(4A). Prior to the enactment of the *Caseload Act*, *MPA* s 72(4) conferred the same power in identical terms (but without being split across two sections).

85 *MPA* s 72(5).

86 *Caseload Act* sch 1 item 28.

the sorts of risks which enliven non-refoulement obligations.⁸⁷ Three judges denied that the exercise of powers under the *MPA* is otherwise circumscribed by Australia's non-refoulement obligations,⁸⁸ while the other members of the Court left this further question open.⁸⁹

On the question of whether 'a place' to which a person is taken must be one at which the person has a right or permission to disembark, the majority of the High Court held that such a right or permission was not necessary.⁹⁰ The Court's reasoning on this matter will be examined in detail in Part IV(B)(1) below, as it raises fundamental constitutional issues.

The most significant textual amendments made by the *Caseload Act* to the detention powers, besides the repeal of section 97 noted above, concern the making of decisions about where a detained vessel or person is to be taken. The *Caseload Act* inserts sections 69(3A) and 72(4B), which permit an officer exercising the powers to change the destination to which a detained vessel and/or a person is being taken 'to a different place at any time (including a time after arrival at the place that was previously the destination)'.⁹¹

It also inserts new sections 69A and 72A into the *MPA*. These permit detention of a vessel or person to take place for any period 'reasonably required' to *decide* the place to which a vessel or person is to be taken;⁹² for any period 'reasonably required' to *consider* whether to change that destination;⁹³ for the period actually taken to *travel* to the destination⁹⁴ (which need not be by the most direct route, and may include stop overs and other contingencies);⁹⁵ and for any period 'reasonably required' for the Minister to *consider* exercising the powers discussed above to make determinations or give directions, as well as a further power to suspend the operation of certain maritime laws that would normally

87 Chief Justice French, Hayne and Bell JJ explicitly made this point, although Hayne and Bell JJ confined the risks in question to risks of physical harm: *CPCF* (2015) 89 ALJR 207, 217 [11]–[12], [17], 233–4 [107]–[111], [131]. Justices Crennan, Gageler and Keane did not explicitly discuss the issue, but the latter two accepted that the safety of disembarkation at a place might depend upon circumstances particular to an individual detainee: at 271 [371], 288 [503]. Only Kiefel J held that the phrase 'a place' refers solely to the place on a vessel where a detained person is placed while being taken to some destination or other: at 260 [294]–[296].

88 Ibid 217 [11] (French CJ), 273 [387], 275 [391] (Gageler J), 282 [463] (Keane J).

89 Ibid 234 [112] (Hayne and Bell JJ), 249–50 [220] (Crennan J), 260–1 [296]–[304] (Kiefel J).

90 *CPCF* (2015) 89 ALJR 207. Chief Justice French, Crennan, Gageler and Keane JJ formed the majority while Hayne, Bell and Kiefel JJ dissented.

91 *MPA* ss 69(3A), 72(4B), as inserted by *Caseload Act* sch 1 items 11, 15.

92 *MPA* ss 69A(1)(a)(i), 72A(1)(a)(i).

93 *MPA* ss 69A(1)(a)(ii), 72A(1)(a)(ii).

94 *MPA* ss 69A(1)(c), 72A(1)(c).

95 *MPA* ss 69A(2), 72A(2).

apply to a vessel's travel.⁹⁶ Section 72A further expressly contemplates that a vessel and/or person might be detained, and their taking to a place be commenced, without prior arrangements having been made to permit disembarkation, because it permits a person to be detained 'for any period reasonably required to make and effect arrangements relating to the release of the person'.⁹⁷

These amendments permit transfer and detention to commence in the absence of any agreement with a third country for the transfer of asylum seekers, and to continue for a period reasonably required to decide, inter alia, which place should be the destination and to continue for so long as is reasonably required to deal with logistical issues. To this extent, they are simply declaratory of the originally enacted version of the *MPA* as interpreted by the High Court in *CPCF*. This is consistent with the view of the government as expressed in the Explanatory Memorandum for the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), which stated that the amendments 'clarify', 'confirm' and 'put beyond doubt' such matters as the 'intended operation' of the detention powers conferred by the *MPA*,⁹⁸ as well as 'explicitly provide' the Minister with the power to give directions.⁹⁹

However, some of the amendments made to the *MPA* by the *Caseload Act* are arguably more substantive in effect. The *MPA*, as amended by the *Caseload Act*, envisages the prospect of individuals being interdicted in the contiguous zone, then detained on a vessel at sea (whether their own boat or an Australian vessel onto which they have been transferred) and taken on an open-ended ocean voyage while the Australian government tries to find some other country willing to take them. They may be taken to a place where time is spent determining whether or not they can be disembarked, and a change then made to the intended destination, and the whole process repeated, without practical limits upon the permissible time of detention. Although section 87 of the *MPA* sets out a 28-day time limit for the detention of a vessel,¹⁰⁰ section 69A(3) clarifies that any time taken in deciding where to go, in considering a change of destination, in the Minister considering whether or not to exercise his or her powers, and in actual

96 *MPA* ss 69A(1)(b), 72A(1)(b). The power to suspend the operation of maritime laws is found in s 75H. The laws that may have their operation suspended include the *Navigation Act 2012* (Cth), the *Shipping Registration Act 1981* (Cth) and the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Cth): *MPA* s 75H(3).

97 *MPA* s 72A(1)(d). The amended *MPA* also provides that, 'to avoid doubt', a vessel or person may be taken to a place 'whether or not Australia has an agreement or arrangement with any other country relating to the vessel ... (or the persons on it), or the person': *MPA* s 75C(1)(b)(i).

98 Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 2–3, 22–7.

99 *Ibid* 2.

100 Subject to extension upon application to a magistrate: *MPA* ss 87(2)(b), 88.

travel, do not count towards the 28-day limit.¹⁰¹ Section 72A(3) states that detention of a person must not continue ‘for any longer than is permitted by subsection (1) of this section’, but as has just been explained, this does not impose any practical limit.

The scenario outlined is particularly concerning in relation to asylum seekers, who might be taken elsewhere in the region by boat without there being an agreement in place with the destination country. This could lead to long periods of detention at sea, as there is no guarantee that a third country will take asylum seekers that it may well regard as Australia’s responsibility.¹⁰²

We will consider the constitutional questions raised by these amendments in Part IV(B)(2) below.

III INTERNATIONAL AND COMPARATIVE CONTEXT

A International Legal Concerns

1 *International Law of the Sea*

It is arguable that the detention permitted under the *MPA*, especially as amended by the *Caseload Act*, goes beyond what is necessary and permitted at international law to exercise control in the contiguous zone.

Under international law, the sovereignty of a state extends over its land territory and territorial waters, but does not normally extend beyond that.¹⁰³ Pursuant to *UNCLOS*, Australia (like other countries) lacks jurisdiction on

101 *MPA* s 69A(3): ‘Days in periods covered by subsection (1) do not count towards the 28 day limit specified in paragraph 87(2)(a)’.

102 The potential for prolonged detention is a concern also raised in a number of submissions to the Senate Legal and Constitutional Affairs Committee’s Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014: see, eg, Law Council of Australia, Submission No 129 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 5 November 2014, 16 [50]: ‘There is the potential for prolonged periods of detention. If this power is to be retained it should be subject to a maximum time period to encourage expeditious decision-making and judicial oversight mechanisms’.

103 Australia has jurisdiction over an area of 12 nautical miles from the Australian shoreline (including the mainland and territories such as Christmas Island and the Ashmore Reef), known as the ‘territorial sea’: *UNCLOS* art 2(1). ‘The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea’: *UNCLOS* art 2(1). *UNCLOS* art 3 provides: ‘Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention’. See also, Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing, 2012) 227: ‘As a general rule, and failing the existence of a permissive rule to the contrary, a state may not enforce its authority outside its own territories’.

the high seas.¹⁰⁴ Australia also lacks jurisdiction in its contiguous zone. Although, as noted above, Australia does enjoy limited international rights to exercise control so as to prevent infringement of certain of its domestic laws, this permission of certain, proscribed actions of control in the contiguous zone does not amount to a conferral of jurisdiction.¹⁰⁵ Preventative actions to deflect asylum seekers outside Australian territory in the contiguous zone or beyond are to be distinguished in this regard from dealing reactively with asylum seekers once they enter Australian territorial waters.¹⁰⁶

The *MPA* as originally enacted recognised the potential international legal significance of its authorisation of the interception and detention of asylum seeker vessels, and the detention and transfer of asylum seekers, outside Australian territory. In addition to section 41, discussed above, section 7 (titled ‘Guide to this Act’) stated that ‘[i]n accordance with international law, the exercise of powers is limited in places outside Australia’. Those words were repealed by the *Caseload Act*,¹⁰⁷ thereby eliminating what might otherwise have been an interpretive implication generated by those words, that the words of the *MPA* conferring powers and governing their exercise were to be read down so as to not exceed Australia’s international legal authority.¹⁰⁸

The *Caseload Act* also introduced provisions into the *MPA* which provide, inter alia, that the authorisation and exercise of detention powers is not invalid because of any failure to consider, or defective consideration of, Australia’s international obligations, or because the authorisation or exercise of power is

104 Article 87(1) of *UNCLOS* states that the high seas shall not be subjected to the sovereignty of any state: ‘The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas ... comprises, inter alia, both for coastal and land-locked States: (a) freedom of navigation’. See also art 89: ‘No State may validly purport to subject any part of the high seas to its sovereignty’ and art 92(1): ‘Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas’. The Permanent Court of International Justice also stated that ‘vessels on the high seas are subject to no authority except that of the State whose flag they fly’: *S S Lotus (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10, 9 [64].

