

**DOES LIM TRULY HAVE ‘NOTHING TO SAY’  
ABOUT THE COMMONWEALTH’S REGIONAL  
PROCESSING ARRANGEMENTS? HABEAS CORPUS  
AS A VEHICLE FOR TESTING THE  
CONSTITUTIONAL VALIDITY OF OFFSHORE  
DETENTION**

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*The High Court recently held that offshore immigration detention under the Commonwealth’s regional processing arrangements is attributed to the third sovereign interposed in the detention, rather than the Commonwealth. Thus, the Court was not required to determine the constitutional validity of the law supporting the Commonwealth’s involvement in the detention, as it was not detention ‘by the Commonwealth’. This article considers how these issues might be canvassed on an application for habeas corpus by a person detained under these arrangements. It examines jurisprudence in England and Wales and the United States concerning habeas corpus and offshore detention, and applies those principles to the regional processing scenario against the Australian constitutional backdrop. It is contended that seeking habeas in such circumstances could lead to a different outcome in future cases.*

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## I INTRODUCTION

Many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their contemporary and undiminished force.<sup>1</sup>

'This is such a case', Brennan J in *Re Bolton; Ex parte Beane* ('*Re Bolton*') continued, 'and ... habeas corpus ... [is one] such [law]'.<sup>2</sup> These remarks define this article, their own force remaining undiminished. The concern is with the offshore detention of 'aliens' under the Commonwealth's regional processing ar-

<sup>1</sup> *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 520-1 (Brennan J) ('*Re Bolton*').

<sup>2</sup> *Ibid* 521.

rangements. A re-examination of the foundational legal protections of individual liberty is necessary within this setting, because ‘all else’ has failed.<sup>3</sup> Indeed, legal challenges to the regional processing arrangements have proved unsuccessful.<sup>4</sup> The decision of the High Court in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (‘M68’)<sup>5</sup> was ‘one more nail in the coffin’,<sup>6</sup> and is the central focus herein. There, the Court, by majority, rejected an argument that the principle in *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (‘Lim’)<sup>7</sup> applied to detention under the regional processing arrangements.<sup>8</sup> *Lim* holds that a law conferring authority upon the executive to detain aliens is valid, so long as the authority conferred is reasonably necessary for a permitted purpose.<sup>9</sup> So limited, such a law does not confer upon the executive the judicial power of the Commonwealth, and so does not offend ch III of the *Constitution*.<sup>10</sup>

This article is a response to the decision in *M68*, and in particular the plurality’s holding that ‘*Lim* has nothing to say’ about detention under the regional processing arrangements.<sup>11</sup> The fundamental argument herein is that *Lim* may apply to such detention. It is not suggested that *M68* was wrongly decided, however; rather, it is argued that a different result should be reached on an application for a writ of habeas corpus, with which the Court in that case was not concerned. By advancing a positive claim in response to the decision in *M68*, this article builds on the limited existing commentary on that case, which has

<sup>3</sup> See Justice Robert J Sharpe, ‘Book Review: *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth* by DJ Clark and G McCoy’ (2001) 1(2) *Oxford University Commonwealth Law Journal* 287, 292.

<sup>4</sup> See, eg, *Sadiqi v Commonwealth* [No 3] [2010] FCA 596, [52] (McKerracher J); *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28, 46 [38], 48 [45]–[49] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (‘*Plaintiff S156/2013*’); *Plaintiff S195/2016 v Minister for Immigration and Border Protection* (2017) 261 CLR 622, 636–7 [29] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) (‘*Plaintiff S195/2016*’).

<sup>5</sup> (2016) 257 CLR 42 (‘*M68*’).

<sup>6</sup> David Hume, ‘Plaintiff M68-2015: Offshore Processing and the Limits of Chapter III’, *AUSPUBLAW* (Blog Post, 26 February 2016) <<https://auspublaw.org/2016/02/plaintiff-m68-2015/>>, archived at <<https://perma.cc/LQS7-LP3U>>.

<sup>7</sup> (1992) 176 CLR 1 (‘*Lim*’).

<sup>8</sup> *M68* (n 5) 70 [41] (French CJ, Kiefel and Nettle JJ), 124–5 [238]–[241] (Keane J).

<sup>9</sup> See *Lim* (n 7) 32–3 (Brennan, Deane and Dawson JJ, Mason CJ agreeing at 10), 71 (McHugh J).

<sup>10</sup> *Ibid.*

<sup>11</sup> *M68* (n 5) 70 [41] (French CJ, Kiefel and Nettle JJ).

rested largely on notions of form and substance in reviewing detention arrangements.<sup>12</sup>

Part II of this article provides an account of the *Lim* principle, and discusses its application in *M68*. Noting the importance of the law of habeas corpus in the reasons of Gageler J in that case,<sup>13</sup> as well as the increasing number of applications for habeas within the migration setting,<sup>14</sup> Part III discusses the High Court's jurisdiction and power to direct the issue of habeas, and in particular the writ's extraterritorial reach.<sup>15</sup> The different approaches to this issue in England and Wales and the United States are considered in turn, after which a suggested Australian position is offered. Finally, Part IV engages with the question whether *Lim* may apply on an application for habeas corpus in respect of detention under the regional processing arrangements. Given that the focus is on *Lim* in the context of the decision in *M68*, this article does not consider any

<sup>12</sup> See Bryanna Workman, 'Protecting Individual Liberty: Recent Applications of the *Lim* Principle' (2016) 35(2) *University of Tasmania Law Review* 136, 141–3; Hume (n 6); Scott Stephenson, Michael Crommelin and Cheryl Saunders, 'Scott Stephenson, Michael Crommelin and Cheryl Saunders on the Judgments in Plaintiff M68-2015 v Commonwealth', *Opinions on High* (Blog Post, 29 February 2016) <<https://blogs.unimelb.edu.au/opinionsonhigh/2016/02/29/stephenson-crommelin-saunders-m68>>, archived at <<https://perma.cc/5WNH-5VLA>>; Madeline Gleeson, 'Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors [2016] HCA 1', *Andrew & Renata Kaldor Centre for International Refugee Law, UNSW Law* (Blog Post, 13 July 2016) <<https://kaldorcentre.unsw.edu.au/publication/plaintiff-m682015-v-minister-immigration-and-border-protection-ors-2016-hca-1>>, archived at <<https://perma.cc/8DHM-9E7W>>.

<sup>13</sup> See *M68* (n 5) 103–7 [155]–[166].

<sup>14</sup> See, eg, *Mokhles v Minister for Home Affairs* (2020) 382 ALR 1, 3 [4] (Edelman J) ('*Mokhles*'); Transcript of Proceedings, *Kazemi v Minister for Home Affairs* [2020] HCATrans 124, 15–20 (Edelman J); *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 416, [11] (Anderson J), revd (2020) 283 FCR 602, 608 [4], 621–2 [72] (Allsop CJ), 622 [73] (Besanko J), 632 [113] (Mortimer J) ('*McHugh (Full Court)*'); *Commonwealth v AJL20* (2021) 391 ALR 562, 566 [7] (Kiefel CJ, Gageler, Keane and Steward JJ) ('*AJL20*').

<sup>15</sup> See *R v Secretary of State for Home Affairs; Ex parte O'Brien* [1923] 2 KB 361, 381 (Banks LJ), 392–3 (Scrutton LJ), 398–9 (Atkin LJ) ('*O'Brien*'), affd *Secretary of State for Home Affairs v O'Brien* [1923] AC 603, 613–14 (Earl of Birkenhead), 620 (Viscount Finlay), 646 (Lord Shaw); *Ex parte Mwenya* [1960] 1 QB 241, 311 (Sellers LJ) ('*Mwenya*'); *Hicks v Ruddock* (2007) 156 FCR 574, 576 [1], 600 [92]–[94] (Tamberlin J) ('*Hicks*'); *Rahmatullah v Secretary of State for Defence* [2012] 1 WLR 1462, 1472 [20]–[21] (Laws LJ) ('*Rahmatullah (Divisional Court)*'). See also at 1489 [52] (Lord Neuberger MR) ('*Rahmatullah (Court of Appeal)*'), affd [2013] 1 AC 614, 645 [76], 649 [85] (Lord Kerr JSC for Lords Dyson MR, Kerr and Wilson JJC, Lord Phillips agreeing at 653 [107], Lord Reed JSC agreeing at 653 [108], Lord Carnwath and Baroness Hale JJC agreeing at 655 [116]) ('*Rahmatullah (Supreme Court)*'). See generally Matthew Groves, 'Habeas Corpus, Justiciability and Foreign Affairs' (2013) 11(3) *New Zealand Journal of Public and International Law* 587, 597, 599 ('Habeas Corpus'). Cf *Re Sankoh* (Court of Appeal of England and Wales, Ward, Waller and Laws LJ), 27 September 2000 [2], [12]–[13] (Laws LJ).

potential administrative law grounds of habeas review in this setting. It is emphasised, however, that the discussion of the extraterritorial reach of habeas corpus would be equally relevant to applications raising such grounds.

The conclusion is that *Lim* would apply on an application for habeas corpus in respect of detention under the regional processing arrangements, such that the constitutional validity of s 198AHA(2) of the *Migration Act 1958* (Cth) (*Migration Act*), the law authorising the Commonwealth's involvement in regional processing, would arise for determination. This ultimate question is beyond the scope of this article, the engagement of *Lim* being a more pressing concern in light of the majority view in *M68*.<sup>16</sup> However, if s 198AHA(2) were found to be invalid under the *Lim* principle, the result would be that the detention would be unlawful and habeas would issue to compel release.<sup>17</sup> Such a result would have broader implications for the Commonwealth's regional processing arrangements.<sup>18</sup>

## II CONSTITUTIONAL CONTEXT

### A Executive Detention of Aliens and ch III: The *Lim* Principle

The starting point in respect of ch III of the *Constitution* is the first limb of the decision in *R v Kirby; Ex parte Boilermakers' Society of Australia* (*'Boilermakers' Case*): 'No part of the judicial power can be conferred ... otherwise than in accordance with ... Chap III.'<sup>19</sup> To the exclusion of the legislature and executive, therefore, ch III vests the judicial power of the Commonwealth in the courts it designates.<sup>20</sup> Of the functions forming 'part' of the judicial power, '[t]he most important ... is the adjudgment and punishment of criminal guilt.'<sup>21</sup> It is exclusively for a ch III court, therefore, to order the punitive detention of a person.<sup>22</sup> Thus, Deane J in *Re Bolton* said: 'The common law ... knows no ... warrant pursuant to which either citizen or alien can be deprived of [their] freedom by

<sup>16</sup> But see *M68* (n 5) 87 [101] (Bell J), 111–12 [185] (Gageler J), 160–1 [381]–[382], 162–3 [388]–[393] (Gordon J). Their Honours determined that *Lim* (n 7) was engaged. By majority, s 198AHA(2) was held to be valid: *M68* (n 5) 87–8 [101]–[103] (Bell J), 111–12 [185], 112 [187] (Gageler J). See also at 73–5 [54] (French CJ, Kiefel and Nettle JJ), 131 [264]–[265] (Keane J).

<sup>17</sup> See *Lim* (n 7) 19 (Brennan, Deane and Dawson JJ), 51 (Toohey J).

<sup>18</sup> See Hume (n 6).

<sup>19</sup> (1956) 94 CLR 254, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) (*'Boilermakers' Case*).

<sup>20</sup> *Constitution* ss 71, 77(iii).

<sup>21</sup> *Lim* (n 7) 27 (Brennan, Deane and Dawson JJ).

<sup>22</sup> *Ibid.*

mere administrative ... action.<sup>23</sup> This proposition is subject to exceptions. Parliament may authorise executive detention of citizens in those circumstances that are 'not seen by the law as punitive', such as detention on remand.<sup>24</sup> As to aliens, however, Brennan, Deane and Dawson JJ in *Lim* (with whom Mason CJ agreed) recognised a principled exception, based upon the interaction between the 'aliens' power in s 51(xix) of the *Constitution* and ch III.<sup>25</sup>

Their Honours in *Lim* first determined that *any* executive detention of an alien must be authorised by a law of the Commonwealth Parliament (the 'preliminary holding'),<sup>26</sup> then expounding a principle of constitutional validity applicable to such laws (the 'seminal holding').<sup>27</sup> It was held that, although s 51 is expressed as being 'subject to' the *Constitution* and, concomitantly, the separation of judicial power mandated by ch III, s 51(xix) 'encompasses the conferral upon the Executive of authority to detain ... an alien in custody for the purposes of expulsion or deportation.'<sup>28</sup> To these permitted purposes, their Honours added 'to receive, investigate and determine an application by [an] alien for an entry permit.'<sup>29</sup> Provided that the authority conferred 'is limited to what is reasonably ... necessary for [those] purposes,'<sup>30</sup>

[s]uch limited authority to detain an alien in custody can be conferred on the Executive without infringement of Ch III ... [T]o that limited extent, authority to detain in custody is neither punitive in nature nor part of the judicial power of the Commonwealth. ... [I]t takes its character from the executive powers to exclude, admit and deport of which it is an incident.<sup>31</sup>

The operation of this principle in the context of detention challenges was recently explained by the majority of Kiefel CJ, Gageler, Keane and Steward JJ in *Commonwealth v AJL20* ('AJL20'):

If the statute, properly construed, can be seen to conform to constitutional limitations upon legislative competence without any need to read it down to save its validity, then it is valid in all its applications, and no further constitutional issue

<sup>23</sup> *Re Bolton* (n 1) 528.

<sup>24</sup> *Lim* (n 7) 28 (Brennan, Deane and Dawson JJ).

<sup>25</sup> *Ibid* 32 (Brennan, Deane and Dawson JJ, Mason CJ agreeing at 10).

<sup>26</sup> *Ibid* 19 (Brennan, Deane and Dawson JJ).

<sup>27</sup> As it has been described elsewhere: *AJL20 v Commonwealth* (2020) 279 FCR 549, 559 [29] (Bromberg J).

<sup>28</sup> *Lim* (n 7) 32 (Brennan, Deane and Dawson JJ) (emphasis added).

<sup>29</sup> *Ibid*.

<sup>30</sup> *Ibid* 33.