105 The precise juridical status of the contiguous zone is somewhat contested in the literature on the law of the sea, but a number of leading commentators agree that a coastal state does not exercise ‘jurisdiction’ as such in the contiguous zone: A Shearer, ‘Problems of Jurisdiction and Law Enforcement against Delinquent Vessels’ (1986) 35 *International and Comparative Law Quarterly* 320, 330; Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press, 2011) 88; Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 417, citing R R Churchill and A V Lowe, *The Law of the Sea* (Manchester University Press, 2nd revised ed, 1988) 137.

106 See Senate Select Committee on a Certain Maritime Incident, above n 2.

107 *Caseload Act* sch 1 item 1.

108 In *CPCF*, French CJ characterised this element of s 7 of the *MPA* as ‘a declaration about substantive provisions of the Act’, including s 41, but denied that the words could ‘be elevated to support the plaintiff’s contention that powers under the *MPA* are to be exercised “in accordance with international law”’: *CPCF* (2015) 89 ALJR 207, 216 [7]–[8]. Justice Gageler made the same point: at 273 [386].

inconsistent with those obligations.¹⁰⁹ The effect of these provisions is that, even if a lawful exercise of power pursuant to the *MPA* would require giving proper consideration to Australia's international obligations, a decision taken without such consideration will still be valid and hence have its legal effect.¹¹⁰

The *MPA* as currently in force therefore appears to permit interdiction operations that exceed Australia's international legal authority – for instance, interdicting a vessel in the contiguous zone but then detaining it, taking control of it, and sailing it out of the contiguous zone, and hence exercising jurisdiction where, at international law, no jurisdiction is enjoyed.¹¹¹ This possibility was discussed in argument in the High Court proceedings in *CPCF*, with such an exercise of power being described as an 'exorbitant jurisdiction'.¹¹² In that case, the issue did not arise in the manner sketched earlier in this paragraph, as the asylum seekers had been transferred onto an Australian vessel – over which Australia therefore enjoyed jurisdiction – prior to leaving the contiguous zone. In their dissenting judgment Hayne and Bell JJ nevertheless characterised the powers exercised as “exorbitant” powers which “run counter to the normal rules of comity among civilised nations”, because the Australian government determined unilaterally where foreign nationals interdicted in the contiguous zone were to be taken, and detained them on a Commonwealth ship for this purpose.¹¹³

Another manner in which the *MPA* appears to permit such 'exorbitant' exercises of interdiction jurisdiction, and which arguably did arise on the facts of *CPCF*,¹¹⁴ is in relation to the requirement of necessity. It is far from clear that taking asylum seekers from their own boat onto an Australian vessel with the intention of sailing the oceans looking (or hoping) for a viable point of disembarkation, is necessary to prevent infringement of Australia's immigration laws and regulations. One alternative, given that Australia is a party to the *Refugee Convention* and *Protocol*, would be to hear asylum claims and issue entry permits – perhaps temporary ones, pending a more adequate determination process – to those who have *prima facie* claims. This can be contrasted with a

109 *MPA* ss 22A (pertaining to authorisation), 75A (pertaining to exercise of powers).

110 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 392–3 (McHugh, Gummow, Kirby and Hayne JJ); *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 156–7 [23]–[25] (Gummow, Hayne, Heydon and Crennan JJ).

111 *UNCLOS* art 89.

112 Transcript of Proceedings, *CPCF* [2014] HCATrans 228 (15 October 2014) 4366–82, 4414–34, 4475–585. The phrase 'exorbitant jurisdiction' comes from Lord Diplock in *Siskina v Distos Compania Naviera SA* [1979] AC 210, 254 who, in the context of assertions of jurisdiction by domestic courts over foreigners referred to “exorbitant” jurisdictions which run counter to the normal rules of comity among civilised nations’.

113 *CPCF* (2015) 89 ALJR 207, 229–230 [78]–[82]. Their Honours also noted that the extent of a coastal state's international legal powers in the contiguous zone ‘remains controversial’: at [79].

114 Transcript of Proceedings, *CPCF* [2014] HCATrans 228 (15 October 2014) 4387–405.

case in which the detained persons are not asylum seekers and do not enjoy refugee status, and hence can simply be returned to their state of nationality.

2 *Non-Refoulement*

The potential inconsistency between Australia's international legal obligations and authority, and the carrying out of asylum seeker interdiction operations in the contiguous zone and beyond, to a significant extent arises out of the Australian government's desire to minimise the practical consequences, in terms of the reception of refugees, that might arise if the right to seek asylum and protection obligations were more fully honoured.

An overly narrow reading of the *Refugee Convention* is a more general problem. This is demonstrated by the arguments of the Commonwealth in *CPCF*: the Commonwealth accepted that the non-refoulement obligations under the *International Covenant on Civil and Political Rights*¹¹⁵ and the *Convention against Torture*¹¹⁶ were not subject to any territorial limitation.¹¹⁷ However, it argued that the *Refugee Convention* does not apply outside Australian territory, as 'Australia's obligations under the *Refugees Convention* were not enlivened in respect of the plaintiff, because they arise only with respect to persons who enter Australia's territory'.¹¹⁸

As discussed above in Part II(D), the High Court in *CPCF* did not hand down a clear ruling on the application of the non-refoulement principle to interdiction and detention of asylum seekers at sea. Justice Gageler held that the *Migration Act* should not be read as proceeding on the assumption that Australia owes

115 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'). Australia signed the ICCPR in 1972 and ratified it in 1980. The ICCPR entered into force in Australia on 13 November 1980, except art 41, which came into force in Australia on 28 January 1993.

116 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*CAT*').

117 Minister for Immigration and Border Protection, 'Submissions of the Defendants', above n 8, 3–4 [20]. The Statement of Compatibility with Human Rights lodged with the original Maritime Powers Bill 2012 (Cth) similarly noted that certain provisions raised non-refoulement risks under the ICCPR and CAT, and hence that 'in order to ensure that a maritime officer who has detained a person aboard a vessel acts in accordance with Australia's non-refoulement obligations, procedures relating to the consideration of refoulement risks would need to be in place': Replacement Explanatory Memorandum, Maritime Powers Bill 2012 (Cth) 6 (emphasis added).

118 Minister for Immigration and Border Protection, 'Submissions of the Defendants', above n 8, 3–4 [20].

obligations to individuals under the *Refugee Convention*.¹¹⁹ Similarly, as noted above, his Honour held that the exercise of maritime power under section 72(4) of the *MPA* is not conditioned by the *Refugee Convention*, the *ICCPR* or the *CAT*.¹²⁰ Justice Keane also held that the power conferred by section 72(4) is not subject to observance by the non-refoulement obligation in article 33 of the *Refugee Convention*.¹²¹ His Honour further held, inter alia, that the terms of the *Migration Act* do not support a finding that the potential benefits it confers upon asylum seekers in Australia are available to a non-citizen outside Australia.¹²²

(a) *Maritime Rescue and Its Relationship to Non-Refoulement*

Certain international search and rescue obligations arise in relation to interception operations in circumstances where persons are in distress at sea, and in *CPCF* French CJ held that because the vessel in that case had become unseaworthy after interception by the Australian customs vessel, Australia's rescue obligations became engaged in respect of its passengers and crew.¹²³ Article 98 of *UNCLOS* provides that every state shall require the master of a ship flying its flag to render assistance to any person found at sea in danger of being lost,¹²⁴ and the *International Convention on Maritime Search and Rescue*, to which Australia is a party, also requires the responsible state party to ensure that rescued persons are delivered to a place of safety.¹²⁵ Interestingly, search and rescue guidelines developed by the International Maritime Organization deal directly with the disembarkation of asylum seekers and refugees rescued at sea.¹²⁶ Paragraph 6.17 of the guidelines provides that '[t]he need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the

119 *CPCF* (2015) 89 ALJR 207, 274 [390] (Gageler J). In this context, his Honour noted that the plaintiff's argument was that the power to detain and take in the earlier incarnation of *MPA* s 72(4) – s 245F(9) of the *Migration Act* – was 'implicitly conditioned on observance of Australia's obligations under the *Refugees Convention*', an implicit limitation which was carried over to s 72(4): at 274 [389]. His Honour noted that reliance here was by way of analogy to *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 and *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, and that those cases rested on the assumption that Australia owed obligations to individuals under the *Refugee Convention*. However, due to amendments to s 36 of the *Migration Act* made before the *MPA* was enacted, his Honour held that '[t]here is no basis for considering that the erroneous statutory assumption, having been corrected in the *Migration Act*, was implicitly picked up and carried over to the [*MPA*]: at 274 [390].

120 *CPCF* (2015) 89 ALJR 207, 275 [391].

121 *Ibid* 282 [463].

122 *Ibid* 282–3 [465], citing *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1.

123 *CPCF* (2015) 89 ALJR 207, 218 [17].

124 *UNCLOS* art 98(1)(a). See also the *Navigation Act 2012* (Cth).

125 *International Convention on Maritime Search and Rescue*, opened for signature 27 April 1979, 1405 UNTS 119 (entered into force 22 June 1985).

126 The guidelines are contained in Maritime Safety Committee, *Guidelines on the Treatment of Persons Rescued at Sea*, UN Doc MSC 78/26/Add.2 (adopted 20 May 2004) annex 34.

case of asylum-seekers and refugees recovered at sea'.¹²⁷ In *CPCF*, French CJ indicated that this 'might be taken to import an extra-territorial non-refoulement obligation in respect of the persons rescued',¹²⁸ but as has already been noted, his Honour went on to say that within the framework of the *MPA* any such obligation is subsumed by the requirement of 'safety' imposed by section 74 of the *MPA*.¹²⁹ While section 74 of the *MPA* requires that the place in which the asylum seeker is placed must be 'safe', this may be interpreted as physical safety and not the more comprehensive protection provided by the non-refoulement principle set out in the *Refugee Convention*.¹³⁰

International legal rescue obligations were also discussed by Crennan J, who noted the

inherent tension between the obligations of Australian authorities (whether under the [*International Convention on Maritime Search and Rescue*] or otherwise) to assist persons in the contiguous zone on unseaworthy vessels in conditions of distress and danger, the federal legislature's object of preventing contraventions of the *Migration Act* in the contiguous zone, and the preference of persons like the plaintiff to access non-refoulement obligations under the *Refugees Convention* in Australia rather than in another country.¹³¹

Her Honour presented this as a reason against importing international obligations into the interpretation of the *MPA*'s power to detain and take.¹³²

(b) The Caseload Act Amendments

While the *MPA* currently in force retains the section 74 requirement of 'safety', the *Caseload Act* has introduced a provision which provides that a decision under section 74 is not invalid because of any failure to consider, or defective consideration of, Australia's international obligations, or because the placing of a person in a place is inconsistent with those obligations.¹³³ Because section 74 conditions the inquiry by reference to a factual state of affairs – safety – rather than a legal state of affairs, this provision seems to have only modest practical significance. It may be that in some circumstances, however, it would validate a decision that would otherwise be invalid on the grounds that a maritime officer did not pay sufficient regard to the legal framework that shapes

127 *CPCF* (2015) 89 ALJR 207, 218 [16] (French CJ).

128 *Ibid* 218 [17] (French CJ).

129 *Ibid*.

130 See, eg, *ibid* 233 [109] (Hayne and Bell JJ).

131 *Ibid* 248 [213].

132 *Ibid* 248 [214].

133 *MPA* s 75A(1).

the risks to which a person might be exposed upon being disembarked at a particular place.¹³⁴

Furthermore, section 75C of the *MPA*, introduced by the *Caseload Act*,¹³⁵ permits a vessel or person to be taken to a destination under section 69 or 72 ‘irrespective of the international obligations or domestic law of any other country’.¹³⁶ The amended *MPA* also states that an authorisation or exercise of power shall not be invalid because of a failure to consider, or a defective consideration of, the international obligations or domestic law of any other country.¹³⁷ In other words, the powers under the *MPA* are not conditioned upon or in any way linked to Australia’s international obligations. It is no surprise that the Parliamentary Joint Committee on Human Rights considered that the amendments to the *MPA* made by the *Caseload Act* were ‘incompatible with Australia’s obligations under the *ICCPR* and *CAT*’.¹³⁸

3 *Arbitrary and Inhumane Detention*

The *MPA*, particularly as amended by the *Caseload Act*, also raises the prospect of violations of Australia’s international legal obligations in relation to arbitrary detention. The open-ended nature of the detention that is permitted is clearly at odds with the international legal prohibition on arbitrary detention set out in article 9(1) of the *ICCPR*.¹³⁹ According to the United Nations (‘UN’) Human Rights Committee draft *General Comment No 35* on article 9, ‘[a]rticle 9 guarantees those rights to everyone’ and ‘everyone’ includes, among others, ‘aliens’, ‘refugees’ and ‘asylum seekers’.¹⁴⁰ It sets out some principles applicable to immigration detention which are of direct relevance to detention at sea:

134 See the discussion of the difference between lawfulness and validity of a decision in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 392–3 (McHugh, Gummow, Kirby and Hayne JJ); *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 156–7 [23]–[25] (Gummow, Hayne, Heydon and Crennan JJ).

135 *Caseload Act* sch 1 item 19.

136 *MPA* s 75C(1)(b)(ii).

137 *MPA* ss 22A(1)(a)–(b), 75A(1)(a)–(b). This amendment is consistent in spirit with amendments to the *Migration Act* in recent years in relation to offshore processing, such as s 198AA(d), which states that ‘Parliament considers 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’.

138 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Fourteenth Report of the 44th Parliament* (2014) 77 [1.362].

139 Article 9 provides that: ‘Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his [or her] liberty except on such grounds and in accordance with such procedure as are established by law’. It is noteworthy that while the Commonwealth in its submissions in *CPCF* accepted the existence of non-refoulement obligations under the *ICCPR* (see Minister for Immigration and Border Protection, above n 8), it did not refer to the potential for detention under the *MPA* to breach the prohibition on arbitrary detention set out in art 9 of that treaty.

140 Human Rights Committee, *General Comment No 35: Article 9 (Liberty and Security of Person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) 1 [3].

Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in light of the circumstances and reassessed as it extends in time.¹⁴¹

In *Van Alphen v Netherlands*, the UN Human Rights Committee commented on the meaning of arbitrariness in the context of article 9(1).¹⁴² The Committee noted that '[t]he drafting history of article 9, paragraph 1, confirms that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability'.¹⁴³

Similarly, the European Court of Human Rights has underlined in a number of cases the importance of ensuring that persons in detention have access to prompt review of that detention¹⁴⁴ and that states which intercept and detain persons on the high seas must have a legal basis of the requisite quality to satisfy the 'general principle of legal certainty'.¹⁴⁵

It is highly arguable that detention of the sort contemplated by the *MPA*, which does not limit the duration of detention and makes no provision for reassessment (which, as a practical matter, would be highly difficult given the geographic circumstances of the detention), is not justified as reasonable, necessary or proportionate. A lack of predictability is also raised by the fact that detention continues for as long as it takes to obtain an agreement with any possible receiving third state. The *MPA* is similarly contrary to guidelines on

141 Ibid 5 [18].

142 Human Rights Committee, *Hugo van Alphen v Netherlands: Communication No 305/1988*, UN Doc CCPR/C/39/D/305/1988 (23 July 1990).

143 Ibid [5.8].

144 Such as in *Ali Samatar v France* (European Court of Human Rights, Chamber, Application Nos 17110/10 and 17301/14, 4 December 2014) and *Hassan v France* (European Court of Human Rights, Chamber, Application Nos 46695/10 and 54588/10, 4 December 2014), the European Court of Human Rights ('ECtHR') held that France had violated art 5(3) of the *European Convention on Human Rights*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('ECHR') (right to liberty and security). These two cases concerned Somali nationals, who, having hijacked French-registered vessels off the coast of Somalia, were arrested and held by the French army, then transferred to France, where they were taken into police custody and prosecuted for acts of piracy. The ECtHR found a breach of the ECHR because:

the applicants had been taken into custody for 48 hours on their arrival in France instead of being brought 'promptly' before a legal authority, when they had already been deprived of their liberty for four days and some twenty hours (*Ali Samatar and Others*) and six days and sixteen hours (*Hassan and Others*).

European Court of Human Rights, 'Suspects of Piracy against French Vessels, Apprehended in Somalia by the French Authorities, Should Have Been Brought before a Legal Authority as Soon as They Arrived in France' (Press Release, ECHR 361, 4 December 2014) 1.

145 *Medvedyev v France* (European Court of Human Rights, Grand Chamber, Application No 3394/03, 29 March 2010). In this case, French naval authorities intercepted a Cambodian vessel on the high seas on the basis that it was suspected of trafficking drugs. The French navy, with the agreement (via diplomatic note) of Cambodia rerouted the vessel back to France for prosecution. This led to the occupants being detained for a total of 13 days (including the time taken for the journey to France). The occupants challenged this before the ECtHR, arguing they had been subjected to unlawful deprivation of liberty under art 5 of the ECHR, a claim which the Grand Chamber of the Court upheld.

detention issued by the United Nations High Commissioner for Refugees ('UNHCR'), which recommend that maximum periods of detention should be set out in national legislation to guard against arbitrariness.¹⁴⁶ As the UNHCR quite rightly states, '[w]ithout maximum periods, detention can become prolonged, and in some cases indefinite'.¹⁴⁷

In assessing the human rights implications of detention under the *MPA*, regard must also be had to the likely conditions of detention. In this respect, the new section 75C states that the destination to which a vessel or person may be taken need not be a country, may be a vessel, and may be 'just outside a country'.¹⁴⁸ This means that if Australia intercepts asylum seekers on the high seas, it can take the persons not to a country, but also to another vessel or maritime installation. We note that Mr Merkel QC, acting for the plaintiffs in *CPCF*, described the ordeal faced by the 157 Sri Lankan asylum seekers detained for 29 days at sea by Australian authorities as a 'tortuous journey'.¹⁴⁹

In circumstances in which there is no prior agreement or arrangement in place with a destination country willing to receive interdicted asylum seekers, the time taken to make and put into effect an agreement could potentially be months. This prolonged detention of asylum seekers in cramped or injurious conditions at sea, with no or restricted access to fresh air and concerns about access to sufficient food and medical care, may lead to a breach of the prohibition of 'cruel, inhuman or degrading treatment or punishment' under article 7 of the *ICCPR*.¹⁵⁰ Article 10(1) of the *ICCPR* also provides that 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.¹⁵¹

Australia would be responsible for any violation of the *ICCPR* (and other human rights treaties to which it is a party) despite the fact that the detention occurs outside Australian territory. It is widely accepted at international law that a state's human rights obligations can apply extraterritorially where that state is

146 UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (Guidelines, 2012) 26 [46] ('*Guidelines on Detention*') <www.unhcr.org/505b10ee9.html>.