<sup>31</sup> *Ibid* 32 (citations omitted).

arises. The question then is whether the executive action in question was authorised by the statute, with that question to be resolved by reference to the statute as a matter of administrative law.<sup>32</sup>

Their Honours proceeded to decry ‘the heresy’ that the conduct of a particular instance of detention by the executive ‘can take the law [authorising that detention] outside Parliament’s competence.’<sup>33</sup> This reasoning has the effect of drawing attention, in most cases, to questions of administrative law. But that will not always be so. The decision in *Al-Kateb v Godwin* (‘*Al-Kateb*’) is one such example.<sup>34</sup> There, an additional purpose for which a law may confer upon the executive authority to detain aliens in custody, in point of constitutional principle, was embraced by a majority of the High Court — namely, ‘exclusion from the Australian community.’<sup>35</sup> It might be noted that, unlike the purposes identified in *Lim*, this purpose is an end in itself, and is not ‘connected’ to any administrative processes.<sup>36</sup> In this respect, it is a ‘continuing purpose.’<sup>37</sup> On the basis of the decision in *Al-Kateb*, therefore, it has been observed that the list of permitted purposes ‘may not be closed.’<sup>38</sup>

Although ‘[t]he validity of immigration detention was upheld in ... *Lim*,’<sup>39</sup> and notwithstanding that the list of permitted purposes may yet be expanded

<sup>32</sup> *AJL20* (n 14) 574 [43] (Kiefel CJ, Gageler, Keane and Steward JJ) (citations omitted). See also at 584 [78]–[80] (Gordon and Gleeson JJ), 598–9 [127]–[129] (Edelman J). See also *ASP15 v Commonwealth* (2016) 248 FCR 372, 383 [41]–[42] (Robertson, Griffiths and Bromwich JJ). See generally *Wotton v Queensland* (2012) 246 CLR 1, 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

<sup>33</sup> *AJL20* (n 14) 576 [48] (Kiefel CJ, Gageler, Keane and Steward JJ). See also at 607 [156] (Edelman J).

<sup>34</sup> (2004) 219 CLR 562 (‘*Al-Kateb*’).

<sup>35</sup> *Ibid* 648 [255] (Hayne J, Heydon J agreeing at 662–3 [303]). See also at 584–5 [45]–[46] (McHugh J). Justice Callinan voiced tentative support for this additional purpose: at 658 [289].

<sup>36</sup> Cf *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, 369 [139] (Crennan, Bell and Gageler JJ) (‘*Plaintiff M76/2013*’).

<sup>37</sup> James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis, 2<sup>nd</sup> ed, 2020) 306 [5.144] (‘*The Federal Judicature*’).

<sup>38</sup> *M68* (n 5) 161 [382] (Gordon J). See also *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582, 594 [22] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ). See generally James Stellios, *Zines’s The High Court and the Constitution* (Federation Press, 6<sup>th</sup> ed, 2015) 316; Gabrielle Appleby and Stephen McDonald, ‘Punishment and Chapter III of the Constitution’ in Justice John Griffiths and James Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (Federation Press, 2020) 64, 96.

<sup>39</sup> *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, 512 [73] n 79 (Kirby J) (‘*Behrooz*’). See also *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, 77 [227] (Callinan J) (‘*Re Woolley*’); *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 355 [81] (Gageler and Gordon JJ) (‘*Falzon*’); *AJL20* (n 14) 569–70 [23] (Kiefel CJ, Gageler, Keane and Steward JJ).

further, the authority of the *Lim* principle remains undiminished,<sup>40</sup> as an important limitation upon Parliament's power to authorise executive detention of aliens. Indeed, it may be seen as a 'protective principle',<sup>41</sup> as recently discussed by Gabrielle Appleby and Stephen McDonald.<sup>42</sup> That is because the object of the separation of powers mandated by the *Constitution*, from which *Lim* springs, is the protection of individual liberty,<sup>43</sup> in that 'no individual can be deprived of ... liberty at the instance of ... the Commonwealth executive.'<sup>44</sup> *Lim* ensures that detention is not implemented merely 'at the instance' of the executive, in that it must be authorised by a valid law of the Commonwealth Parliament.<sup>45</sup> In this, *Lim* may be seen as part of the constitutional framework protecting individual liberty.

### B Regional Processing and ch III: The Decision in M68

The High Court in *M68* considered whether *Lim* applied to the Commonwealth's regional processing arrangements, as implemented in the Republic of

<sup>40</sup> Contrary views have emerged: see, eg, *Lim* (n 7) 55 (Gaudron J); *Kruger v Commonwealth* (1997) 190 CLR 1, 110–11 (Gaudron J); *Re Woolley* (n 39) 25–7 [59]–[62] (McHugh J). Justice Gaudron and McHugh J said that the validity of executive detention of aliens was simply a question of characterisation. That position has not gained the acceptance of a majority of the Court, however. Nor has the approach of Callinan J in *Al-Kateb* (n 34), his Honour suggesting that the purpose of detention was the sole point of inquiry: at 660 [294]. The majority approach in *Lim* (n 7) remains authoritative: see, eg, *Plaintiff M76/2013* (n 36) 369 [137]–[138] (Crennan, Bell and Gageler JJ); *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219, 231 [25]–[26] (French CJ, Hayne, Crennan, Kiefel and Keane JJ); *M68* (n 5) 69–70 [40] (French CJ, Kiefel and Nettle JJ), 86 [97]–[98] (Bell J), 130 [260] (Keane J), 161–2 [385]–[386] (Gordon J). See generally Appleby and McDonald (n 38) 69–70; Stellios, *Zines's The High Court and the Constitution* (n 38) 317–18.

<sup>41</sup> *Falzon* (n 39) 344 [33] (Kiefel CJ, Bell, Keane and Edelman JJ).

<sup>42</sup> Appleby and McDonald (n 38) 65–6. See generally Workman (n 12).

<sup>43</sup> See, eg, *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 382 (Isaacs J), quoting with minor changes William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765–69) bk 1, 269; *R v Davison* (1954) 90 CLR 353, 380–1 (Kitto J); *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 11 (Jacobs J); *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 151 (Brennan J), quoting with minor changes Blackstone (n 43) bk 1, 269; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 12 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *M68* (n 5) 86 [97] (Bell J). See generally Stellios, *The Federal Judicature* (n 37) 94–9 [3.88]–[3.95]; Appleby and McDonald (n 38) 86–8, 96.

<sup>44</sup> *Magaming v The Queen* (2013) 252 CLR 381, 400 [63] (Gageler J).

<sup>45</sup> *Lim* (n 7) 19 (Brennan, Deane and Dawson JJ). See also at 10 (Mason CJ), 55 (Gaudron J).

Nauru.<sup>46</sup> Because this issue assumes significance herein, it is necessary to provide an account of those arrangements. The decision in *M68* is then discussed.

### 1 Background: The Regional Processing Arrangements in Nauru

The advent of regional processing coincided with the ‘*Tampa* incident’.<sup>47</sup> The ‘Pacific Solution’ to that matter involved Nauru agreeing to process a number of the asylum seekers rescued by the MV *Tampa*,<sup>48</sup> arrangements which were implemented more broadly in the years following.<sup>49</sup> The arrangements were discontinued in 2007,<sup>50</sup> but reinstated in 2012.<sup>51</sup> Amendments to the *Migration Act* were consequently enacted.<sup>52</sup> Pursuant to inserted s 198AB(1),<sup>53</sup> the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (‘Minister’) designated each of Papua New Guinea and Nauru as a ‘regional

<sup>46</sup> *M68* (n 5) 69–70 [38]–[41] (French CJ, Kiefel and Nettle JJ), 80–1 [78] (Bell J), 111–12 [183]–[185] (Gageler J), 124–5 [238]–[241] (Keane J).

<sup>47</sup> Over 400 asylum seekers were rescued at sea by the MV *Tampa*. The Commonwealth prevented them from being brought to Australia: see, eg, David Marr and Marian Wilkinson, *Dark Victory* (Allen & Unwin, 2004) 24–9; Justice Stephen Gageler, ‘A Tale of Two Ships: The MV *Tampa* and the SS *Afghan*’ (2019) 40(3) *Adelaide Law Review* 615, 616. See generally *Ruddock v Vadarlis* (2001) 110 FCR 491 (‘*Tampa Case*’).

<sup>48</sup> Peter Mares, ‘Ten Years after *Tampa*’ (August 2011) *The Monthly* 11. See also Marr and Wilkinson (n 47) 142–3.

<sup>49</sup> See generally Andrew Clennell, ‘Nauru Asked to Take More Boat People’, *The Sydney Morning Herald* (Sydney, 1 December 2001) 2; Mike Seccombe, ‘Detainees for Succour: Nauru to Get \$10m More’, *The Sydney Morning Herald* (Sydney, 12 December 2001) 1.

<sup>50</sup> Craig Skehan, ‘Pacific Solution Ends but Tough Stance to Remain’, *The Sydney Morning Herald* (online, 8 December 2007) <<https://www.smh.com.au/national/pacific-solution-ends-but-tough-stance-to-remain-20071208-gdrrvz.html>>, archived at <<https://perma.cc/NRS9-4M6A>>.

<sup>51</sup> Alison Rourke, ‘Australia to Deport Boat Asylum Seekers to Pacific Islands’, *The Guardian* (online, 13 August 2012) <<https://www.theguardian.com/world/2012/aug/13/australia-asylum-seekers-pacific-islands>>, archived at <<https://perma.cc/AT4H-XXJK>>. See also Julia Gillard, ‘Moving Australia Forward’ (Speech, Lowy Institute, 6 July 2010) <[https://archive.loyyinstitute.org/sites/default/files/pubfiles/Moving-Australia-forward\\_Julia-Gillard-PM\\_1.pdf](https://archive.loyyinstitute.org/sites/default/files/pubfiles/Moving-Australia-forward_Julia-Gillard-PM_1.pdf)>, archived at <<https://perma.cc/NH54-8QM6>>; Matthew Franklin and Lanai Vasek, ‘Labor Urged to Revive Pacific Solution by Refugee Activists’, *The Australian* (online, 4 June 2011) <<https://www.theaustralian.com.au/national-affairs/labor-urged-to-revive-pacific-solution-by-refugee-activists/news-story/a80707ba2815ea2ac-daa379939932e70>>, archived at <<https://perma.cc/2BAX-7XFK>>.

<sup>52</sup> See *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) (‘2012 Migration Amendment Act’).

<sup>53</sup> *Migration Act 1958* (Cth) s 198AB(1) (‘*Migration Act*’), as inserted by *2012 Migration Amendment Act* (n 52) sch 1 item 25.

processing country.<sup>54</sup> Inserted s 5AA(1) and ss 13(1) and 14(1) provide that a person seeking entry into Australia without a valid visa is an ‘unlawful non-citizen’ who must be detained under s 189(1), and that such a person who has travelled by sea is an ‘unauthorised maritime arrival’, who must be taken to a regional processing country pursuant to inserted s 198AD(2).<sup>55</sup>

The Commonwealth and Nauru signed a Memorandum of Understanding (‘MOU’) for the establishment of a Regional Processing Centre (‘RPC’) in Nauru,<sup>56</sup> and also agreed to detailed ‘Administrative Arrangements.’<sup>57</sup> The operation of this framework, elucidated by the agreed facts stated for the Court in *M68*,<sup>58</sup> was detailed extensively in the reasons of Gordon J.<sup>59</sup> For her Honour, the starting point was this: ‘[t]he Commonwealth *may* transfer but Nauru *will* accept Transferees.’<sup>60</sup> ‘Transferees’ were persons transferred, in accordance with Australian law,<sup>61</sup> to Nauru for the purposes of the MOU.<sup>62</sup> Thereafter, all processing decisions would be made under Nauruan law.<sup>63</sup> On behalf of Transferees, however, the Commonwealth would lodge applications for RPC visas.<sup>64</sup> RPC visas were issued by Nauru to facilitate residence during processing.<sup>65</sup> The ‘invariable practice’ was that RPC visas would require that Transferees reside at the RPC.<sup>66</sup> It was an offence to attempt to leave the RPC without approval.<sup>67</sup> The Commonwealth was obliged to procure security services,<sup>68</sup> which it contracted

<sup>54</sup> Minister for Immigration and Citizenship (Cth), *Instrument of Designation of the Republic of Nauru as a Regional Processing Country under Subsection 198AB(1) of the Migration Act 1958* (10 September 2012) 1; Minister for Immigration and Citizenship (Cth), *Instrument of Designation of the Independent State of Papua New Guinea as a Regional Processing Country under Subsection 198AB(1) of the Migration Act 1958* (9 October 2012) 1.

<sup>55</sup> See especially *Migration Act* (n 53) s 5AA, as inserted by *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth) sch 1 item 8; *Migration Act* (n 53) s 198AD(2), as inserted by *2012 Migration Amendment Act* (n 52) sch 1 item 25.

<sup>56</sup> *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues*, signed 3 August 2013, cl 10 (‘*Nauru–Australia MOU*’).

<sup>57</sup> *M68* (n 5) 137 [293] (Gordon J).

<sup>58</sup> See below Part II(B)(2).

<sup>59</sup> See *M68* (n 5) 137–42 [293]–[307]. See also Hume (n 6).

<sup>60</sup> *M68* (n 5) 136 [288] (emphasis in original).

<sup>61</sup> *Ibid* 138 [295]. See *Migration Act* (n 53) s 198AD(2).

<sup>62</sup> *M68* (n 5) 135 [283] (Gordon J).

<sup>63</sup> See *ibid* 139 [300].

<sup>64</sup> *Ibid* 138 [295]–[296], 143 [313].

<sup>65</sup> *Ibid* 61 [5] (French CJ, Kiefel and Nettle JJ).

<sup>66</sup> *Ibid* 143 [313] (Gordon J). See also at 113 [192], 118 [216] (Keane J), 132 [268] (Gordon J).

<sup>67</sup> *Ibid* 107–8 [169] (Gageler J).

<sup>68</sup> *Ibid* 139 [298], [300] (Gordon J).

Transfield Services (Australia) Pty Ltd ('Transfield') to provide.<sup>69</sup> The Commonwealth consented to a subcontract between Transfield and Wilson Parking Australia 1992 Pty Ltd ('Wilson Security'),<sup>70</sup> which agreed to monitor the sole point of entry to and exit from the RPC, and which would seek assistance from Nauruan Police in respect of unauthorised departures.<sup>71</sup> Ultimately, Transferees would either be settled in Nauru, resettled in a third country, or returned to their country of origin.<sup>72</sup>

## 2 The Facts and Issues in M68

The plaintiff travelled to Australia by sea.<sup>73</sup> Because she did not hold a visa for entry into Australia,<sup>74</sup> she was transferred to Nauru pursuant to s 198AD(2).<sup>75</sup> After being brought to Australia temporarily to undergo medical treatment,<sup>76</sup> the plaintiff instituted proceedings against the Commonwealth in the original jurisdiction of the High Court,<sup>77</sup> seeking a declaration that her detention in Nauru had been unlawful.<sup>78</sup> Questions stated for the opinion of the Court were later amended due to 'events of significance' that had since occurred.<sup>79</sup> Relevantly,<sup>80</sup> s 198AHA had been inserted into the *Migration Act*,<sup>81</sup> with retrospective operation.<sup>82</sup> Section 198AHA applies 'if the Commonwealth enters into an

<sup>69</sup> Ibid 63 [12] (French CJ, Kiefel and Nettle JJ), 146 [322] (Gordon J).