147 Ibid.

148 *MPA* s 75C(1)(a).

149 Transcript of Proceedings, *CPCF* [2014] HCATrans 227 (14 October 2014) 499–500.

150 In this context, guideline 8 of the *Guidelines on Detention* states that '[c]onditions of detention must be humane and dignified': UNHCR, above n 146, 29. It sets out minimum conditions that must be present to satisfy such a requirement, including '[t]he opportunity to conduct some form of *physical exercise* through daily indoor and outdoor recreational activities ... as well as access to suitable outside space, including fresh air and natural light': at 30 [48] (emphasis in original).

151 *ICCPR* art 10(1).

exercising ‘effective control’ or jurisdiction.¹⁵² This principle was accepted by the Australian Senate Legal and Constitutional Affairs References Committee, which stated in its recent report on the Manus Island incident in early 2014 that:

Australia’s human rights obligations apply to all people subject to Australia’s jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia over whom Australia is exercising ‘effective control’, or who are otherwise under Australia’s jurisdiction.¹⁵³

The *MPA* provides that:

A person arrested, detained or otherwise held under this Act must be treated with humanity and respect for human dignity, and must not be subject to cruel, inhuman or degrading treatment.¹⁵⁴

Justices Crennan and Gageler both noted that this imposed a constraint on the legality of actions taken under the *MPA*,¹⁵⁵ but gave no guidance on its substantive content, or how this might relate to the relevant concepts deployed in international human rights law.

B International Comparisons

There does not appear to be an equivalent piece of legislation in any comparable common law country (eg, New Zealand, Canada or the United

152 See, eg, Human Rights Committee, *General Comment No 35: Article 9 (Liberty and Security of Person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) 18 [63]; Committee Against Torture, *General Comment No 2: Implementation of Article 2 by States Parties*, UN Doc CAT/C/GC/2 (24 January 2008) [16]; *Al-Jedda v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 27021/08, 7 July 2011); *Al-Skeini v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011).

153 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (2014) 131 [7.20] <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Manus_Island/Report>. The Committee refers to evidence which suggests that Australia has recognised this right: Human Rights Committee, *Replies to the List of Issues (CCPR/C/AUS/Q/5) To Be Taken Up in Connection with the Consideration of the Fifth Periodic Report of the Government of Australia (CCPR/C/AUS/5)*, 95th sess, UN Doc CCPR/C/AUS/Q/5/Add.1 (5 February 2009) 4 [16]–[17], cited in Amnesty International, Submission No 22 to Senate Legal and Constitutional Affairs References Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014*, 9 May 2014, attachment, 83 n 264; cited in Senate Legal and Constitutional Affairs References Committee Report, Parliament of Australia, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (2014) 132 n 16. However, *Replies to the List of Issues* sets out a rather hesitant approach to the issue which falls short of acceptance of extraterritorial application of international human rights treaties. The document states that ‘Australia accepts that there may be exceptional circumstances in which the rights and freedoms set out under the Covenant may be relevant beyond the territory of a State party’ but that ‘Australia believes that a high standard needs to be met before a State could be considered as effectively controlling territory abroad’: Human Rights Committee, *Replies to the List of Issues*: at 153, 4 [17]. Even if the threshold is a high one, Australian government vessels under the control of Australian military or customs personnel presumably would satisfy it.

154 *MPA* s 95.

155 *CPCF* (2015) 89 ALJR 207, 245 [186], 246 [193] (Crennan J), 265–6 [339] (Gageler J).

Kingdom) which confers coercive powers of interdiction and detention over asylum seeker vessels on the high seas contrary to international law. Section 284 of the *Immigration Act 2009* (NZ) does permit search and entry of vessels interdicted in the contiguous zone of New Zealand where the immigration officer has reasonable grounds for believing, inter alia, that the persons on board do not have permission to enter New Zealand.¹⁵⁶ However, it does not specifically confer a right of ‘detention’.

The detention provisions in the *MPA* are also inconsistent with international practice in relation to the interception of asylum seeker vessels. For instance, the European Parliament recently passed a regulation relating to border surveillance, which will govern the interception and rescue operations of key European Union border control bodies.¹⁵⁷ Article 7 permits the seizure of a vessel on the high seas and the apprehension of persons on board where there is evidence confirming that the vessel may be carrying persons intending to circumvent checks at border crossing points or is engaged in the smuggling of migrants at sea.¹⁵⁸ However, article 7 clearly states that consent of the flag state will be required and that such actions are subject to international law.¹⁵⁹ Article 7(2) states that any seizure and apprehension of a vessel and persons on board must be in ‘accordance with the *Protocol against the Smuggling of Migrants*, and where relevant, national and international law’.¹⁶⁰ Article 4 also sets out specific protections against transfers contrary to non-refoulement obligations, including a prohibition on transferring asylum seekers to a third country where the state is ‘aware or ought to be aware’

156 Section 284 of the *Immigration Act 2009* (NZ) states:

- (1) An immigration officer may exercise the powers in subsection (2) where the officer believes on reasonable grounds that there is on board any craft that is in the contiguous zone or territorial sea of New Zealand, a person who, if he or she lands in New Zealand, will –
 - (a) commit an offence against this Act; or
 - (b) be liable for deportation; or
 - (c) be, or be likely to be, liable for turnaround.
- (2) An immigration officer may at any time, without a warrant or any other authority than this section, and by force if necessary, do the following things:
 - (a) enter and search any craft for the purpose of determining whether there is a person to whom subsection (1) applies on board; and
 - (b) if satisfied that there is a person to whom subsection (1) applies on board, exercise any power under this Act or any other Act that he or she could exercise if the craft was in New Zealand.

157 *Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 Establishing Rules for the Surveillance of the External Sea Borders in the Context of Operational Cooperation Coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union* [2014] OJ L 189/93.

158 Ibid art 7.

159 Ibid. See also art 7(11) which sets out certain interception and search powers in relation to stateless vessels where there is a reasonable suspicion they are engaged in the smuggling of migrants by sea. This is also explicitly stated to allow appropriate measures in accordance with national and international law.

160 Ibid art 7(2).

that the third country engages in refoulement.¹⁶¹ Article 8 of that regulation, dealing with interception in the contiguous zone, states that any authorisation:

may only be given for measures that are necessary to prevent the infringement of relevant laws and regulations within that Member State's territory or territorial sea ...¹⁶²

This regulation therefore ensures that interception and enforcement action taken on behalf of European Union countries are reflective of article 33 of *UNCLOS*. The decoupling of the *MPA* from Australia's international obligations, described above is therefore significantly out of step with other countries.

So is the Australian interdiction and detention of the Sri Lankan vessel in July 2014, and the practice that may be expected to follow the amendment of the *MPA* to expressly permit detention and taking, in the absence of any certainty as to the possibility of disembarkation. The United States and certain European countries have engaged in interdiction of asylum seeker vessels for the purpose of return to their country of origin or elsewhere,¹⁶³ but in these countries interdiction of asylum seekers has generally been carried out pursuant to a written agreement between countries, whether bilateral agreements or diplomatic exchanges.¹⁶⁴

However, that Australian law does not conform to the norms of international law or international practice does not affect its domestic legal validity. The final section of this article will therefore consider possible constitutional objections to the *MPA*.

¹⁶¹ Ibid art 4(2).

¹⁶² Ibid art 8.

¹⁶³ For instance, according to information from Italian authorities, Italy conducted nine push backs of asylum seeker vessels to Libya between 6 May 2009 and 6 November 2009. As a result, a total of 834 persons were returned to Libya and a smaller number of migrants to Algeria. These operations were in accordance with bilateral agreements concluded between Italy and Libya: Maarten den Heijer, 'Reflections on Refoulement and Collective Expulsion in the *Hirsi Case*' (2013) 25 *International Journal of Refugee Law* 265, 269. Some of these practices have been found to be unlawful under European human rights law. For instance, the interdiction by Italy of a vessel containing asylum seekers of Eritrean and Somalian nationality and its transfer to Libya in 2009 was found unlawful by the European Court of Human Rights in *Hirsi Jamaa v Italy* (European Court of Human Rights, Grand Chamber, Application No 27765/09, 23 February 2012).

¹⁶⁴ See, eg, agreements between Italy and Libya, cited in the UNHCR's Submission to the European Court of Human Rights in *Hirsi Jamaa v Italy*: UNHCR, Submission in *Hirsi Jamaa v Italy*, Application No 27765/09, 2012, 2. On US practice, see Ruth Ellen Wasem, 'US Immigration Policy on Haitian Migrants' (Research Report, US Congressional Research Service, 15 January 2010) 3 <<http://trac.syr.edu/immigration/library/P4230.pdf>>; Azadeh Dastyari, *United States Migrant Interdiction and the Detention of Refugees in Guantanamo Bay* (Cambridge University Press, 2015).

IV CONSTITUTIONAL CONCERNS

Assessing the validity of the detention powers conferred by the *MPA* requires consideration of the principles that govern executive detention of aliens under Australian law.

A The Constitutional Permissibility of Statutory Regimes of Executive Detention

In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*, Brennan CJ, Deane and Dawson JJ famously stated that ‘the common law knows neither *lettre de cachet* nor other executive warrant authorizing arbitrary arrest or detention’, and hence that ‘any officer of the Commonwealth Executive who purports to authorize or enforce the detention in custody of ... an alien [who is within Australia] without judicial mandate will be acting lawfully only to the extent that his or her conduct is justified by valid statutory provision’.¹⁶⁵ In that case it was held that the *Migration Act* did provide such justification, because it permitted detention without judicial mandate for the purposes of processing an application by a non-citizen for admission to Australia, and of expulsion or deportation of a non-citizen. The Court also held that the conferral of such powers upon the executive government of Australia is a valid exercise of the power to legislate with respect to ‘aliens’ conferred by section 51(xix) of the *Constitution*.¹⁶⁶

This understanding of the scope of the aliens power, and hence of the constitutionality of mandatory detention of asylum seekers pursuant to the *Migration Act*, has most recently been affirmed by a unanimous High Court in *Plaintiff S4/2014 v Minister for Immigration and Border Protection*.¹⁶⁷

1 The Importance of a Limit on the Period of Detention

In *Plaintiff S4*, the High Court reiterated that the provisions of the *Migration Act* which authorised mandatory detention of certain aliens were valid laws if the detention was limited to what was ‘reasonably capable of being seen as necessary for the purposes of deportation or to enable an application for permission to enter and remain in Australia to be made and considered’.¹⁶⁸ The High Court elaborated this connection between detention and either admission to, or removal from, Australia:

The duration of the plaintiff’s lawful detention under the Act was thus ultimately bounded by the Act’s requirement to effect his removal as soon as reasonably

¹⁶⁵ (1992) 176 CLR 1, 19.

¹⁶⁶ Ibid 10 (Mason CJ), 32 (Brennan, Deane and Dawson JJ), 47 (Toohey J), 56–7 (Gaudron J), 64 (McHugh J).

¹⁶⁷ (2014) 88 ALJR 847, 851.

¹⁶⁸ Ibid 853 [26] (The Court).

practicable. It was bounded in this way because the requirement to remove was the only event terminating immigration detention which, all else failing, must occur.

It follows that the Executive's consideration (while the plaintiff was in immigration detention) of whether he might seek and be granted a protection visa had to be undertaken within that framework. ... [T]he authority [under the *Migration Act*] to detain the plaintiff is an incident of the power of the Executive to remove the plaintiff or to permit him to enter and remain in Australia, and the plaintiff's detention is limited to what is reasonably capable of being seen as necessary to effect those purposes. The purpose for his detention had to be carried into effect as soon as reasonably practicable. That is, consideration of whether a protection visa may be sought by or granted to the plaintiff had to be undertaken and completed as soon as reasonably practicable. Departure from that requirement would entail departure from the purpose for his detention and could be justified only if the Act were construed as permitting detention at the discretion of the Executive. The Act is not to be construed as permitting detention of that kind.¹⁶⁹

The phrase 'reasonably practicable' is found in the *Migration Act*.¹⁷⁰ As indicated in the reasoning above, its presence is crucial to the constitutional validity of the legislative scheme of detention. If, for instance, the *Migration Act* provided that an unlawful non-citizen shall be removed from Australia at the Minister's pleasure, and mandated that she or he be kept in immigration detention in the meantime, then it would be unconstitutional. The High Court explained why the time constraint makes the difference:

The duration of any form of detention, and thus its lawfulness, must be capable of being determined at any time and from time to time. Otherwise, the lawfulness of the detention could not be determined and enforced by the courts, and, ultimately, by this Court. And because immigration detention is not discretionary, but is an incident of the execution of particular powers of the Executive, it must serve the purposes of the [Migration] Act and its duration must be fixed by reference to what is both necessary and incidental to the execution of those powers and the fulfilment of those purposes. These criteria, against which the lawfulness of detention is to be judged, are set at the start of the detention.¹⁷¹

Four members of the High Court in *CPCF* expressly accepted the relevance of these remarks to the construction of section 72(4) of the MPA.¹⁷²

Although the Court in *Plaintiff S4* did not cite the dissenting judgment of Gummow J in *Al-Kateb v Godwin*, the passage quoted directly above is consistent with Justice Gummow's earlier remarks:

In saying in *Calwell* that in the [*Immigration Restriction Act 1901* (Cth)] 'the words "pending deportation" imply purpose',¹⁷³ Dixon J was not reading the statute as imposing legal consequences purely on a legislative or executive opinion as to the attainability of that purpose. Such a construction would have

169 Ibid 854 [33]–[34] (The Court).

170 See especially *Migration Act* s 198, dealing with the removal of non-citizens from Australia.

171 *Plaintiff S4* (2014) 88 ALJR 847, 853 [29] (The Court) (citations omitted).

172 *CPCF* (2015) 89 ALJR 207, 231–2 [97] (Hayne and Bell JJ), 263 [321] n 239 (Kiefel J), 272 [374] n 299 (Gageler J).

173 *Al-Kateb v Godwin* (2004) 219 CLR 562, 599 [88] (Gummow J), quoting *Lau v Calwell* (1949) 80 CLR 533, 581 (Dixon J).

invited an attack on validity of a similar nature to that which shortly after *Calwell* was to succeed in *Australian Communist Party v The Commonwealth*.¹⁷⁴ (That case is authority for the basic proposition that the validity of a law or of an act of the executive branch done under a law cannot depend upon the view of the legislature or executive officer that the conditions requisite for validity have been satisfied.) Rather, Dixon J went on in *Calwell* to describe the purpose as one to be attained within ‘a reasonable time’, to be assessed, if need be, by a court on an application for habeas corpus ...¹⁷⁵

Parliament has the power to authorise the Executive to detain aliens for the purposes of ‘deportation or expulsion’, and as an incident to the executive powers to ‘receive, investigate and determine an application by that alien for an entry permit’.¹⁷⁶ However, the purposes are not at large. The continued viability of the purpose of deportation or expulsion cannot be treated by the legislature as a matter purely for the opinion of the executive government. The reason is that it cannot be for the executive government to determine the placing from time to time of that boundary line which marks off a category of deprivation of liberty from the reach of Ch III. The location of that boundary line itself is a question arising under the *Constitution* or involving its interpretation, hence the present significance of the *Communist Party Case*.¹⁷⁷ Nor can there be sustained laws for the segregation by incarceration of aliens without their commission of any offence requiring adjudication, and for a purpose unconnected with the entry, investigation, admission or deportation of aliens.¹⁷⁸

The significance of detention having a duration capable of ascertainment at any time by an adjudicating court, therefore, is because this is what enables the court to be able to determine that the detention is serving a constitutionally permissible purpose.

2 *The Need for a Constitutionally Permissible Purpose for Detention*

Members of the High Court have adopted two main approaches to determining the range of permissible purposes of detention. The majority in *Chu Kheng Lim* expressed the view that the imposition of detention is, in the ordinary course, punishment imposed as a consequence of a judicial determination of criminal guilt for past actions. Hence, because Chapter III of the *Constitution* vests the judicial power of the Commonwealth exclusively in those courts identified in section 71, and because the legislative powers of the Commonwealth Parliament are subject to Chapter III, the scope for legislation to establish schemes of purely executive detention is limited to certain

174 Ibid, citing *Australian Communist Party v Commonwealth* (1951) 83 CLR 1. See also *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 512–13 [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

175 Ibid, citing *Lau v Calwell* (1949) 80 CLR 533, 581 (Dixon J).

176 Ibid 613 [140] (Gummow J), citing *Chu Kheng Lim* (1992) 176 CLR 1, 32 (Brennan, Deane and Dawson JJ); see also *Lau v Calwell* (1949) 80 CLR 533; *Hung v The Queen* (1953) 87 CLR 575.

177 Ibid, citing *A-G (WA) v Marquet* (2003) 78 ALJR 105, 116 [66] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

178 Ibid 599 [88], 613 [139]–[140] (Gummow J) (citations in original).

historically recognised exceptions, of which immigration detention is one.¹⁷⁹ Justice Gummow upheld this approach in *Re Woolley; Ex parte Applicants M276/2003*:

A law imposing disabilities upon aliens, including their segregation from other persons at large in Australia, will be a law with respect to aliens. But such a law will be valid only if it survives its subjection by the opening words of s 51 to the other provisions of the *Constitution*, particularly Ch III.¹⁸⁰

His Honour affirmed this approach also in *Fardon v Attorney-General (Qld)*:

I would prefer a formulation of the principle derived from Ch III in terms that, the ‘exceptional cases’ aside, the involuntary detention of a citizen in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts ...