<sup>70</sup> See ibid 148 [333] (Gordon J).

<sup>71</sup> Ibid 108 [170]–[171] (Gageler J).

<sup>72</sup> Ibid 136–7 [289] (Gordon J), quoting *Nauru–Australia MOU* (n 56) cls 12–14.

<sup>73</sup> M68 (n 5) 113 [190] (Keane J), 132 [266] (Gordon J). See also at 60 [1] (French CJ, Kiefel and Nettle JJ).

<sup>74</sup> Ibid 132 [266] (Gordon J).

<sup>75</sup> Ibid 113 [191] (Keane J), 132 [267] (Gordon J).

<sup>76</sup> Ibid 113 [193] (Keane J), 133 [271] (Gordon J).

<sup>77</sup> See also Transfield Services (Australia) Pty Ltd, 'Outline of Submissions of the Third Defendant', Submission in *Plaintiff M68/2015 v Minister for Immigration and Border Protection*, M68/2015, 18 September 2015, 1 [2]–[3]. Transfield substantially joined in the arguments put by the Commonwealth.

<sup>78</sup> M68 (n 5) 65 [20] (French CJ, Kiefel and Nettle JJ), 89 [109] (Gageler J).

<sup>79</sup> Ibid 89–90 [110] (Gageler J).

<sup>80</sup> It was also announced that freedom of movement would be afforded at the RPC: ibid 90 [111] (Gageler J). This rendered hypothetical the plaintiff's claim for prohibition to restrain the Commonwealth from returning her to Nauru, and a distinction was drawn in the amended special case between 'past conduct' in Nauru (when no freedom of movement was afforded) and the 'future arrangements': at 133 [273]–[274], 134 [278]–[280] (Gordon J). See below Part IV(C).

<sup>81</sup> See *Migration Amendment (Regional Processing Arrangements) Act 2015* (Cth) sch 1 item 1.

<sup>82</sup> Ibid s 2, cited in M68 (n 5) 89–90 [110] (Gageler J).

arrangement ... in relation to the regional processing functions of a country.’<sup>83</sup> Upon entry into such an arrangement, sub-s (2)(a) authorises the Commonwealth to ‘take ... any *action* in relation to the arrangement’,<sup>84</sup> which includes ‘exercising restraint over the liberty of a person.’<sup>85</sup> Subsection (3) provides that ‘subsection (2) is intended to ensure that the Commonwealth has *capacity* ... to take action, without otherwise affecting the lawfulness of that action.’<sup>86</sup> The lawfulness of that action would depend upon the laws of the regional processing country.<sup>87</sup> Section 198AHA(2) was relied upon by the Commonwealth in *M68* as authority for its involvement in regional processing in Nauru.<sup>88</sup>

The plaintiff argued that, as a matter of substance, she was detained in custody by the Commonwealth, because it had ‘effectively controlled’ her detention.<sup>89</sup> She submitted that such conduct was sufficient to engage *Lim*, reasoning that, in expounding what was referred to above as the preliminary holding,<sup>90</sup> the plurality in *Lim* spoke broadly of authority to ‘authorise or enforce’ detention.<sup>91</sup> Thus, the plaintiff argued that s 198AHA(2) was invalid because it authorised her detention, which was not reasonably necessary for a permitted purpose.<sup>92</sup> Those permitted purposes were spent upon her removal from Australia.<sup>93</sup>

The Commonwealth submitted that *Lim* was not engaged because it had not detained the plaintiff ‘in custody.’<sup>94</sup> It said that the plaintiff was detained by Nauru, because her detention was authorised under the laws of Nauru.<sup>95</sup> A distinction was drawn between the preliminary holding in *Lim* and what was referred to above as the seminal holding,<sup>96</sup> which the Commonwealth submitted

<sup>83</sup> *Migration Act* (n 53) s 198AHA(1).

<sup>84</sup> *Ibid* s 198AHA(2)(a) (emphasis added).

<sup>85</sup> *Ibid* s 198AHA(5) (definition of ‘action’ para (a)).

<sup>86</sup> *Ibid* s 198AHA(3) (emphasis added).

<sup>87</sup> See *M68* (n 5) 58 (SP Donaghue QC) (during argument); Explanatory Memorandum, Migration Amendment (Regional Processing Arrangements) Bill 2015 (Cth) 7 [17]–[18] (‘Explanatory Memorandum’).

<sup>88</sup> *M68* (n 5) 63 [15] (French CJ, Kiefel and Nettle JJ), 125 [242] (Keane J).

<sup>89</sup> *Ibid* 69 [37]–[38] (French CJ, Kiefel and Nettle JJ).

<sup>90</sup> See above n 26 and accompanying text.

<sup>91</sup> *M68* (n 5) 70 [41] (French CJ, Kiefel and Nettle JJ), quoting with minor changes *Lim* (n 7) 19 (Brennan, Deane and Dawson JJ).

<sup>92</sup> *M68* (n 5) 85 [95] (Bell J), 111 [183] (Gageler J).

<sup>93</sup> See *ibid* 133 [274], 166 [403] (Gordon J).

<sup>94</sup> *Ibid* 82 [83] (Bell J). See also at 70 [41] (French CJ, Kiefel and Nettle JJ).

<sup>95</sup> *Ibid* 55 (JT Gleeson SC) (during argument).

<sup>96</sup> *Ibid* 54 (JT Gleeson SC) (during argument). See above nn 27–31 and accompanying text.

was the ‘true principle’ for which *Lim* is authority.<sup>97</sup> The Commonwealth noted that, in enunciating this principle, the plurality in *Lim* referred only to ‘detention *in custody*’, and not to broader arrangements.<sup>98</sup> In the alternative, the Commonwealth argued that any detention authorised by s 198AHA(2) was reasonably necessary for the processing of claims for refugee status.<sup>99</sup>

### 3 Decision

The Court held, by majority, that the regional processing arrangements did not offend *Lim*.<sup>100</sup> The majority comprised French CJ, Kiefel and Nettle JJ, Bell J, Gageler J and Keane J.<sup>101</sup> Justice Gordon dissented.<sup>102</sup>

The members of the majority disagreed as to the engagement of *Lim*. The plurality and Keane J rejected the plaintiff’s case, holding that the plaintiff was detained in custody by Nauru.<sup>103</sup> That was because “[d]etention” ... involves the exercise of governmental power,<sup>104</sup> their Honours observing that the plaintiff’s detention was authorised ‘under the laws of Nauru [and was] administered by ... Nauru.’<sup>105</sup> Their Honours accepted that the Commonwealth had ‘participated’ in her detention.<sup>106</sup> The plurality determined, however, that ‘*Lim* has nothing to say about the validity of actions of the Commonwealth ... in participating in ... detention ... by another State.’<sup>107</sup>

Justice Bell and Gageler J determined that *Lim* applied,<sup>108</sup> but held that s 198AHA(2) was valid.<sup>109</sup> Justice Bell accepted that the plaintiff’s detention ‘was, as a matter of substance, caused and effectively controlled by the Commonwealth’,<sup>110</sup> and determined that there was ‘no principled reason’ why *Lim*

<sup>97</sup> *M68* (n 5) 85–6 [96] (Bell J).

<sup>98</sup> *Ibid* 52, 55 (JT Gleeson SC) (during argument) (emphasis added).

<sup>99</sup> See Minister for Immigration and Border Protection and Commonwealth, ‘Submissions of the First and Second Defendants’, Submission in *Plaintiff M68/2015 v Minister for Immigration and Border Protection*, M68/2015, 18 September 2015, 15–16 [75]–[77].

<sup>100</sup> *M68* (n 5) 69–70 [40]–[41] (French CJ, Kiefel and Nettle JJ), 87–8 [101]–[103] (Bell J), 111–12 [185], 112 [187] (Gageler J), 131 [264] (Keane J).

<sup>101</sup> *Ibid*.

<sup>102</sup> *Ibid* 167 [408] (Gordon J).

<sup>103</sup> *Ibid* 67 [32] (French CJ, Kiefel and Nettle JJ), 124 [239] (Keane J).

<sup>104</sup> *Ibid* 67 [30] (French CJ, Kiefel and Nettle JJ).

<sup>105</sup> *Ibid* 67 [32] (French CJ, Kiefel and Nettle JJ). See also at 115 [199], 125 [242] (Keane J).

<sup>106</sup> *Ibid* 115 [199] (Keane J). See also at 69 [37] (French CJ, Kiefel and Nettle JJ).

<sup>107</sup> *Ibid* 70 [41] (French CJ, Kiefel and Nettle JJ) (emphasis added).

<sup>108</sup> *Ibid* 84–5 [93], 87 [99] (Bell J), 111 [184] (Gageler J).

<sup>109</sup> *Ibid* 87–8 [101]–[103] (Bell J), 111–12 [185] (Gageler J).

<sup>110</sup> *Ibid* 85 [93].

was not engaged.<sup>111</sup> Section 198AHA(2) was valid, however, because the authority it conferred was ‘limited to action that can reasonably be seen to be related to Nauru’s regional processing functions.’<sup>112</sup> Justice Bell reasoned that the MOU, which detailed those functions, required detention for permitted purposes only — namely, to facilitate ‘the processing of any protection claim made by a transferee and the removal from Nauru of transferees.’<sup>113</sup>

Justice Gageler articulated the engagement of *Lim* upon an alternative basis. His Honour said that a general constitutional limitation upon executive detention arises as a consequence of ‘the availability ... of habeas corpus to compel release from any executive detention not affirmatively authorised by statute,’<sup>114</sup> a principle which his Honour regarded as being part of ‘our contemporary constitutional structure.’<sup>115</sup> Thus, there existed ‘an inherent constitutional *incapacity*’ of the executive to detain a person without statutory authorisation.<sup>116</sup> Justice Gageler drew attention to the fact that Wilson Security had detained the plaintiff in custody as an agent of the Commonwealth, under the Transfield contract.<sup>117</sup> Thus, statutory authority for the plaintiff’s detention was necessary.<sup>118</sup> That authority was conferred by s 198AHA(2), the validity of which arose for determination.<sup>119</sup> Similarly to Bell J, however, Gageler J held that s 198AHA(2) was valid by virtue of the processing functions detailed in the MOU.<sup>120</sup>

Justice Gordon accepted the plaintiff’s case, rejecting the approach to *Lim* taken by the plurality and Keane J:

[T]o focus on the exercise of the sovereign power by *Nauru*, or on the words ‘in custody’ in the phrase ‘detention in custody’ ... is to distract attention from the fundamental point to which *Lim* is directed ... [namely,] the power of the Commonwealth executive to ... deprive [the plaintiff] of her liberty.<sup>121</sup>

<sup>111</sup> Ibid 87 [99].

<sup>112</sup> Ibid 87 [101].

<sup>113</sup> Ibid.

<sup>114</sup> Ibid 105 [159].

<sup>115</sup> Ibid 103 [155], citing *Re Bolton* (n 1) 520–1 (Brennan J).

<sup>116</sup> *M68* (n 5) 105 [159] (emphasis added). See also at 105–6 [162], 106 [164].

<sup>117</sup> Ibid 108 [171]–[173].

<sup>118</sup> Ibid 108–9 [174]–[175].

<sup>119</sup> Ibid.

<sup>120</sup> Ibid 111–12 [185].

<sup>121</sup> Ibid 154 [356] (emphasis in original) (citations omitted).

Her Honour suggested that, when the plurality in *Lim* recognised as a permitted purpose the determination of ‘an application by [an] alien for an entry permit’,<sup>122</sup> their Honours were referring to an application for entry *into Australia*, and a determination *by the Commonwealth*.<sup>123</sup> Here, the plaintiff’s application had been determined by Nauru, that application being for entry into Nauru.<sup>124</sup> Her Honour considered that the permitted purposes were spent upon the removal of the plaintiff from Australia.<sup>125</sup> Justice Gordon refused to recognise a new purpose, because ‘the aliens power does not provide ... power ... after removal [from Australia] is completed’.<sup>126</sup>

Thus, the questions stated in the special case were answered against the plaintiff, and the orders sought refused.<sup>127</sup>

It is difficult to locate any through line in the Court’s reasoning in *M68*. Indeed, a contest recently arose before the Federal Court as to the ratio of the decision.<sup>128</sup> Relevantly, however, the plurality and Keane J held that *Lim* was not engaged,<sup>129</sup> such that the validity of s 198AHA(2) did not arise for determination. It is also observed that, while *M68* involved no application for a writ of habeas corpus, habeas formed the basis of the ‘inherent constitutional incapacity’ recognised by Gageler J.<sup>130</sup> Noting the apparent importance of habeas corpus in this setting,<sup>131</sup> therefore, the ultimate question considered herein is whether, on an application for habeas corpus by a person detained under the regional processing arrangements, a different result would be reached on the engagement of *Lim*. Before that issue is determined, Part III discusses the High Court’s jurisdiction and power to direct the issue of habeas corpus in such cases.

<sup>122</sup> *Lim* (n 7) 32 (Brennan, Deane and Dawson JJ).

<sup>123</sup> *M68* (n 5) 160–1 [381].

<sup>124</sup> *Ibid* 163 [391].

<sup>125</sup> *Ibid* 166 [403].

<sup>126</sup> *Ibid* 163 [393] (emphasis omitted).

<sup>127</sup> *Ibid* 73–5 [54] (French CJ, Kiefel and Nettle JJ, Bell J agreeing at 88 [103]), 112 [187] (Gageler J), 131 [265] (Keane J).

<sup>128</sup> See *Plaintiff M83A/2019 v Morrison [No 2]* [2020] FCA 1198, [43] (Mortimer J).

<sup>129</sup> See above nn 100–26 and accompanying text.

<sup>130</sup> See above nn 114–16 and accompanying text. See also Plaintiff *M68/2015*, ‘Plaintiff’s Submissions’, Submission in *Plaintiff M68/2015 v Minister for Immigration and Border Protection*, *M68/2015*, 4 September 2015, 10 [46] n 37, 14–15 [66].

<sup>131</sup> See above n 14 and accompanying text.