That formulation ... eschews the phrase ‘is penal or punitive in character’. In doing so, the formulation emphasises that the concern is with the deprivation of liberty without adjudication of guilt rather than with the further question whether the deprivation is for a punitive purpose.¹⁸¹

His Honour also noted that:

It must be said that the expression of a constitutional principle in this form has certain indeterminacies. The first is the identification of the beneficiary of the principle as ‘a citizen’. That may readily be understood given the context in *Lim* of the detention of aliens with no title to enter or remain in Australia and their liability to deportation processes. But in other respects aliens are not outlaws; many will have a statutory right or title to remain in Australia for a determinate or indeterminate period and at least for that period they have the protection afforded by the *Constitution* and the laws of Australia. There is no reason why the constitutional principle stated above should not apply to them outside the particular area of immigration detention with which *Lim* was concerned.¹⁸²

The alternative approach was articulated by Gaudron J on a tentative basis in *Chu Kheng Lim*,¹⁸³ and then more definitely in *Kruger v Commonwealth*:

The exceptions recognised in *Lim* are neither clear nor within precise and confined categories ... [I]t is not possible to say that, subject to clear exceptions, the power to authorise detention in custody is necessarily and exclusively judicial power. Accordingly, I adhere to the view that I tentatively expressed in *Lim*, namely, that a law authorising detention in custody is not, of itself, offensive to Ch III.¹⁸⁴

On this approach, constitutional limits on the power to legislatively establish schemes of executive detention are found in the proper construction of the Commonwealth’s heads of legislative power: ‘the true constitutional position is that, subject to certain exceptions, a law authorising detention in custody,

179 *Chu Kheng Lim* (1992) 176 CLR 1, 10 (Mason CJ), 27–32 (Brennan, Deane and Dawson JJ), 45–7, 50 (Toohey J), 64–6, 69–71 (McHugh J).

180 (2004) 225 CLR 1, 55 [149] (*‘Re Woolley’*).

181 (2004) 223 CLR 575, 612–13 [80]–[81] (citations omitted). This statement of the relevant principle was affirmed by Kirby J in *Thomas v Mowbray* (2007) 233 CLR 307, 430 [353].

182 *Fardon v A-G (Qld)* (2004) 223 CLR 575, 611–12 [78] (citations omitted).

183 (1992) 176 CLR 1, 55–7.

184 (1997) 190 CLR 1, 110 (citations omitted).

divorced from any breach of the law, is not a law on a topic with respect to which s 51 confers legislative power'.¹⁸⁵

In relation to non-citizens, this principle is said to operate in the following way:

a law imposing special obligations or special disabilities on aliens, whether generally or otherwise, which are unconnected with their entitlement to remain in Australia and which are not appropriate and adapted to regulating entry or facilitating departure as and when required, is not, in my view, a valid law under s 51(xix) of the *Constitution*. A law of that kind does not operate by reference to any matter which distinguishes aliens from persons who are members of the community constituting the body politic, nor by reference to the consequences which flow from non-membership of the community and thus, in my view, is not a law with respect to aliens.¹⁸⁶

In *Al-Kateb v Godwin*, Hayne J expressed agreement with this approach to the issue,¹⁸⁷ although his Honour also seemed to accept that if the purpose of a regime of detention is punitive, then the imposition of detention under such a regime is an exercise of judicial power.¹⁸⁸ In *Re Woolley*, McHugh J agreed with Hayne J on both these points; his Honour also emphasised that the test for whether a regime of detention is punitive is a test of statutory purpose.¹⁸⁹ On this latter point, Gummow J agreed:

it may be that, if it could be demonstrated that a federal law authorised or mandated detention of those individuals seeking their release from what in their case were harsh, inhumane and degrading conditions, this would indicate that the purpose of that detention went beyond the range of purposes that are permissible, consistently with Ch III. Nevertheless, the criterion of validity would remain the purpose for which the detention is authorised, not its effect on the individual. No case of the kind just indicated has been advanced here.¹⁹⁰

We have seen, then, that there are two elements to establishing the constitutional validity of a statutory regime of executive detention: (i) the purpose of the detention, as ascertained from the statute, must be constitutionally permissible (whether that is understood as being a purpose that falls within the exceptions to a general principle derived from Chapter III, or as a purpose that

185 Ibid 111.

186 *Chu Kheng Lim* (1992) 176 CLR 1, 57 (Gaudron J). Writing before the adoption of the 'object of command' test in relation to the corporations power (see *New South Wales v Commonwealth* (2006) 229 CLR 1) Gaudron J notes that her preferred approach to the aliens powers might appropriately differ from that taken in respect of the corporations power, even though both are powers to legislate with respect to a particular class of persons, as 'the analogy between people and corporations is less than perfect, particularly when it comes to laws authorizing executive interference with the liberty of the individual': at 56. The contrast with the view of Gummow J, stated in *Re Woolley* (2004) 225 CLR 1, 55 [149], is evident.

187 *Al-Kateb v Godwin* (2004) 219 CLR 562, 646–7 [251]–[253], 648–50 [255]–[263]. Justice Heydon agreed: at 662–3 [303].

188 Ibid 647 [252], 649–50 [263].

189 *Re Woolley* (2004) 225 CLR 1, 24–6 [57]–[60].

190 Ibid 61 [167].

validly falls under a head of legislative power); and (ii) the detention must have an ascertainable duration, such that its conformity to that permissible purpose is subject to adjudication by a court. In the absence of any such time constraint, the detention would cease to be properly incidental to a permissible purpose – such as removing an unlawful non-citizen from Australia – because it would become, in effect, detention at the discretion of the executive.

B Validity of, and under, the *MPA*

1 The Decision in *CPCF*

The constitutional validity of the *MPA* was not disputed by the plaintiff in *CPCF*.¹⁹¹ Rather, the central question was whether the decision to detain the plaintiff and take him to India was a valid exercise of the power to detain a person and take that person to ‘a place’. The majority held that it was. In doing so, French CJ clearly stated that the power to detain under the *MPA* ‘does not authorise indefinite detention’¹⁹² and that the *MPA* ‘should not be taken as authorising a futile or entirely speculative taking and therefore a futile or entirely speculative detention’.¹⁹³ However, his Honour held that where negotiations are in place in relation to the reception of a person by a country, then the relevant maritime officer may take the person to that country on the basis that ‘there is a reasonable possibility that agreement will be reached or consent received’ and hence that the person will be able to be disembarked, bringing detention to an end.¹⁹⁴ His Honour held that this type of assessment was a matter for the executive and did not go to the validity of the exercise of the power conferred by section 72(4) of the *MPA*, ‘unless the probability is such as to render the taking decision futile or entirely speculative’.¹⁹⁵ Justice Gageler similarly found that there was:

no basis for concluding that the attempt ... to take the plaintiff ... to India resulted in the overall period of the plaintiff’s detention being unreasonable. It could not be said that there was no prospect of the plaintiff being safely disembarked in India ... Diplomatic negotiations were being conducted ... There is no suggestion that they were not being conducted in good faith.¹⁹⁶

Justice Keane noted that:

there is no suggestion that the [National Security Committee of Cabinet] had been informed by the Indian authorities that the plaintiff would not be allowed to disembark ...

¹⁹¹ (2015) 89 ALJR 207, 221 [32] (French CJ).

¹⁹² Ibid 223–4 [45].

¹⁹³ Ibid 224 [46].

¹⁹⁴ Ibid 224 [47], referring to the operation of s 97 of the *MPA* as then in force.

¹⁹⁵ *CPCF* (2015) 89 ALJR 207, 224 [47].

¹⁹⁶ Ibid 273 [382].

Whether the level of uncertainty is such as to make that course unreasonable may itself raise questions of fact and degree.¹⁹⁷

Justice Crennan found that although existence of a prior agreement was desirable, ‘the existence of a right or permission to disembark at the commencement of a journey cannot be determinative of the lawfulness of any detention for that purpose’.¹⁹⁸ Her Honour did so on two bases: first, that a prior right or permission might be revoked or not honoured;¹⁹⁹ and secondly, that ‘[the High] Court is well-equipped to assess whether ... the achievement of a statutory purpose is a practical possibility or not, and is accustomed to doing so’, even where what is involved are diplomatic negotiations.²⁰⁰

In dissent, Hayne and Bell JJ held that the place to which a person is to be taken under section 72(4) ‘must be a place which, at the time the destination is chosen, the person has a right or permission to enter’.²⁰¹ In doing so, their Honours note that the *MPA*, as it then stood, gave a power to take to ‘a place’, not ‘any place’ outside Australia,²⁰² that is, ‘to one place *identified* at the time the taking begins’.²⁰³ Their Honours quite rightly pointed out that the ‘facts and circumstances of this case are enough to suggest the real possibility of prolongation of detention while political and diplomatic discussions take place in the course of searching for a willing country of reception’.²⁰⁴ Their Honours also pointed out that ‘if the power can be re-exercised as occasion requires’ then the length of detention may be ‘dependent upon the agreement or acquiescence of another state’.²⁰⁵ Only if another country were to refuse to allow a person to exercise a right of entry, or were to revoke a permission which it had previously granted, would there ‘be an “occasion” on which the power to take to a place can be re-exercised’.²⁰⁶ Otherwise:

the reasonably necessary length of detention is readily capable of being judged by reference to wholly objective considerations like the time necessary to identify a place where the person has the right or permission to enter, travel time to that place, any need for the vessel to be resupplied, the state of weather conditions on the journey and the like.²⁰⁷

197 Ibid 281 [455], 282 [457].

198 Ibid 247 [204].

199 Ibid. Chief Justice French made the same point: at 224 [47].

200 Ibid 249 [218].

201 Ibid 228 [71].

202 Ibid 231 [92] (emphasis in original).

203 Ibid (emphasis in original).

204 Ibid 232 [99].

205 Ibid. Their Honours also pointed to the exorbitant character of the power as a reason for preferring a strict rather than an expansive interpretation: at 230 [83], 230–1 [89]–[93].

206 Ibid 233 [104] (Hayne and Bell JJ). Justice Crennan suggested that such contingencies as natural disasters might also occasion re-exercise of the power: at 247 [202]. We agree with this point but do not think it rebuts the general analysis put forward by Hayne and Bell JJ.

207 Ibid 233 [103] (Hayne and Bell JJ).

Justice Kiefel, also in dissent, placed particular emphasis on the then statutory provision (subsequently repealed by the *Caseload Act*) that detention ends upon a person's arrival at the place to which the person has been taken.²⁰⁸ Her Honour held that this 'point[s] strongly to the need for certainty about the choice of place ... limited to one place, which is identified at the time the decision is made as one where it is known that the detained person may be disembarked'.²⁰⁹

The dissenting Justices also noted that the *MPA* had been enacted, in 2013, in circumstances where it was known that Australia had regional processing arrangements with other countries. This showed that there was an awareness, at the time of enactment, that disembarkation might require prior agreement between governments.²¹⁰ Hence, the dissenting judges held that, in the absence of an arrangement or agreement permitting disembarkation, the decision to detain the plaintiff so as to take him to India was not authorised by section 72(4) of the *MPA*.²¹¹

It will be evident from the foregoing that we prefer the reasoning of the minority. The majority's interpretation of the *MPA* leaves determination of the duration of detention, and hence its legality, too much of a matter for the executive, contrary to the relevant constitutional requirements. These requirements, as Gummow J has explained, are ultimately stated authoritatively in the *Australian Communist Party v Commonwealth*.²¹² As Hayne and Bell JJ asked:

Is a court to inquire into the course taken in diplomatic discussions between Australia and the government of a place about whether, or on what terms, that government would grant permission to land to persons whom Australia wishes to leave in that place but who have no right or permission to enter? And if a court cannot or should not do that, how would the lawful duration of the detention be judged?²¹³

Furthermore, French CJ – himself a member of the majority – described as 'opaque' the parties' description of the decision to depart from the neighbourhood of India and sail to the Cocos (Keeling) Islands as having been made for 'operational and other reasons'.²¹⁴ This seems to belie Justice Crennan's judicial optimism, and does not bode well for the capacity of the Court to hold the executive to account in respect of this sort of decision-making.

208 Ibid 263 [317], referring to the operation of s 97 of the *MPA* as then in force.

209 *CPCF* (2015) 89 ALJR 207, 263 [318].

210 Ibid 230 [86] (Hayne and Bell JJ), 263 [320] (Kiefel J).

211 Ibid 236 [123] (Hayne and Bell JJ), 263 [323] (Kiefel J).

212 (1951) 83 CLR 1.

213 Ibid 232–3 [102].

214 Ibid 215 [3].

2 *The MPA after the Caseload Act*

Having explained why we prefer the minority decision in *CPCF* as an application of constitutional considerations to the proper construction of the *MPA*, we will now give two reasons for doubting that the *MPA*, as amended by the *Caseload Act*, is constitutionally valid on the same basis as immigration detention pursuant to the *Migration Act*.

The first relates to purpose. Interdiction of vessels in the contiguous zone is, quite plausibly, connected to the aliens power, and in particular the permissible purpose of excluding from Australia non-citizens who have no right of entry (the same reasoning would apply in respect of the immigration power).²¹⁵ However, detaining the aliens whose boat is interdicted seems to be a different matter. On the approach favoured by the majority in *Chu Kheng Lim*, there does not seem to be a historical exception that extends even to detaining aliens so as to return them to their country of nationality, let alone one which extends to taking them to any place deemed suitable by the Australian government. And on the approach favoured by Gaudron J, the detention and taking does not seem to fasten upon some ‘matter which distinguishes aliens from persons who are members of the community constituting the body politic’ of Australia.²¹⁶ It might be different if the power were one to return non-citizens to their countries of nationality, or even if it permitted a detained person to insist upon being returned to the country of his or her nationality.²¹⁷ But the *MPA* regime does not have such features.

The obvious answer to these concerns is provided by the need for the exercise of detention powers to remain connected to administering and ensuring compliance with the *Migration Act*, or to investigating or preventing contravention of an Australian law. As we saw above, in the case of asylum seekers this is likely to be their actual or anticipated contravention of the *Migration Act*.²¹⁸ In argument in *CPCF*, the Commonwealth conceded that this connection must be sustained throughout the period of the exercise of powers under the *MPA*.²¹⁹ When counsel for the Commonwealth then went on to characterise detention and taking as constituting ‘prevention and appropriate remedial response to a contravention’,²²⁰ Hayne J replied: ‘I do not know what appropriate remedial response means’.²²¹ The notion of ‘appropriate remedial response’ seems to be an attempt to extend the scope of prevention beyond that which is immediately necessary to prevent a contravention, so as to include

215 *Constitution* s 51(xxvii). Interdictions might also be supported as incidental to the power to legislate with respect to the influx of criminals: *Constitution* s 51(xxviii).

216 *Chu Kheng Lim* (1992) 176 CLR 1, 57.

217 Just as s 198(1) of the *Migration Act* obliges the Minister to remove from Australia any unlawful non-citizen who makes such a request in writing.

218 See above Part II(C).

219 Transcript of Proceedings, *CPCF* [2014] HCATrans 228 (15 October 2014) 4595–600, 4605–7, 4612–25.

220 *Ibid* 4606–7.

221 *Ibid* 4609–10.

action that is incidental to the means of prevention adopted. When the adopted means is the detention of boats and people to stop them entering Australia, something then has to be done with them, and the Commonwealth seems to be characterising that ‘appropriate remedial response’ for which the *MPA* provides as an incident of prevention.

We think it is arguable that the open-ended character of the detention for which the *MPA* provides, particularly following enactment of the *Caseload Act*,²²² is not sufficiently connected to the constitutionally permitted purpose of preventing non-citizens entering Australia without authorisation. Because the validity of the *MPA* was not at issue in *CPCF*, these matters were not discussed by the Court, although Kiefel J observed that ‘[w]here conferred by statute, the power of the Commonwealth executive to detain takes its character from the legislative powers to exclude and deport aliens, of which it is an incident’.²²³ If the legislation does not admit of such characterisation, then it will not be valid. It is not a sufficient answer of this concern to point out that the legislation states that the power to detain may only be exercised for a constitutionally permissible purpose,²²⁴ if the detention power itself is not conformable to such a purpose.

The *Caseload Act* amendments were set out above. They include the repeal of section 97, which specified an end point for detention, and permit detaining persons while *decisions* are made, while *arrangements* are made and while *consideration* is given to the making of various administrative determinations. These do not seem to exhibit sufficient connection to the exclusion of persons or vessels from Australia; rather, they seem to make the taking of foreigners to other places an end in itself. Detention that is open-ended in this way would therefore seem to lose touch with its constitutionally permitted basis, instead amounting to an open-ended power to keep non-citizens detained on Australian vessels at sea.

The second reason is, in our view, the stronger one. This is the lack of an adequate statutory specification of a duration for detention. This has been set out in detail in Part II(D) above. A key point to note for current purposes is that only in one case do the words ‘reasonably required’ directly constrain the period of detention as such, namely, when they are said to limit the period spent making arrangements for the release of detainees from detention.²²⁵ But this does not provide any guarantee that the detention has an end point. For instance, there is no obligation that disembarkation be effected as soon as reasonably practicable, and the express provision for the remaking of the decision as to a destination seems to preclude reading in such a requirement by way of implication.²²⁶

222 See Part II(C) above.

223 *CPCF* (2015) 89 ALJR 207, 257 [273].

224 See, eg, *MPA* s 32.

225 *MPA* s 72A(1)(d).

226 For a discussion of such implications, see *CPCF* (2015) 89 ALJR 207, 247 [200] (Crennan J), 262 [313] (Kiefel J), 272 [376] (Gageler J), 281 [451] (Keane J). All made reference to *Lau v Calwell* (1949) 80 CLR 533, including the judgments of Dixon J: at 573–4, and Williams J: at 590.

Otherwise the words ‘reasonably required’ limit only the time that may be spent by Commonwealth officers deciding on a destination, considering a change of destination, or considering the exercise of ministerial powers.²²⁷ There is nothing inherent to those exercises of discretion that has a tendency to bring the detention to an end.

Hence, from the perspective of the aliens power we regard the *MPA* as constitutionally suspect. The detention that it permits seems to go well beyond what is reasonably capable of being seen as necessary for the purpose of ensuring exclusion of unlawful non-citizens from Australia, and is not stated in such a way that the duration of such detention, and thus its lawfulness, is capable of being determined at any time and from time to time, by reference to criteria which are set at the start of the detention.²²⁸

The other head of power that is relevant to the *MPA* is the external affairs power. In *XYZ v Commonwealth*,²²⁹ a majority of the High Court accepted a matter’s geographic externality from Australia as sufficient to enliven the external affairs power in respect of it.²³⁰ However, it has never been contended that the external affairs power permits the statutory authorisation of the executive detention of vessels and persons simply on the basis that they are geographically external to Australia. There is no historical precedent for such a practice (as the majority in *Chu Kheng Lim* would require), and on the approach favoured by Gaudron J, there is nothing about the mere fact of a person’s or vessel’s geographically external location that establishes any basis for detaining that person or vessel.