### III HABEAS CORPUS AND OFFSHORE DETENTION

This Part begins with an account of the High Court's jurisdiction and power in relation to directing the issue of writs of habeas corpus. It is observed that, although habeas corpus is not a 'constitutional writ', it takes on a constitutional significance. The extraterritorial reach of habeas, an issue of present concern, is then discussed. As this issue has rarely been considered by Australian courts, the different approaches in England and Wales and in the United States are considered. By arguing that the more flexible English approach should be preferred in Australia, it is concluded that habeas may provide a good remedy for persons detained offshore under arrangements such as those considered in *M68*.

#### A *Habeas Corpus in the High Court*

Habeas corpus issues to compel the production of a detained person before the court.<sup>132</sup> The court may then inquire into the lawfulness of their detention and direct their release if the respondent has not justified the detention.<sup>133</sup> Habeas was received in Australia as part of the common law of England,<sup>134</sup> while the 'ancient' English habeas statutes<sup>135</sup> remain in force in Australia.<sup>136</sup>

##### 1 *Jurisdiction, Power and Availability*

Because the High Court 'is not a common law court but a statutory court',<sup>137</sup> the concern is with the jurisdiction conferred by the *Constitution* and legislation such as the *Judiciary Act 1903* (Cth) ('*Judiciary Act*'), to which the Court 'owes ... all its powers'.<sup>138</sup> Those common law bases of habeas corpus, however, remain part of the Australian constitutional framework.<sup>139</sup>

<sup>132</sup> *Habeas Corpus Act 1816*, 56 Geo 3, c 100, s 2. See also *M68* (n 5) 103–4 [155] (Gageler J).

<sup>133</sup> See generally *Re Bolton* (n 1) 522 (Brennan J); *Antunovic v Dawson* (2010) 30 VR 355, 360 [15] (Bell J) ('*Antunovic*').

<sup>134</sup> See, eg, *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 37–8 (Brennan J); *Antunovic* (n 133) 361–2 [18]–[23] (Bell J). See also *Ex parte Nichols* (1839) 1 Legge 123, 128 (Dowling CJ) (Supreme Court of New South Wales); *Ex parte Lo Pak* (1888) 9 LR (NSW) 221, 227 (Darley CJ) (during argument), 234 (Darley CJ), 247 (Windeyer J) ('*Lo Pak*'); *Re Bolton* (n 1) 520–2 (Brennan J).

<sup>135</sup> *Re Bolton* (n 1) 520 (Brennan J). See also at 521, citing *Habeas Corpus Act 1679*, 31 Car 2, c 2, *Habeas Corpus Act 1816* (n 132).

<sup>136</sup> *Re Bolton* (n 1) 520–1 (Brennan J); *Antunovic* (n 133) 362–3 [25] (Bell J).

<sup>137</sup> *R v Bevan*; *Ex parte Elias and Gordon* (1942) 66 CLR 452, 464 (Starke J) ('*Bevan*').

<sup>138</sup> *Ibid.*

<sup>139</sup> *Re Bolton* (n 1) 520–1 (Brennan J); *M68* (n 5) 103 [155] (Gageler J). See also *Ex parte Walsh*; *Re Yates* (1925) 37 CLR 36, 79 (Isaacs J) ('*Re Yates*').

Relevantly, the High Court is granted original jurisdiction by s 75(iii) of the *Constitution* in matters in which the Commonwealth is a party, and by s 75(v) in matters in which one of the ‘constitutional writs’<sup>140</sup> — namely, mandamus and prohibition<sup>141</sup> — is sought against an officer of the Commonwealth. Section 30(a) of the *Judiciary Act* confers upon the Court additional original jurisdiction in matters ‘arising under the *Constitution* or involving its interpretation.’<sup>142</sup> Although habeas corpus is not named in the *Constitution*, it likely remains ‘ancillary or incidental ... to the effective exercise’ of jurisdiction in matters under s 75(v).<sup>143</sup> Indeed, once the Court’s jurisdiction is properly invoked, it is ‘clothed with full authority essential for the complete adjudication of the matter.’<sup>144</sup> This authority encompasses the power to direct the issue of habeas corpus.<sup>145</sup> That is made clear by s 33(1)(f) of the *Judiciary Act*,<sup>146</sup> in respect of which Starke J in *Jerger v Pearce* said: ‘the Court has jurisdiction to exercise this

<sup>140</sup> *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 92–3 [21] (Gaudron and Gummow JJ), 133–4 [138], 135–6 [144] (Kirby J), 141–2 [165]–[166] (Hayne J) (*‘Ex parte Aala’*).

<sup>141</sup> The injunction is also named in s 75(v).

<sup>142</sup> See also *Constitution* s 76(i).

<sup>143</sup> *Ex parte Aala* (n 140) 90 [14] (Gaudron and Gummow JJ), quoted in *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 673 [63] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ) (*‘Bodruddaza’*). While their Honours were speaking of certiorari, the same was recently held in respect of habeas by Edelman J, sitting as a single Justice: *Mokhlis* (n 14) 5–6 [14], citing *M68* (n 5) 105 [161] (Gageler J). The point has not been decided by the Full Court, however. The significance of the holding in *Mokhlis* (n 14) is that it follows that, although habeas is not constitutionally entrenched and, concomitantly, it is in principle ‘open to the Parliament ... to prevent the grant of such relief’, that effectively cannot be done given that the jurisdiction conferred by s 75(v) cannot be removed: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 507 [81] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). See generally Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6<sup>th</sup> ed, 2017) 905–8 [14.20]. See also James Barrett, ‘Habeas Corpus, Jurisdiction, and Aboriginal-Identifying People in Immigration Detention: McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 223’, *AUSPUBLAW* (Blog Post, 10 February 2021) <<https://auspublaw.org/2021/02/habeas-corpus-jurisdiction-and-aboriginal-identifying-people-in-immigration-detention-mchugh-v-minister-for-immigration-citizenship-migrant-services-and-multicultural-affairs-2020-fcfc-223>>, archived at <<https://perma.cc/5XN7-SM6T>>.

<sup>144</sup> *Bevan* (n 137) 465 (Starke J). See also *Re Yates* (n 139) 130 (Starke J); *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557, 587 (Starke J); *R v Carter; Ex parte Kisch* (1934) 52 CLR 221, 224 (Evatt J) (*‘Carter’*); *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457, 496 (Gibbs J), 531 (Aickin J), 544 (Wilson J) (*‘Philip Morris’*); *Bodruddaza* (n 143) 673 [64] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

<sup>145</sup> See generally PHL, ‘High Court’s Jurisdiction to Issue Writs’ (1967) 41(4) *Australian Law Journal* 130.

<sup>146</sup> That subsection provides: ‘The High Court may ... direct the issue of writs ... of habeas corpus.’

power *in aid of its ... original jurisdiction*.<sup>147</sup> Thus, the High Court may direct the issue of habeas to officers of the Commonwealth in matters under s 75(v),<sup>148</sup> to the Commonwealth in matters under s 75(iii),<sup>149</sup> and to any party in matters under s 30(a) of the *Judiciary Act*.<sup>150</sup>

An additional consideration — at least, it seems, in the migration setting — is the availability of habeas. In respect of the framework established by ss 189 and 196 of the *Migration Act*, Kiefel CJ, Gageler, Keane and Steward JJ in *AJL20* held that, '[b]ecause the evident intention of the Act is that an unlawful non-citizen may not, in any circumstances, be at liberty in the Australian community, no question of release on *habeas* can arise'.<sup>151</sup> It might be noted that Gordon and Gleeson JJ dissented strongly on this point, suggesting that '[t]his Court should do nothing that undermines the availability of the writ to protect against unlawful detention by the Executive'.<sup>152</sup> Their Honours added that '[t]he contrary conclusion not only is abdication by the Court of performance of its obligations but would bring the law into disrepute'.<sup>153</sup>

This debate may, it is suggested, be put to one side in respect of detention under the regional processing arrangements. Section 189, with which the Court in *AJL20* was concerned, is expressed as applying only within the 'migration zone' — 'in broad terms, Australia'<sup>154</sup> — while, as discussed above, detention under the regional processing arrangements is authorised by the laws of the regional processing country.<sup>155</sup> In the case of Nauru, the relevant legislative framework does not rest upon or include an at-large requirement of detention equivalent to s 189 of the *Migration Act*,<sup>156</sup> which conditioned the majority's

<sup>147</sup> (1920) 28 CLR 588, 590 (Starke J) (emphasis added) ('*Jerger*'), cited in *Re Officer in Charge of Cells, ACT Supreme Court; Ex parte Eastman* (1994) 123 ALR 478, 479 (Deane J).

<sup>148</sup> See, eg, *Bevan* (n 137) 462 (Rich J), 465 (Starke J), 480 (Williams J); *Ex parte Williams* (1934) 51 CLR 545, 548 (Starke J); *Truth about Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 599–600 [2] (Gleeson CJ and McHugh J); *Plaintiff M76/2013* (n 36) 368 [133], 369–70 [139] (Crennan, Bell and Gageler JJ); *M68* (n 5) 105 [161] (Gageler J).

<sup>149</sup> See, eg, *Ex parte Williams* (n 148) 548 (Starke J); *Lim* (n 7) 19–20 (Brennan, Deane and Dawson JJ); *Plaintiff M76/2013* (n 36) 369–70 [139] (Crennan, Bell and Gageler JJ); *M68* (n 5) 105 [161] (Gageler J).

<sup>150</sup> See, eg, *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322, 341–2 [42] (Gummow and Hayne JJ), 357 [92] (Kirby J) ('*Ex parte Eastman*'); *Philip Morris* (n 144) 498 (Gibbs J).

<sup>151</sup> *AJL20* (n 14) 579 [61]. See also at 583 [73].

<sup>152</sup> *Ibid* 589 [94] (citations omitted).

<sup>153</sup> *Ibid* 590 [97]. See also at 596 [116] (Edelman J).

<sup>154</sup> *Ibid* 567 [13] (Kiefel CJ, Gageler, Keane and Steward JJ).

<sup>155</sup> See above nn 63–7 and accompanying text.

<sup>156</sup> See *M68* (n 5) 67 [32] (French CJ, Kiefel and Nettle JJ), 81 [80] (Bell J).

approach in *AJL20* in limiting the availability of habeas.<sup>157</sup> Rather, the starting point is s 10(1) of the *Immigration Act 2014* (Nauru), which provides that '[a] person who is not a citizen of Nauru must not enter or remain in Nauru without a valid visa'. As discussed above,<sup>158</sup> that Transferees are to reside at the RPC is not required by law;<sup>159</sup> rather, it is one of the '[c]onditions attaching to an RPC Visa',<sup>160</sup> and is attached as a matter of 'practice' of the executive government of Nauru.<sup>161</sup> The majority in *AJL20* having been concerned that 'the rule of law [not be] subverted' by directing the issue of habeas contrary to legislative intention,<sup>162</sup> no such issue arises in respect of detention under the regional processing arrangements. Nor, in any event, can legislative intention be discerned that the restraint upon liberty brought about by RPC visa conditions be absolute — s 18C(1) of the *Asylum Seekers (Regional Processing Centre) Act 2012* (Nauru) having the effect that Transferees may leave the RPC with prior approval.<sup>163</sup>

Turning also to the position of the Commonwealth under these arrangements, the authority conferred by s 198AHA(2) of the *Migration Act* is not 'hedged about by enforceable duties',<sup>164</sup> as is s 189 by the duties in provisions such as s 198(6),<sup>165</sup> on the basis of which the majority in *AJL20* concluded that mandamus was the appropriate remedy, 'to compel the proper performance of those duties'.<sup>166</sup> Rather, s 198AHA(2) is in more similar terms to the 'open-textured'<sup>167</sup> provisions considered in cases such as *Lau v Calwell*,<sup>168</sup> detention under which the majority in *AJL20* conceded would remain amenable to

<sup>157</sup> *AJL20* (n 14) 579 [61] (Kiefel CJ, Gageler, Keane and Steward JJ).

<sup>158</sup> See above nn 65–7 and accompanying text.

<sup>159</sup> Cf *Immigration Regulations 2014* (Nauru) reg 9(6)(a), which prescribes the general condition that 'the [RPC visa] holder must reside in premises specified in the visa'.

<sup>160</sup> *M68* (n 5) 143 [310] (Gordon J).

<sup>161</sup> *Ibid* 143 [313]. See also *A-G (Nauru) v Secretary for Justice* [2013] NRSC 10, [7], [22] (von Doussa J) ('*A-G (Nauru)*').

<sup>162</sup> *AJL20* (n 14) 576 [48] (Kiefel CJ, Gageler, Keane and Steward JJ). See also at 577 [52].

<sup>163</sup> See also *A-G (Nauru)* (n 161) [33]–[35] (von Doussa J).

<sup>164</sup> Cf *AJL20* (n 14) 575 [44] (Kiefel CJ, Gageler, Keane and Steward JJ).

<sup>165</sup> *Migration Act* (n 53) s 198(6) sets out the circumstances in which '[a]n officer must remove as soon as reasonably practicable an unlawful non-citizen'. 'Upon performance of these duties, the detention is brought to an end': *AJL20* (n 14) 575 [44] (Kiefel CJ, Gageler, Keane and Steward JJ).

<sup>166</sup> *AJL20* (n 14) 577 [52].

<sup>167</sup> Cf *ibid* 593–4 [109], 597 [124] (Edelman J).

<sup>168</sup> (1949) 80 CLR 533 ('*Lau*'). See at 550–1 (Latham CJ), quoting *War-Time Refugees Removal Act 1949* (Cth) s 7: 'A deportee may ... be kept in such custody as the Minister or an officer directs.'

habeas.<sup>169</sup> It might also be noted that Gordon and Gleeson JJ said that the availability of mandamus was ‘not determinative’ of that of habeas, on the basis that the two ‘are different remedies’ due to the ‘differences in the underlying complaint’.<sup>170</sup>

Thus, habeas corpus would be available, and the appropriate remedy, if it were sought in respect of detention under the Commonwealth’s regional processing arrangements. Were such proceedings instituted, the High Court’s jurisdiction should be invoked under ss 75(iii) and (v), despite their ‘considerable overlap’.<sup>171</sup> That is due to the multiplicity of issues that would be raised.<sup>172</sup> Thus, both the Commonwealth and the Minister would be named as respondents, and prohibition sought in addition to habeas,<sup>173</sup> to attract both sources of jurisdiction. It might be added that the Federal Court also has jurisdiction in such matters,<sup>174</sup> while the same appears to be true with respect to the state Supreme Courts in the exercise of federal jurisdiction.<sup>175</sup>

<sup>169</sup> *AJL20* (n 14) 579 [60] (Kiefel CJ, Gageler, Keane and Steward JJ).

<sup>170</sup> *Ibid* 588–9 [93]. See also at 604 [143] (Edelman J).

<sup>171</sup> Geoffrey Lindell, *Cowen and Zines’s Federal Jurisdiction in Australia* (Federation Press, 4<sup>th</sup> ed, 2016) 78.

<sup>172</sup> See below Part IV.

<sup>173</sup> As has been done in the cases: see, eg, *Bevan* (n 137) 459–60 (Rich J); *Re Bolton* (n 1) 534 (Toohey J).

<sup>174</sup> *Judiciary Act 1903* (Cth) ss 39B(1), (1A)(b) (*‘Judiciary Act’*). The general power to ‘direct the issue of ... writs’ under s 23 of the *Federal Court of Australia Act 1976* (Cth) has recently been found to be of similar operation to s 33(1)(f) of the *Judiciary Act* (n 174): *McHugh (Full Court)* (n 14) 648 [188]–[192], 653 [214] (Mortimer J, Allsop CJ agreeing at 611 [20]–[23], Besanko J agreeing at 622 [75]). That is to say, ‘where this Court otherwise has original jurisdiction ... it has the power to issue such a writ under s 23’: at 653 [214]. Cf *Tampa Case* (n 47) 518 [106]–[107] (Beaumont J). See generally *Al-Kateb* (n 34) 578–9 [24]–[25] (Gleeson CJ).

<sup>175</sup> There are at least three sources. See *Judiciary Act* (n 174) s 39(2). But see at s 38(e). Although jurisdiction in matters under s 75(v) of the *Constitution* is withheld from the Supreme Courts, they are invested with jurisdiction in matters under s 75(iii) and s 30(a) of the *Judiciary Act* (n 174), to the exercise of which habeas is incidental. See above nn 143, 150 and accompanying text. But see *Ah Sheung v Lindberg* [1906] VLR 323, 325–6 (Cussen J) (*‘Ah Sheung’*), affd *A-G (Cth) v Ah Sheung* (1906) 4 CLR 949, 951–2 (Griffith CJ for the Court), where habeas issued in the Supreme Court of Victoria to a party who had acted ‘under the authority ... of the Commonwealth’: *Ah Sheung* (n 175) 325, 342 (Cussen J). It appears that this was a matter under s 75(v) of the *Constitution*, although there was no contest as to jurisdiction: *Ah Sheung* (n 175) 325–6 (Cussen J). In any event, Supreme Courts can now determine matters under s 75(v) in the exercise of cross-vested jurisdiction of the Federal Court: *Hopkins v Governor-General* (2013) 303 ALR 157, 161 [10]–[11], 164–5 [24]–[27] (Basten, Gleeson and Leeming JJA). See generally *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth); Lindell (n 171) 72, 76–7.

## 2 Constitutional Grounds of Review

Although habeas corpus is not a constitutional writ, the grounds upon which it issues are not limited to those pointing to jurisdictional error. Indeed, it issues in cases of detention authorised by a law that is constitutionally invalid, as in *Ah Sheung v Lindberg*<sup>176</sup> and *Ex parte Walsh; Re Yates*.<sup>177</sup> In those cases, the applicants were considered to be beyond the limits of the immigration power in s 51(xxvii) of the *Constitution*, the result being that the immigration laws authorising their detention could not validly apply.<sup>178</sup> Although unsuccessful, the appellant in *Al-Kateb* sought habeas on the ground that ss 189, 196 and 198 of the *Migration Act* were invalid, because the detention authorised was not for a permitted purpose, contrary to the *Lim* principle.<sup>179</sup> While it is noted that many other cases raising constitutional issues failed or succeeded upon other grounds,<sup>180</sup> the point is that constitutional grounds of review are available on an application for habeas corpus.

This proposition does no harm to the reasoning expounded in *AJL20* that, in most cases, the appropriate question will be ‘whether the executive action in

<sup>176</sup> *Ah Sheung* (n 175) 333–4, 342 (Cussen J).

<sup>177</sup> *Re Yates* (n 139) 62, 65–6 (Knox CJ), 109–12 (Higgins J), 137–8 (Starke J).

<sup>178</sup> See *Ah Sheung* (n 175) 328, 331–4, 338, 342 (Cussen J); *Re Yates* (n 139) 62, 65–6 (Knox CJ), 80–2, 107–8 (Isaacs J), 109–12 (Higgins J), 137–8 (Starke J).

<sup>179</sup> *Al-Kateb* (n 34) 565–6 (CM O’Connor) (during argument). See also at 578 [24] (Gleeson CJ), 596 [78] (Gummow J), 630–1 [196] (Hayne J), 653 [277] (Callinan J).

<sup>180</sup> Most involved challenges to the law authorising the detention: see, eg, *Jerger* (n 147) 594–5 (Starke J); *Carter* (n 144) 575–6, 580–1 (Latham CJ), 594 (McTiernan J), 602 (Williams J); *Lau* (n 168) 556, 567 (Latham CJ, McTiernan J agreeing at 583), 583 (Dixon J), 593 (Williams J, Rich J agreeing at 570), 595 (Webb J); *R v Green; Ex parte To* (1965) 113 CLR 506, 517 (Barwick CJ, Kitto, Taylor, Windeyer and Owen JJ); *Ex parte de Braic* (1971) 124 CLR 162, 164–5 (Barwick CJ, McTiernan J agreeing at 165, Menzies J agreeing at 165–6, Owen J agreeing at 167), 167 (Windeyer J); *R v Forbes; Ex parte Lee* (1971) 124 CLR 168, 174–5 (Latham CJ, McTiernan J agreeing at 175, Windeyer J agreeing at 175, Owen J agreeing at 176, Gibbs J agreeing at 176); *Vasiljkovic v Commonwealth* (2006) 227 CLR 614, 633 [41] (Gleeson CJ), 643 [87]–[89] (Gummow and Hayne JJ). But see *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, 161–2, 170 (Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ); *Ex parte Eastman* (n 150) 329 [2], 334 [16] (Gleeson CJ, McHugh and Callinan JJ), 341 [41] (Gaudron J), 354 [83] (Gummow and Hayne JJ); *Tampa Case* (n 47) 533 [162], 548 [215] (French J, Beaumont J agreeing at 514 [95]). See generally Lindell (n 171) 79 n 222, 80 n 224. Other cases were determined before detention was actually implemented, so that prohibition was sought: see, eg, *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 533 (Mason CJ, Wilson and Dawson JJ), 550 (Brennan and Toohey JJ); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 406 [28]–[29] (Gaudron J), 420 [85] (McHugh J), 437 [137]–[138] (Gummow and Hayne JJ); *White v Director of Military Prosecutions* (2007) 231 CLR 570, 591 [33] (Gummow, Hayne and Crennan JJ) (*‘White’*); *Lane v Morrison* (2009) 239 CLR 230, 236 [6] (French CJ and Gummow J), 267–8 [118] (Hayne, Heydon, Crennan, Kiefel and Bell JJ).

question was authorised by the statute.<sup>181</sup> Although directed to the Commonwealth executive, an application for habeas may properly raise for determination the constitutional validity of the law authorising the detention. As discussed above, *Al-Kateb* was one such case.<sup>182</sup> The plurality and Keane J in *M68* having left undecided the validity of s 198AHA(2) of the *Migration Act*,<sup>183</sup> an application in respect of detention under the regional processing arrangements would be another.

### 3 Procedure

Given that habeas corpus lies in cases of detention, there is an initial requirement to identify the detention complained of.<sup>184</sup> An application made on behalf of, rather than by, the detained person will not be dismissed for want of standing.<sup>185</sup> Applications in the High Court involve a two-stage, show-cause procedure. By virtue of the ‘presumption in favour of liberty’,<sup>186</sup> the applicant initially seeks an order calling upon the respondent to justify why habeas should not

<sup>181</sup> *AJL20* (n 14) 574 [43] (Kiefel CJ, Gageler, Keane and Steward JJ). See also at 584 [78]–[80] (Gordon and Gleeson JJ), 598–9 [127]–[129] (Edelman J). See above nn 32–3 and accompanying text.

<sup>182</sup> See above nn 34–5 and accompanying text.

<sup>183</sup> See above nn 104–7 and accompanying text.

<sup>184</sup> See, eg, *Re Stanbridge’s Application* (1996) 70 ALJR 640, 642 (Kirby J). See generally David Clark and Gerard McCoy, *Habeas Corpus: Australia, New Zealand and the South Pacific* (Federation Press, 2<sup>nd</sup> ed, 2018) 66–7 (*‘Habeas Corpus’*).

<sup>185</sup> See, eg, *Re Yates* (n 139) 76 (Isaacs J). See generally Clark and McCoy, *Habeas Corpus* (n 184) ch 6. Issues of standing may arise in respect of the offshore detention of aliens, however: David Clark and Gerard McCoy, *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth* (Clarendon Press, 2000) 155–6. The plurality in *Lim* (n 7) said that, ‘subject to qualification in the case of an enemy alien in time of war, an alien *who is within this country* ... can invoke the original jurisdiction of this Court’: at 19–20 (Brennan, Deane and Dawson JJ) (emphasis added) (citations omitted). The applicant for habeas in *Jerger* (n 147), however, was an enemy alien in time of war, but was not denied standing: at 590–1 (Starke J). Further, and relevantly, the plaintiff in *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 (*‘CPCF’*) was an alien detained on the high seas: at 524–5 [1]–[4] (French CJ). No issues of standing arose in that case, a matter arising under s 75(iii) of the *Constitution: CPCF* (n 185) 566 [145] (Hayne and Bell JJ). See also *Plaintiff S156/2013* (n 4) 36–7 [1]–[4] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

<sup>186</sup> *Re Yates* (n 139) 79 (Isaacs J). See also *Lim* (n 7) 13 (Mason CJ), 19 (Brennan, Deane and Dawson JJ), 63 (McHugh J).

issue (historically, the rule nisi).<sup>187</sup> If granted, the respondent must adduce lawful justification for the detention.<sup>188</sup> While that justification is most commonly supplied by ‘a warrant ... or other documentation’,<sup>189</sup> statutory authority will also suffice.<sup>190</sup> Thus, a return was made in *Plaintiff M47/2018 v Minister for Home Affairs* by virtue of the authority for the detention conferred by ss 189 and 196 of the *Migration Act*.<sup>191</sup> Upon the return, the Court inquires into the lawfulness of the detention and decides whether the writ should issue.<sup>192</sup> Habeas may issue at the initial stage, however, so that production of the person occurs with the return of the justification for the detention, and the Court decides whether the person should be released, or the writ quashed.<sup>193</sup>

### B The Extraterritorial Reach of Habeas Corpus

Relevantly, habeas may issue in cases of detention outside the jurisdiction,<sup>194</sup> although there have been different approaches in the English and United States authorities regarding the ‘reach’<sup>195</sup> of habeas. It is necessary to discuss each approach, because this issue has not been authoritatively determined in Australia.

#### 1 The English Authorities: The Proper Respondent and a ‘Vehicle for Inquiry’

Although ostensibly raising questions of territoriality, the English authorities establish that the respondent’s amenability to the court’s writ is the key issue. Any extraterritorial reach of habeas is a consequence of the respondent executing the order to bring the detained person before the court. Given that the focus is on the respondent in this sense, the court will be concerned that an application is directed to the proper party. The House of Lords in *Barnardo v Ford*

<sup>187</sup> *High Court Rules 2004* (Cth) r 25.16 (‘*High Court Rules*’). See also Clark and McCoy, *Habeas Corpus* (n 184) 211.

<sup>188</sup> *High Court Rules* (n 187) r 25.16.4. See also *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285, 299–300 [39] (Kiefel CJ, Keane, Nettle and Edelman JJ) (‘*Plaintiff M47/2018*’), citing *R v Davey*; *Ex parte Freer* (1936) 56 CLR 381, 385 (Evatt J), *Trobridge v Hardy* (1955) 94 CLR 147, 152 (Fullagar J). See also *AJL20* (n 14) 588 [92], 590 [97] (Gordon and Gleeson JJ).

<sup>189</sup> Aronson, Groves and Weeks (n 143) 937 [14.110].

<sup>190</sup> See, eg, *Plaintiff M47/2018* (n 188) 299–300 [39]–[40] (Kiefel CJ, Keane, Nettle and Edelman JJ).

<sup>191</sup> *Ibid* 299–30 [39] (Kiefel CJ, Keane, Nettle and Edelman JJ). See also *AJL20* (n 14) 588 [92] (Gordon and Gleeson JJ).

<sup>192</sup> *High Court Rules* (n 187) r 25.09.3.

<sup>193</sup> *Ibid*. See also at r 25.16.

<sup>194</sup> See generally Groves, ‘Habeas Corpus’ (n 15). See above n 15.

<sup>195</sup> *Boumediene v Bush*, 553 US 723, 746 (Kennedy J for Stevens, Kennedy, Souter, Ginsburg and Breyer JJ) (2008) (‘*Boumediene*’).

(‘*Barnardo*’) held that the proper respondent is any party that has ‘custody, power, or control’ over the detained person.<sup>196</sup>

The first authority to the point is *R v Secretary of State for Home Affairs; Ex parte O’Brien* (‘*O’Brien*’).<sup>197</sup> *O’Brien* was arrested by order of the United Kingdom Secretary of State for Home Affairs.<sup>198</sup> He was removed from England and surrendered to the Irish Free State,<sup>199</sup> where he was detained.<sup>200</sup> An application for a rule nisi for habeas corpus was made in the High Court of England and Wales, the Home Secretary named as respondent.<sup>201</sup> The applicant argued that the regulations authorising *O’Brien*’s arrest had effectively been repealed following the secession of Ireland from Great Britain.<sup>202</sup> The Home Secretary submitted that, because *O’Brien* was no longer within the custody of British authorities, the application was not properly directed to him.<sup>203</sup> The applicant tendered statements made by the respondent during parliamentary debate, that ‘undertakings [had been] given ... by the [Irish] Free State’ for *O’Brien*’s return if it were necessary during the proceedings.<sup>204</sup> Although the applicant failed at first instance, the Court of Appeal of England and Wales granted the rule nisi and both parties were heard.<sup>205</sup> The ‘definite conclusion’ was that the detention was unlawful.<sup>206</sup> The Court applied *Barnardo*, holding that the application was properly directed to the respondent.<sup>207</sup> Lord Justice Atkin said: ‘Actual physical custody is obviously not essential. “Custody” or “control” ... are a correct measure of liability to the writ.’<sup>208</sup> While there remained ‘doubt’ on the evidence as to the respondent’s control over *O’Brien*’s liberty,<sup>209</sup> the rule was made absolute

<sup>196</sup> [1892] AC 326, 338 (Lord Herschell, Lord Hannen agreeing at 341). See also at 333 (Lord Halsbury LC), 340 (Lord Macnaghten).