C Detention of Asylum Seekers Using Non-Statutory Executive Power

As noted above, in *CPCF* the Commonwealth argued that its non-statutory executive power under section 61 of the *Constitution* empowers it to do what was done to the asylum seekers in that case. Its argument to that conclusion drew heavily upon the reasoning of the majority of the Full Federal Court in *Tampa*.²³¹

The argument has two main components. One concerns the ways in which, and extent to which, legislative enactments curtail or override non-statutory executive powers. For reasons of space we will not discuss this issue, and will proceed on the assumption that section 5 of the *MPA*, which provides that ‘[t]his

227 *MPA* ss 69A(1)(a)–(b); 72A(1)(a)–(b).

228 This draws upon the language of the High Court in *Plaintiff S4* (2014) 88 ALJR 847, 853 [29], 854 [34] (The Court).

229 (2006) 227 CLR 532.

230 *Ibid* 542–4 [15]–[19] (Gleeson CJ), 546 [30], 549 [40], 551 [45] (Gummow, Hayne and Crennan JJ). Justice Kirby expressed doubts about the geographic externality principle but decided the case on other grounds: at 571 [114], 572 [117]. Justices Callinan and Heydon rejected the principle: at 598 [189], 603–4 [202]–[206].

231 (2001) 110 FCR 491. For the arguments of the Commonwealth Solicitor-General in *CPCF*, see Transcript of Proceedings, *CPCF* [2014] HCATrans 228 (15 October 2014) 6159–717.

Act does not limit the executive power of the Commonwealth', takes effect according to its terms.²³²

The second component of the argument concerns the content of non-statutory executive power. In *Tampa*, French J stated that:

The scope of the Executive power conferred by s 61 of the *Constitution* is to be measured by reference to Australia's status as a sovereign nation and by reference to the terms of the *Constitution* itself ...

[T]he Executive power of the Commonwealth, absent statutory extinguishment or abridgement, would extend to a power to prevent the entry of non-citizens and to do such things as are necessary to effect such exclusion. ... The power to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the Government of the nation would lack under the power conferred upon it directly by the *Constitution*, the ability to prevent people not part of the Australia [sic] community, from entering ...

[T]here is such a power at least to prevent entry to Australia. ... Absent statutory abrogation it would be sufficient to authorise the barring of entry by preventing a vessel from docking at an Australian port and adopting the means necessary to achieve that result. Absent statutory authority, it would extend to a power to restrain a person or boat from proceeding into Australia or compelling it to leave ...

[T]he actions of the Commonwealth were properly incidental to preventing the rescuees from landing in Australian territory where they had no right to go. ... The presence of SAS troops on board the *MV Tampa* did not itself or in combination with other factors constitute a detention. It was incidental to the objective of preventing a landing ...²³³

It is beyond the scope of this article to fully explore the extent of the executive power described by French J, even if the correctness of his Honour's opinion is accepted.²³⁴ However, two features must be noted. The first is that his Honour concludes that the actions of the Commonwealth in that case did not constitute detention, because those actions were incidental to preventing a landing. The same cannot be said of the sort of actions contemplated by the *MPA*. It is therefore far from clear that any non-statutory executive power could be called upon in support of them.

232 This construction of s 5 was rejected by two members of the High Court in *CPCF*: *CPCF* (2015) 89 ALJR 207, 223 [40]–[41] (French CJ), 258–9 [280]–[285] (Kiefel J). Justices Hayne and Bell expressed similar doubts: at 238 [140]–[141].

233 *Tampa* (2001) 110 FCR 491, 542 [191], 543 [193], 544 [197], 548 [213]. Justice Beaumont agreed: at 514 [95]. Chief Justice Black dissented, noting 'the undoubted power of the Executive to protect Australia's borders against the entry of unlawful non-citizens in times of peace derives only from statute': at 495 [7].

234 Justice Kiefel appeared to reject the correctness of the decision in *Tampa*, citing the dissenting opinion of Black CJ with approval, and rejecting the existence of any non-statutory executive power to expel or detain aliens: *CPCF* (2015) 89 ALJR 207, 255–8 [258]–[280], 259 [285]. Justices Hayne and Bell rejected any suggestion that s 61 of the *Constitution* might authorise detention in the absence of statutory authorisation, and appeared to contrast that view with the opinion expressed in *Tampa* by French J: at 240 [149].

The second is that the power is characterised as one to exclude, and ‘to do such things as are necessary’ to achieve that result, including barring entry and compelling departure. As discussed above,²³⁵ detaining asylum seekers and taking them on an open-ended ocean voyage goes well beyond that. It would be hard to conceive of a clearer instance of the ‘executive warrant authorizing arbitrary arrest or detention’ that three judges in *Chu Kheng Lim* denied is part of Australian law.²³⁶ In *Tampa*, French J noted that denial and went on:

The reference to the common law of Australia in ... *Lim* do[es] not deal with the question whether, absent statutory authorisation, s 61 of the *Constitution* confers upon the Executive a power to exclude or prevent the entry of a non-citizen to Australia and powers incidental thereto.²³⁷

He did not suggest that the denial was mistaken, and three judges in *CPCF* expressly affirmed that the principle in *Chu Kheng Lim* extends to the extraterritorial conduct of the Australian government, while a fourth apparently proceeded on the same assumption.²³⁸ We therefore do not accept that the majority judgment in *Tampa* upholds the legality of the sort of executive detention contemplated by the *MPA*.²³⁹

V CONCLUSION

The power of the Commonwealth to prevent entry of persons into Australian territorial waters by intercepting and detaining them in the contiguous zone and beyond raises very different questions from the practice of dealing with unlawful non-citizens *after* the entry of a vessel into national territory. In addition to

235 Parts III(A)(1), IV(B).

236 *Chu Kheng Lim* (1992) 176 CLR 1, 19.

237 *Tampa* (2001) 110 FCR 491, 544 [197].

238 *CPCF* (2015) 89 ALJR 207, 238–9 [142]–[150] (Hayne and Bell JJ), 258 [276] (Kiefel J). Justices Hayne and Bell argued that when adjudicating the legality of detention on an Australian ship in an Australian court it is Australian law that applies, and that there is no reason to think that a principle different from that stated in *Chu Kheng Lim* should be applied: at 238–9 [142]–[150]. Justice Crennan also discussed the principle in *Chu Kheng Lim* as informing the proper construction of the *MPA*, apparently accepting its extraterritorial application: at 249 [215]–[218]. Only Keane J asserted that the *Chu Kheng Lim* principle applies solely to aliens in Australian territory: at 207, 285 [483]. In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151 [134], a unanimous High Court bench declared that ‘seriously considered dicta of a majority of this Court’ is authoritative. The question of whether the principle in *Chu Kheng Lim* applies to the extraterritorial action of the Australian government therefore seems to have been settled in the affirmative, at least in so far as defences to false imprisonment are concerned.

239 The dissenting judges in *CPCF* reached the same conclusion: *CPCF* (2015) 89 ALJR 207, 240 [151] (Hayne and Bell JJ), 259 [286] (Kiefel J). The majority did not find it necessary to answer this question: at 223 [42] (French CJ), 250 [228] (Crennan J), 275 [393] (Gageler J), 284 [476], 289 [513] (Keane J). However, while finding it ‘strictly unnecessary’ to answer the question, Keane J did consider the issue at length, and seemed to conclude that the Commonwealth’s conduct was lawful under s 61 independently of the *MPA*: at 284–6 [476]–[494]. Conversely, Justice Crennan’s express affirmation of the principle from *Chu Kheng Lim* suggests that her Honour is inclined towards the opposite view.

important legal issues about the power of the Australian government to detain persons outside Australia, the *MPA* raises fundamental questions about the regulation of governmental power, the rule of law, and the nature of the relationship between the domestic and international legal frameworks that bind Australia.

The analysis in this article also raises broader issues about the nature and role of the state and the meaning of sovereignty. The distinctive feature of a state as an international legal concept is its territorial nature.²⁴⁰ Therefore, the exercise of state powers beyond its territories in the way envisioned by the *MPA* may be questioned, not simply as a legal issue but also one of international relations.²⁴¹ In this respect, the manner in which the concept of the state and questions of sovereignty impinge on individual rights in the context of asylum require further consideration.²⁴² In Australia, as perhaps is also the case elsewhere in the world, the question of intercepting and detaining asylum seekers at sea is focused on questions of sovereignty and territory. Despite domestic efforts to curtail accountability for breach of international obligations, Australia continues to be bound by international legal norms, including those which impose obligations as to refugee protection and human rights. These treaty obligations do not carry with them any direct enforceability mechanisms, but nevertheless provide a standard by which the Australian government can be held accountable for extraordinary detention measures at sea.

240 'The importance of State territory lies in the fact that it is the space within which the State exercises its supreme authority. State territory is the object of the Law of Nations because the latter recognises the supreme authority of every State within its territory': L Oppenheim, *International Law: A Treatise* (Longmans, Green, 2nd ed, 1912) vol 1, 231 [170].

241 As international law scholar Cornelisse has noted, 'since the early twentieth century onwards, we have witnessed an ever more progressive assertion of sovereignty as inherently entailing the right to exclude foreigners': Galina Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Brill, 2010) 174. See also John H Herz 'Rise and Demise of the Territorial State' (1957) 9 *World Politics* 473, 480–1: 'sovereign units must know in some detail where their jurisdictions end and those of other units begin; without such standards, nations would be involved in constant strife over the implementation of their independence'.

242 As Cornelisse notes 'the contemporary portrayal of immigration as impinging first and foremost on the "integrity of national borders" overpowers the consideration of most – albeit not all – individual rights that may be at stake in its regulation': Cornelisse, above n 241.