<sup>197</sup> *O’Brien* (n 15).

<sup>198</sup> *Ibid* 373 (Bankes LJ).

<sup>199</sup> See generally *Treaty between Great Britain and Ireland*, Great Britain–Irish Free State, signed 6 December 1921, 26 LNTS 9 (entered into force 31 March 1922) (‘*Great Britain–Ireland Treaty*’).

<sup>200</sup> *O’Brien* (n 15) 373 (Bankes LJ).

<sup>201</sup> *Ibid* 373–4.

<sup>202</sup> *Ibid*. See above n 199. See generally *Restoration of Order in Ireland Act 1920*, 10 & 11 Geo 5, c 31.

<sup>203</sup> *O’Brien* (n 15) 381 (Bankes LJ).

<sup>204</sup> *Ibid* 392 (Scrutton LJ).

<sup>205</sup> *Ibid* 374 (Bankes LJ).

<sup>206</sup> *Ibid* 397–8 (Atkin LJ). See also at 390–1 (Scrutton LJ).

<sup>207</sup> *Ibid* 381 (Bankes LJ), 392–3 (Scrutton LJ), 398–9 (Atkin LJ).

<sup>208</sup> *Ibid* 398.

<sup>209</sup> *Ibid* 381 (Bankes LJ).

and the writ issued.<sup>210</sup> O'Brien was indeed brought before the Court one week later, resolving any such doubt, and his release was ordered.<sup>211</sup>

The full extent of the reach of habeas corpus remained uncertain, however, because the Irish Free State was a dominion of the Crown.<sup>212</sup> That was resolved in *Rahmatullah v Secretary of State for Defence*.<sup>213</sup> Rahmatullah was detained by British forces in Iraq.<sup>214</sup> He was surrendered to United States forces pursuant to an agreement between the two governments,<sup>215</sup> and was later removed to the United States-controlled Bagram Air Force Base in Afghanistan, where he was detained.<sup>216</sup> An application for habeas corpus was made in the High Court, directed to the Secretary of State for Defence.<sup>217</sup> Although it was clear that the detention contravened the law of international armed conflict,<sup>218</sup> the issue was the respondent's amenability to the Court's writ. The applicant argued that, under the agreement between the United Kingdom and United States governments, the respondent could demand Rahmatullah's return.<sup>219</sup> It was submitted that, consistent with *O'Brien*, although the 'existence [and] degree' of the respondent's control over Rahmatullah were 'yet to be ascertained ... the writ should issue so that that might be done' upon the return.<sup>220</sup>

Although the applicant failed at first instance,<sup>221</sup> the Court of Appeal applied *O'Brien*, which it said was authority for the use of habeas corpus as a 'vehicle

<sup>210</sup> Ibid 381 (Banks LJ), 393 (Scrutton LJ), 399 (Atkin LJ).

<sup>211</sup> Ibid 399–400 (Atkin LJ).

<sup>212</sup> See generally *Great Britain–Ireland Treaty* (n 199). See also Fearghal McGarry, 'Revolution: 1916–1923' in Thomas Bartlett (ed), *The Cambridge History of Ireland* (Cambridge University Press, 2018) vol 4, 258, 287.

<sup>213</sup> *Rahmatullah (Divisional Court)* (n 15). See also *Rahmatullah (Court of Appeal)* (n 15).

<sup>214</sup> *Rahmatullah (Divisional Court)* (n 15) 1465 [2] (Laws LJ).

<sup>215</sup> Ibid 1465 [2], 1465–6 [4].

<sup>216</sup> Ibid 1465 [2].

<sup>217</sup> Ibid 1464, 1465 [1] (Laws LJ).

<sup>218</sup> See ibid 1469–70 [15] (Laws LJ). See also *Rahmatullah (Court of Appeal)* (n 15) 1484–5 [33] (Lord Neuberger MR). See also *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 84; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) arts 49, 132–3.

<sup>219</sup> *Rahmatullah (Divisional Court)* (n 15) 1465–6 [4] (Laws LJ). See also *Rahmatullah (Court of Appeal)* (n 15) 1479–80 [5] (Lord Neuberger MR).

<sup>220</sup> *Rahmatullah (Divisional Court)* (n 15) 1472 [21] (Laws LJ).

<sup>221</sup> Ibid 1475–7 [28]–[34] (Laws LJ, Silber J agreeing at 1478 [37]). The designation of 'Silber J' as 'Silber LJ' in the report of the case is a typographical error.

for inquiry'.<sup>222</sup> At first instance, Laws LJ had articulated this notion upon the basis of William Blackstone's remark that 'the king is at all times intitled to have an account, why the liberty of any of his subjects is restrained, *wherever that restraint may be inflicted*'.<sup>223</sup> The respondent made a return by adducing correspondence with the United States Deputy Assistant Secretary of State for Defence, who had refused a request for Rahmatullah's return.<sup>224</sup> Therefore, the respondent could not produce Rahmatullah before the Court, and an appeal was dismissed by the Supreme Court of the United Kingdom.<sup>225</sup>

*O'Brien* and Rahmatullah's case demonstrate that an arrangement with the detaining authority is good evidence that it is within the respondent's power to bring the detained person before the court.<sup>226</sup> Any doubt is resolved in favour of the applicant, such that the situation may become clearer upon the return to the writ; that is, the respondent will either bring the detained person before the court, or explain why that cannot be done.<sup>227</sup> Thus, habeas corpus is used as a 'vehicle for inquiry'<sup>228</sup> in cases of detention outside the jurisdiction where the facts are not readily ascertainable.

## 2 *The United States Authorities: Issues of Standing and Territoriality*

In contrast, the United States authorities hold that the reach of habeas corpus is a question of the United States' sovereign jurisdiction over the location of the detention.<sup>229</sup> The 'Suspension Clause' in the *United States Constitution* provides: 'The Privilege of the Writ of Habeas Corpus shall not be suspended, unless

<sup>222</sup> *Rahmatullah (Court of Appeal)* (n 15) 1489 [52] (Lord Neuberger MR), quoting *Rahmatullah (Divisional Court)* (n 15) 1472–3 [23] (Laws LJ).

<sup>223</sup> Blackstone (n 43) bk 3, 131 (emphasis added) (citations omitted), quoted with minor changes in *Rahmatullah (Divisional Court)* (n 15) 1469 [13] (Laws LJ).

<sup>224</sup> See *Rahmatullah (Court of Appeal)* (n 15) 1491 [2]–[4] (Lord Neuberger MR).

<sup>225</sup> *Rahmatullah (Supreme Court)* (n 15) 645 [76], 649 [85] (Lord Kerr JSC for Lords Dyson MR, Kerr and Wilson JJSC, Lord Phillips agreeing at 653 [107]).

<sup>226</sup> Cf *Re Sankoh* (n 15), in which there was no evidence of such an arrangement, British forces merely having 'support[ed]' Sierra Leone authorities in detaining the applicant: at [4], [11]–[12] (Laws LJ, Waller LJ agreeing at [14]–[15], Ward LJ agreeing at [16]).

<sup>227</sup> See Aronson, Groves and Weeks (n 143) 936–7 [14.110]. Contempt of court lies for any failure to bring the detained person before the court in circumstances where doing so was within the respondent's power: Clark and McCoy, *Habeas Corpus* (n 184) 270–1; Dame Judith Farbey, RJ Sharpe and Simon Atrill, *The Law of Habeas Corpus* (Oxford University Press, 3<sup>rd</sup> ed, 2011) 198.

<sup>228</sup> See above n 222 and accompanying text.

<sup>229</sup> See, eg, *Boumediene* (n 195) 755 (Kennedy J for Stevens, Kennedy, Souter, Ginsburg and Breyer JJ); *Al Maqaleh v Gates*, 605 F 3d 84, 96–7 [6] (Sentelle CJ for Sentelle CJ, Tatel and Edwards JJ) (DC Cir, 2010) ('*Al Maqaleh*').

when ... the public Safety may require it.<sup>230</sup> Given that habeas is a ‘Privilege’,<sup>231</sup> a petitioner’s standing is the key issue, rather than the respondent’s amenability to the court’s writ. Thus, in *Johnson v Eisentrager* (*‘Eisentrager’*), the Supreme Court of the United States denied standing to enemy aliens in time of war who were detained outside the jurisdiction,<sup>232</sup> despite assuming that the United States ‘ha[d] lawful authority to effect their release.’<sup>233</sup>

The reach of habeas also arose in ‘the Guantánamo Bay litigation.’<sup>234</sup> After the United States Congress removed the jurisdiction of the federal courts to determine petitions for habeas corpus by detainees at Guantánamo Bay,<sup>235</sup> the Supreme Court in *Boumediene v Bush* (*‘Boumediene’*) held that the Guantánamo petitioners were constitutionally entitled to have their cases decided.<sup>236</sup> As to standing, the Court distinguished *Eisentrager*, because the petitioners were not citizens ‘of a nation now at war with the United States.’<sup>237</sup> The Court recognised that the operation of the *United States Constitution* could extend to Guantánamo Bay, because the United States enjoys ‘*de facto* sovereignty’ over Guantánamo by virtue of its lease agreement with Cuba.<sup>238</sup> Thus, the Guantánamo petitioners were entitled to the ‘Privilege’ of habeas corpus under the Suspension Clause, such that Congress could not withhold jurisdiction to determine their petitions.<sup>239</sup> Notwithstanding that result, it has since become apparent that the decision of the Supreme Court in *Boumediene* is limited in its application beyond the specific arrangements in Guantánamo Bay.

The broader significance of *Boumediene* was considered by the Court of Appeals for the District of Columbia Circuit in *Al Maqaleh v Gates* (*‘Al Maqaleh’*), a petition for habeas in respect of detention at Bagram Air Force Base.<sup>240</sup> The

<sup>230</sup> *United States Constitution* art 1 § 9 cl 2.

<sup>231</sup> *Ibid.*

<sup>232</sup> 339 US 763, 777–8 (Jackson J for the Court) (1950) (*‘Eisentrager’*).

<sup>233</sup> *Ibid* 766–7.

<sup>234</sup> Timothy Endicott, ‘Habeas Corpus and Guantánamo Bay: A View from Abroad’ (2009) 54(1) *American Journal of Jurisprudence* 1, 1.

<sup>235</sup> See *Detainee Treatment Act of 2005*, Pub L No 109-148, § 1005, 119 Stat 2739, 2742; *Military Commissions Act of 2006*, Pub L No 109-366, § 7, 120 Stat 2600, 2636–7. See also *Rasul v Bush*, 542 US 466, 470, 484 (Stevens J for Stevens, O’Connor, Souter, Ginsburg and Breyer JJ) (2004) (*‘Rasul’*); *Hamdan v Rumsfeld*, 548 US 557, 572–3 (Stevens J for Stevens, Kennedy, Souter, Ginsburg and Breyer JJ) (2006).

<sup>236</sup> *Boumediene* (n 195) 732 (Kennedy J for Stevens, Kennedy, Souter, Ginsburg and Breyer JJ).

<sup>237</sup> *Ibid* 734.

<sup>238</sup> *Ibid* 755. See also at 743.

<sup>239</sup> *Ibid* 771.

<sup>240</sup> *Al Maqaleh* (n 229) 87 (Sentelle CJ for Sentelle CJ, Tatel and Edwards JJ).

Court considered itself bound to follow *Boumediene*, which it read as establishing that, in order for habeas to issue, the United States government must generally exercise at least ‘*de facto* sovereignty’ over the *location* of the detention.<sup>241</sup> Thus, although it was established that the petitioners in *Al Maqaleh* were detained in custody by the United States,<sup>242</sup> the fact that the United States government did not exercise *de facto* sovereignty over Bagram Air Force Base was decisive.<sup>243</sup>

It might be noted that Bagram Air Force Base was also the location of the detention considered in Rahmatullah’s case,<sup>244</sup> in which habeas issued.<sup>245</sup> It is apparent, therefore, that the United States authorities have taken a different direction to the English cases, in that the court is concerned with the territorial status of the location of the detention, rather than the respondent’s ability to bring the detained person before the court. In view of this contrast, it is suggested that political and constitutional context has shaped the United States jurisprudence. While the decision in *Eisentrager* may well have been influenced by deference to the executive in the context of World War II,<sup>246</sup> the Guantánamo Bay litigation was also contextualised by the withholding of the federal courts’ jurisdiction to determine the Guantánamo petitioners’ cases.<sup>247</sup> What was ultimately decided in *Boumediene* was the ‘narrow issue of the reach of the Suspension Clause.’<sup>248</sup> The application of this reasoning by the Court of Appeals in *Al Maqaleh*, a case involving no Suspension Clause issues, demonstrates the extent to which the United States jurisprudence remains ‘incomplete.’<sup>249</sup> Timothy Endicott argues that what remains is for the federal courts ‘to determine the extent of their own power’ to direct the issue of habeas corpus, rather than focusing on standing to seek the exercise of that power.<sup>250</sup>

<sup>241</sup> Ibid 97 [6].

<sup>242</sup> Ibid 87.

<sup>243</sup> See ibid 97 [6], 99 [7]. See also *Al Maqaleh v Hagel*, 738 F 3d 312, 327–8 (Henderson J for Henderson, Griffith and Williams JJ) (DC Cir, 2013).

<sup>244</sup> See above n 216 and accompanying text.

<sup>245</sup> See above nn 222–5 and accompanying text.

<sup>246</sup> See *Eisentrager* (n 232) 778–9 (Jackson J for the Court), quoted in *Rasul* (n 235) 499 (Scalia J). See also *Boumediene* (n 195) 762 (Kennedy J for Stevens, Kennedy, Souter, Ginsburg and Breyer JJ). See generally Kim Lane Scheppele, ‘The New Judicial Deference’ (2012) 92(1) *Boston University Law Review* 89, 104–5.

<sup>247</sup> See above n 235.

<sup>248</sup> See *Boumediene* (n 195) 849, where Scalia J expressed his disagreement with this statement. See also *Ali v Rumsfeld*, 649 F 3d 762, 771–2 (Henderson J for Sentelle CJ and Henderson J) (DC Cir, 2011); *Al Helo v Trump*, 972 F 3d 120, 142 (Rao J) (DC Cir, 2020).

<sup>249</sup> Endicott (n 234) 1, 36.

<sup>250</sup> Ibid 1. See also at 2.

### 3 The Position in Australia

The extraterritorial reach of habeas corpus has not been determined in Australia. In refusing special leave to appeal in *Vadarlis v Ruddock* ('*Tampa (Special Leave)*'),<sup>251</sup> Gaudron J said: 'the agreement ... between ... Australia and Nauru notwithstanding, habeas corpus cannot now issue with respect to ... detention [in Nauru], at least in these proceedings.'<sup>252</sup> The concern there, however, was with the change in circumstances following the first instance decision, the asylum seekers the subject of the proceedings having since been removed from Australia.<sup>253</sup>

*O'Brien* was applied in *Hicks v Ruddock* ('*Hicks*'), albeit in the context of a summary judgment application.<sup>254</sup> The applicant, an Australian citizen, was detained in Afghanistan and transferred to the custody of United States forces.<sup>255</sup> He was thereafter removed to Guantánamo Bay, where he was detained.<sup>256</sup> He applied for an order in the nature of habeas corpus in the Federal Court, directed to the Commonwealth Attorney-General.<sup>257</sup> The Commonwealth unsuccessfully moved for summary dismissal.<sup>258</sup> While the matter never proceeded to full argument,<sup>259</sup> the parties joined issue at the interlocutory stage on the

<sup>251</sup> Transcript of Proceedings, *Vadarlis v Ruddock* (High Court of Australia, M93/2001, Gaudron, Gummow and Hayne JJ, 27 November 2001) 2302–3 (Gaudron J) ('*Tampa (Special Leave)*'). See also above Part II(B)(1).

<sup>252</sup> *Tampa (Special Leave)* (n 251) 2272–4 (Gaudron J) (emphasis added).

<sup>253</sup> *Ibid* 64–70 (Gaudron J and G Griffith QC), 308–9 (Hayne J), 2162–5 (DMJ Bennett QC), 2282–6 (Gaudron J). See also Gageler (n 47) 617.

<sup>254</sup> *Hicks* (n 15) 590–1 [47]–[50] (Tamberlin J). But see *Rahmatullah (Divisional Court)* (n 15) 1475 [29] (Laws LJ); *Rahmatullah (Supreme Court)* (n 15) 652–3 [105] (Lord Phillips); Aronson, Groves and Weeks (n 143) 931–3 [14.100]; Clark and McCoy, *Habeas Corpus* (n 184) 187 nn 60, 64; Groves, 'Habeas Corpus' (n 15) 606–11; Tatyana Eatwell, 'Selling the Pass: Habeas Corpus, Diplomatic Relations and the Protection of Liberty and Security of Persons Detained Abroad' (2013) 62(3) *International and Comparative Law Quarterly* 727, 738. Suffice it to say, *Hicks* (n 15) has attracted considerable interest.

<sup>255</sup> *Hicks* (n 15) 577 [7] (Tamberlin J).

<sup>256</sup> *Ibid*.

<sup>257</sup> *Ibid* 578–9 [9]–[10].

<sup>258</sup> *Ibid* 576 [2], 600 [92]–[94].

<sup>259</sup> See generally Mark Coulton, 'Hicks Pleads Guilty', *The Sydney Morning Herald* (online, 28 March 2007) <<https://www.smh.com.au/world/hicks-pleads-guilty-20070328-gdprud.html>>, archived at <<https://perma.cc/FA9F-EYXR>>; 'Hicks "May Fight Jail Term in Australia"', *The Sydney Morning Herald* (online, 29 March 2007) <<https://www.smh.com.au/national/hicks-may-fight-jail-term-in-australia-20070329-gdpslv.html>>, archived at <<https://perma.cc/4KBL-467V>>.

authority of *O'Brien* as to whether the Commonwealth was the proper respondent.<sup>260</sup> The Commonwealth submitted that *O'Brien* was distinguishable, because there was no 'agreement' with the United States regarding the applicant's liberty.<sup>261</sup> Justice Tamberlin held that it had not been established that the applicant had no reasonable prospects of success on this point.<sup>262</sup> *Tampa (Special Leave)* and *Hicks* were decided before *Rahmatullah's* case, which confirmed the extraterritorial reach of habeas.<sup>263</sup> Thus, Gageler J in *M68* referred to both *O'Brien* and *Rahmatullah v Secretary of State for Defence* ('*Rahmatullah (Supreme Court)*') in suggesting that habeas corpus could issue to the Commonwealth in respect of detention under the regional processing arrangements.<sup>264</sup> It follows, therefore, that the English authorities have been treated with some approval in those Australian cases that have considered the reach of habeas corpus. Justice French in *Ruddock v Vadarlis* said that the United States habeas cases, on the other hand, 'must be read in their constitutional context'.<sup>265</sup> Indeed, that has been suggested above.<sup>266</sup>

Justice French's comment raises the question whether the Australian constitutional context is of any significance in this setting. It is suggested that the jurisdiction conferred on the High Court by s 75(v) of the *Constitution* is similar in operation to the English approach to the reach of habeas. Justice Kiefel in *CPCF v Minister for Immigration and Border Protection* ('*CPCF*') relevantly said: '[t]he actions of officers of the Commonwealth extra-territorially ... remain subject to this Court's jurisdiction given by s 75(v) of the *Constitution*'.<sup>267</sup> Given that the writs therein named lie to restrain excess of jurisdiction by officers of the Commonwealth,<sup>268</sup> it follows that the jurisdiction conferred by s 75(v) must

<sup>260</sup> See *Hicks* (n 15) 590–1 [47]–[50] (Tamberlin J).

<sup>261</sup> *Ibid* 590 [48].

<sup>262</sup> *Ibid* 591 [50].

<sup>263</sup> See above Part III(B)(1).

<sup>264</sup> *M68* (n 5) 106–7 [165]–[166] (Gageler J), citing *Rahmatullah (Supreme Court)* (n 15) 636 [43] (Lord Kerr JSC for Lords Dyson MR, Kerr and Wilson JJSC, Lord Phillips agreeing at 653 [107]), 653 [109] (Lord Reed JSC), *O'Brien* (n 15) 391 (Scrutton LJ), 398 (Atkin LJ).

<sup>265</sup> *Tampa Case* (n 47) 547 [210].

<sup>266</sup> See above Part III(B)(2).

<sup>267</sup> *CPCF* (n 185) 600 [276] (emphasis added).

<sup>268</sup> See, eg, *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 363 (Dixon J), quoted in *Bodruddaza* (n 143) 668 [45] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ), *M68* (n 5) 95 [126] (Gageler J); *Ex parte Aala* (n 140) 140–1 [162] (Hayne J). See generally Lindell (n 171) 86; Justice Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2<sup>nd</sup> ed, 2020) 56–7; Stellios, *The Federal Judicature* (n 37) 386–8 [7.54]. Cf James Stellios, 'Exploring the Purposes of Section 75(v) of the *Constitution*' (2011) 34(1) *University of New South Wales Law Journal* 70, 70–2.

run to wherever an excess of jurisdiction is said to have occurred. Thus, consistent with the English approach, the Court is not concerned with the situation of the applicant,<sup>269</sup> or the location of the alleged excess of jurisdiction.<sup>270</sup> It was submitted during argument in *Tampa (Special Leave)*, therefore, that, pursuant to s 75(v), the High Court's writ 'runs to the Australian Government'.<sup>271</sup> There are no cases to the point, however.<sup>272</sup> As Kiefel J in *CPCF* noted,<sup>273</sup> the most relevant is *R v Bevan; Ex parte Elias and Gordon ('Bevan')*,<sup>274</sup> which still does not make good the proposition. There, rules nisi for habeas corpus and prohibition were sought to be made absolute against the convening authority of a court martial assembled on HMAS *Australia*.<sup>275</sup> The vessel had earlier been transferred to the King's naval forces.<sup>276</sup> Justice Rich held that the respondent had ceased acting as an officer of the Commonwealth upon the transfer, and the Court's jurisdiction under s 75(v) could not be attracted.<sup>277</sup> That this was determinative may, as Kiefel J in *CPCF* suggested, 'imply' that his Honour considered that s 75(v) could otherwise be attracted in respect of action taken outside Australia.<sup>278</sup> The authorities go no further. Were a case like *Eisentrager* to arise,<sup>279</sup> however, it is suggested that the jurisdiction conferred by s 75(v) would be attracted.

<sup>269</sup> Subject to the usual rules of standing: see above n 185. It might be added to what was said above that the application in *Jerger* (n 147) was made against officers of the Commonwealth, while an injunction was also sought: at 590 (Starke J). Although the point was not taken, the Court's jurisdiction may have been attracted under s 75(v). Cf *Eisentrager* (n 232) 777 (Jackson J for the Court).

<sup>270</sup> See above nn 267–8 and accompanying text.

<sup>271</sup> *Tampa (Special Leave)* (n 251) 539 (G Griffith QC) (emphasis added).

<sup>272</sup> *CPCF* (n 185) itself involved claims for declarations and damages: at 590 [237] (Kiefel J). The plaintiff in *M68* (n 5) was present within Australia: at 63 [14] (French CJ, Kiefel and Nettle JJ). See above nn 76–8 and accompanying text. See also *Plaintiff S156/2013* (n 4) 37–8 [4]–[6] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

<sup>273</sup> *CPCF* (n 185) 600 [276].

<sup>274</sup> *Bevan* (n 137).

<sup>275</sup> *Ibid* 459–60 (Rich J).

<sup>276</sup> *Ibid* 460, 462.

<sup>277</sup> *Ibid* 462. Justice Starke and Williams J determined that jurisdiction was attracted under s 30(a) of the *Judiciary Act* (n 174): *Bevan* (n 137) 465–6 (Starke J), 480–1 (Williams J). Justice McTiernan did not decide the jurisdictional question: at 479.

<sup>278</sup> *CPCF* (n 185) 600 [276].

<sup>279</sup> There, writs were sought in the Supreme Court in relation to a United States military commission convened in China: *Eisentrager* (n 232) 766–7 (Jackson J for the Court). Although the petitioners failed, it was not suggested that writs could not issue: see above nn 232–3 and accompanying text.

Justice Starke in *Bevan* made obiter remarks consistent with the use of habeas as a vehicle for inquiry into detention outside the jurisdiction.<sup>280</sup> Although ultimately discharging the rules nisi,<sup>281</sup> his Honour would have preferred ‘that this case had been decided upon a formal return to a writ of habeas corpus than upon the rule nisi’, in part because ‘the evidence [was] far from satisfactory.’<sup>282</sup> While there was no doubt as to the respondent’s control in *Bevan*, Starke J’s reasoning is consistent with the English approach in cases of detention outside the jurisdiction where the facts are not readily ascertainable.

### C A ‘Vehicle’ for Testing the Constitutional Validity of Offshore Detention?

The foregoing discussion demonstrates that, for good reason, the Australian cases that have examined the reach of the court’s writ suggest that the approach in the English extraterritorial habeas cases is to be followed. It is suggested that habeas lies in cases of detention outside Australia, where a writ is directed to an officer of the Commonwealth, and that party is the proper respondent to the application. Where there is doubt as to the respondent’s control over the detention, habeas issues so that the situation will become clearer upon the return. Earlier, it was recognised that habeas may issue on constitutional grounds. Thus, it is suggested that habeas may act as a vehicle for testing the constitutional validity of offshore detention. This notion was not in issue in *M68*, and Part IV considers the use of habeas as a vehicle for a *Lim* argument in relation to detention under the regional processing arrangements.

## IV OFFSHORE DETENTION AND CH III, REVISITED

This Part considers whether, on an application for a writ of habeas corpus, it remains that ‘*Lim* has nothing to say’<sup>283</sup> about the Commonwealth’s regional processing arrangements. First, this Part determines whether the Commonwealth and the Minister would be the proper respondents to such an application, on the English approach to that issue discussed above. Secondly, the question whether *Lim* applies is considered. The facts of *M68* are re-examined for this purpose, although it is emphasised that the discussion in this Part will be applicable beyond the specific arrangements considered by the High Court in that case.

<sup>280</sup> See *Bevan* (n 137) 465–6.

<sup>281</sup> *Ibid* 476. See also at 479 (McTiernan J), 487 (Williams J).

<sup>282</sup> *Ibid* 474.

<sup>283</sup> *M68* (n 5) 70 [41] (French CJ, Kiefel and Nettle JJ).

### A Amenability to Habeas Corpus: Testing the Evidence

A writ would be directed to the Commonwealth and the Minister.<sup>284</sup> It must be established that those parties are the proper respondents.<sup>285</sup> Mark Aronson, Matthew Groves and Greg Weeks suggest that the facts in *M68* would likely have 'equate[d] to control for the purposes of *habeas corpus*'.<sup>286</sup> However, those facts elucidated no arrangements for the plaintiff's return to Australia, of the kind identified in *O'Brien* and in Rahmatullah's case. In particular, the MOU does not deal with the return of Transferees from Nauru to Australia.<sup>287</sup> The absence of any such arrangements in *Hicks* was raised by the Commonwealth as a ground for summary dismissal of the application for habeas in that case.<sup>288</sup> In anticipation of a similar issue in the present context, it is necessary to discuss further the proper respondent point.

Section 198B of the *Migration Act* assists in canvassing this issue. That section provides: 'An officer may, for a temporary purpose, bring a transitory person to Australia from a country or place outside Australia.'<sup>289</sup> The expression 'transitory person' includes a person taken to a regional processing country.<sup>290</sup> While the expression 'temporary purpose' is not defined, the relevant second reading speech offered as an example of the intended operation of s 198B 'transfers to Australia ... to give evidence as a witness'.<sup>291</sup> That the curial setting was contemplated is significant, because the power under s 198B has most often been used for the purpose of facilitating medical treatment, as was the case in *M68*.<sup>292</sup> This may lend credence to the argument that the Commonwealth is amenable to habeas corpus in respect of detention under the regional processing arrangements. As in *O'Brien* and Rahmatullah's case, however, the key issue is whether the power in s 198B is able to be exercised unilaterally by the Commonwealth, regardless of the position of the regional processing country.

<sup>284</sup> See above nn 171–3 and accompanying text.

<sup>285</sup> See above Part III(B)(1).

<sup>286</sup> Aronson, Groves and Weeks (n 143) 935 [14.100].

<sup>287</sup> See *M68* (n 5) 135–7 [282]–[292] (Gordon J).

<sup>288</sup> *Hicks* (n 15) 590–1 [48]–[49] (Tamberlin J). See also *Re Sankoh* (n 15) [11]–[12] (Laws LJ, Waller LJ agreeing at [14]–[15], Ward LJ agreeing at [16]).

<sup>289</sup> *Migration Act* (n 53) s 198B(1).

<sup>290</sup> *Ibid* s 5(1) (definition of 'transitory person' para (aa)). See also at s 198AD.

<sup>291</sup> Albeit in a criminal setting: see Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1105 (Philip Ruddock, Minister for Immigration and Multicultural and Indigenous Affairs). See also Revised Explanatory Memorandum, Migration Legislation Amendment (Transitional Movement) Bill 2002 (Cth) 2 [5]. See, eg, *Sadiqi v Commonwealth [No 2]* (2009) 181 FCR 1, 19 [52] (McKerracher J).

<sup>292</sup> See above n 76 and accompanying text.

If that were so, s 198B could be relied upon at the initial stage of an application for habeas corpus as prima facie evidence that the Commonwealth is able to bring the detained person before the court.

Nauru serves as a useful case study on this point. A ‘raft’<sup>293</sup> of recent decisions of the Federal Court have elucidated the ‘administrative difficulties’<sup>294</sup> associated with effecting transfers from Nauru to Australia, either under s 198B or pursuant to orders of the Court compelling such a transfer.<sup>295</sup> These cases have revealed that medical transfers require approval by the Nauru Overseas Medical Referral Committee (‘OMR Committee’),<sup>296</sup> a process in which ‘the Australian Government is not involved.’<sup>297</sup> These difficulties have in a number of cases thwarted transfers under s 198B<sup>298</sup> and compliance with interlocutory injunctions granted by the Court to compel transfers by the Commonwealth,<sup>299</sup> in circumstances where the OMR Committee has not approved a transfer,<sup>300</sup> or where so-called ‘uplift approval’ has been refused by the Nauru Secretary for Multicultural Affairs.<sup>301</sup>

<sup>293</sup> *BNL20 v Minister for Home Affairs* [2020] FCA 1180, [30] (Murphy J).

<sup>294</sup> *CDO19 v Minister for Immigration, Citizenship and Multicultural Affairs* (2019) 165 ALD 480, 486 [25] (Flick J) (‘*CDO19*’). See also *FJG18 v Minister for Immigration, Citizenship and Multicultural Affairs* [2018] FCA 1585, [19] (Bromberg J) (‘*FJG18*’).

<sup>295</sup> The effect of ss 494AB(1)(c)–(ca) of the *Migration Act* (n 53) on the jurisdiction of the Court to decide these cases was tested in *FRM17 v Minister for Home Affairs* (2019) 271 FCR 254, 259 [1], 260 [8] (Kenny, Robertson and Griffiths JJ) (‘*FRM17 (Full Court)*’), revd *Minister for Home Affairs v DLZ18* (2020) 270 CLR 372, 407–8 [83]–[84] (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ) (‘*FRM17 (High Court)*’). Those sections prescribe a ‘[b]ar on ... proceedings’ relating to persons brought to Australia under s 198B and (among other things) action taken by the Commonwealth under s 198AHA, respectively: *Migration Act* (n 53) ss 494AB(1)(c)–(ca). The High Court unanimously held that, on its proper construction, s 494AB(1) ‘does not limit the jurisdiction of any court’: *FRM17 (High Court)* (n 295) 392 [26] (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ). Rather, it acts as a ‘bar to a remedy’ when pleaded by the Commonwealth in an applicable case, ‘analogous to a time bar’: at 393 [30], 394–5 [35].

<sup>296</sup> See, eg, *ELF18 v Minister for Home Affairs* [2018] FCA 1368, [66] (Mortimer J) (‘*ELF18*’).

<sup>297</sup> See *CCA19 v Minister for Home Affairs* [2019] FCA 939, [56] (Bromberg J) (‘*CCA19*’). See also *Health Practitioners (Overseas Medical Referrals Compliance) Regulations 2019* (Nauru), cited in *CDO19* (n 294) 486 [26] (Flick J).

<sup>298</sup> *CDO19* (n 294) 481 [2], 486 [26] (Flick J). See also *CEU19 v Minister for Immigration, Citizenship and Multicultural Affairs* (2019) 165 ALD 566, 571 [28]–[30] (Mortimer J) (‘*CEU19*’).

<sup>299</sup> See, eg, *ELF18* (n 296) [62], [64]–[65] (Mortimer J). See also *CCA19* (n 297) [3], [24] (Bromberg J).

<sup>300</sup> See, eg, *CDO19* (n 294) 486 [26] (Flick J).

<sup>301</sup> *ELF18* (n 296) [69] (Mortimer J). See also *CEU19* (n 298) 578 [60] (Mortimer J); *CCA19* (n 297) [62] (Bromberg J). See generally Saba Vasefi and Helen Davidson, ‘Dozens of Refugee Medical Transfers Held Up by Nauru’s Controversial Approval System’, *The Guardian* (online, 25 November 2019) <<https://www.theguardian.com/australia-news/2019/nov/25/dozens-of-refugee-medical-transfers-held-up-by-naurus-controversial-approval-system>>, archived at <<https://perma.cc/VD2V-K32W>>.

As to the significance of these difficulties in the present context, the situation appears analogous to the United States' refusal of a request for the return of the detained person in *Rahmatullah (Supreme Court)*, evidence of which amounted to a sufficient return to the writ of habeas corpus that issued in that case.<sup>302</sup> The Commonwealth could raise these difficulties, therefore, as evidence that it is not able to bring before the court the person the subject of an application for habeas. Despite the difficulties foreshadowed by the Commonwealth in the medical transfer cases, however, Mortimer J has wondered

how it can be ... that ... Nauru can prevent [persons] from leaving Nauru, in circumstances where it is clear on the evidence (looking for example at the [MOU] between the Commonwealth and Nauru ... and the Administrative Arrangements ... ) that:

- (a) the Commonwealth bears all the costs of [a] transfer;
- (b) IHMS [the medical treatment provider contracted by the Commonwealth] is obliged to provide an escort ... under its contract with the Commonwealth if such an escort is requested ... ; and
- (c) [a Transferee] has a legal entitlement under [their] visa to leave Nauru and to re-enter.<sup>303</sup>

Thus, the Federal Court has continued to make orders compelling transfers by the Commonwealth in these cases, despite the doubt on the evidence. The position taken by Mortimer J in *EUB18 v Minister for Home Affairs*<sup>304</sup> — that administrative difficulties 'cannot ... stand in the way of orders being made to preserve the ... wellbeing of an individual'<sup>305</sup> — has been followed on several occasions.<sup>306</sup> In *ELF18 v Minister for Home Affairs*, a subsequent hearing was convened due to the Commonwealth's inability in fact to comply with the orders made in that case.<sup>307</sup> It is suggested that this approach is consistent with that in *O'Brien* and in *Rahmatullah's* case in respect of applications for habeas corpus, that any doubt on the evidence does not justify refusal to direct the issue of a writ. Rather, such doubt is resolved in favour of the applicant. Were a writ of habeas corpus to issue in this instance, the position as to the Commonwealth's

<sup>302</sup> See above nn 224–5 and accompanying text.

<sup>303</sup> *CEU19* (n 298) 580 [68].

<sup>304</sup> [2018] FCA 1432.

<sup>305</sup> *Ibid* [36] (emphasis added).

<sup>306</sup> See *FJG18* (n 294) [22] (Bromberg J); *CDO19* (n 294) 486 [25] (Flick J); *CCA19* (n 297) [50] (Bromberg J).

<sup>307</sup> *ELF18* (n 296) [64]–[65] (Mortimer J).

control would become clearer upon the return; that is, the Commonwealth would either produce the detained person before the court, or explain why that could not be done.<sup>308</sup>

It is suggested, therefore, that the Commonwealth is amenable to habeas corpus in respect of detention under the regional processing arrangements. There is sufficient prima facie evidence that the Commonwealth will be able to bring the detained person before the court. In the case of Nauru, that remains so despite evidence that the Commonwealth may face administrative difficulties in doing so. Thus, *Lim* may be considered as a ground of review on such an application.

### B *Engagement of Lim on an Application for Habeas Corpus*

As Gageler J in *M68* noted, ‘the question of amenability to the writ is quite distinct from the question of the legality ... of the detention.’<sup>309</sup> As has been contemplated, *Lim* supplies the ground of review of the legality of the detention here. The invocation of *Lim* in this setting, however, is met with three issues. The first is whether the principle applies outside Australia. The second, and key, issue is whether *Lim* — which concerns ‘detention in custody by the Commonwealth’<sup>310</sup> — may apply to the regional processing arrangements, under which a third sovereign is interposed in the detention. Finally, there is the question whether the seminal holding in *Lim* may properly be engaged in respect of s 198AHA(2) of the *Migration Act*, which does not itself deal with detention in the relevant sense. These issues are considered in turn.

#### 1 *The Application of Lim outside Australia*

It is to be recalled that the *Lim* principle emerges from ch III of the *Constitution*.<sup>311</sup> That is to say, it is not concerned with the question whether a law is supported by a head of power. It was observed above that habeas has issued on questions of characterisation,<sup>312</sup> and it has been argued that habeas could issue on such grounds in cases of detention outside Australia.<sup>313</sup> It may be that the position in respect of offshore detention and ch III is different, however. Before the High Court in *M68*, the Commonwealth contended:

<sup>308</sup> See above n 227 and accompanying text.

<sup>309</sup> *M68* (n 5) 107 [165].

<sup>310</sup> See *ibid* 82 [83] (Bell J). See also at 67 [30]–[31] (French CJ, Kiefel and Nettle JJ), 124 [238] (Keane J).

<sup>311</sup> See above Part II(A).

<sup>312</sup> See above Part III(A)(2).

<sup>313</sup> See above Part III(B)(3).

[T]he endpoint of an argument would be that this power ... is judicial power of the Commonwealth and so a Chapter III court should be exercising it. ... [T]he plaintiff is not arguing, *and could not argue*, that the judicial power of the Commonwealth could be applied by Australia to determine whether people are detained in Nauru. It could not be reason of sovereign equality.<sup>314</sup>

The holding in *M68* that '*Lim* has nothing to say about ... detention ... by another State'<sup>315</sup> may indicate acceptance of this kind of argument. Similarly, Keane J in *CPCF* maintained that *Lim* applies only 'in relation to non-citizens who are actually within Australia'.<sup>316</sup>

Although ostensibly raising 'the notion that public law stops at the border',<sup>317</sup> this issue might equally be expressed as concerning cases where a ch III court could *not* in fact exercise judicial power in the manner in which another branch of government is said to be impermissibly exercising that power. The question is whether a law may offend ch III in such cases. That question may be resolved by reference to the decision of the High Court in *Polyukhovich v Commonwealth* ('*Polyukhovich*'), which concerned a retroactive criminal law.<sup>318</sup> In dissent, Deane J and Gaudron J determined that, on its proper construction, the law determined guilt in addition to establishing an offence, thus offending ch III as an impermissible usurpation of judicial power.<sup>319</sup> In so holding, Deane J noted that a ch III court could not in fact determine guilt for an act 'which was not criminal when done'.<sup>320</sup> Rather than pointing away from the conclusion that ch III was offended, as would follow on the approach advocated by the Commonwealth in *M68*, Gaudron J said more generally that laws impermissibly usurping judicial power in the exercise of 'a power which ... could not validly be conferred on a court' would remain 'invalid for offending Ch III'.<sup>321</sup>

<sup>314</sup> Transcript of Proceedings, *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2015] HCATrans 256, 4965–73 (JT Gleeson SC) (emphasis added).

<sup>315</sup> *M68* (n 5) 70 [41] (French CJ, Kiefel and Nettle JJ).

<sup>316</sup> See *CPCF* (n 185) 648 [483].

<sup>317</sup> Groves, 'Habeas Corpus' (n 15) 591, quoting Campbell McLachlan, 'The Allocative Function of Foreign Relations Law' (2012) 82(1) *British Yearbook of International Law* 349, 357.

<sup>318</sup> (1991) 172 CLR 501, 524–6 (Mason CJ) ('*Polyukhovich*'). See also *War Crimes Act 1945* (Cth) s 9(1), as amended by *War Crimes Amendment Act 1988* (Cth) s 5, which proscribed war crimes committed outside Australia from 1939–45. Given its extraterritorial operation, the majority of the Court decided the case upon the question whether it was a valid law under the 'external affairs' power in s 51(xxix) of the *Constitution: Polyukhovich* (n 318) 530–1 (Mason CJ), 641–2 (Dawson J), 655–6 (Toohey J), 712 (McHugh J).

<sup>319</sup> *Polyukhovich* (n 318) 613–14 (Deane J), 706–7 (Gaudron J).

<sup>320</sup> *Ibid* 613 (Deane J). See also at 704 (Gaudron J).

<sup>321</sup> *Ibid* 704.

Although *Polyukhovich* concerned a legislative usurpation of judicial power, the reasoning of Deane J and Gaudron J in that case is instructive. It is suggested that ch III may be offended by a law conferring upon the executive authority to detain aliens outside Australia, despite the fact that a ch III court could not direct detention in those circumstances. Such a view is consistent with an understanding of ch III as a constitutional limitation on legislative power and, accordingly, with Bell J's suggestion in *M68* that there is 'no principled reason' why *Lim* may not apply in cases of detention outside Australia.<sup>322</sup> Justice Gordon in that case was of a similar view to that espoused by Bell J,<sup>323</sup> as were four judges in *CPCF*.<sup>324</sup>

## 2 'Detention in Custody by the Commonwealth'

The *Lim* principle applies to 'detention in custody by the Commonwealth'.<sup>325</sup> As in *M68*, the issue in respect of regional processing is whether detention under those arrangements satisfies that precondition, in circumstances where the detention is authorised under the laws of the regional processing country.<sup>326</sup> To examine this issue, it is necessary to consider what is meant by 'detention in custody by the Commonwealth'.

The first component of this statement, 'detention in custody,' may swiftly be dealt with. Given that *Lim* springs from ch III, reference to 'detention in custody' must be informed by this constitutional setting.<sup>327</sup> Justice Gummow and Hayne J in *Fardon v Attorney-General (Qld)* ('*Fardon*') embraced as the 'central constitutional conception of detention' that which is generally reserved for the ch III courts, namely, imprisonment 'as a consequence of ... determination of engagement in past conduct'.<sup>328</sup> Relevantly, the High Court in *Thomas v Mowbray* ('*Thomas*') considered within this context the status of the 'interim control order' regime contained in the schedule to the *Criminal Code Act 1995* (Cth).<sup>329</sup> Among other things, the control order in *Thomas* required the plaintiff to remain at his residence at certain times and occasionally to report to police, while

<sup>322</sup> *M68* (n 5) 87 [99].

<sup>323</sup> *Ibid* 163 [390], 164 [395].

<sup>324</sup> *CPCF* (n 185) 567–8 [149]–[150] (Hayne and Bell JJ), 600 [276] (Kiefel J), 625 [374] (Gageler J).

<sup>325</sup> *M68* (n 5) 82 [83] (Bell J). See also at 124 [238] (Keane J). Cf at 154 [356] (Gordon J). See also above n 121 and accompanying text.

<sup>326</sup> See above nn 63–7 and accompanying text.

<sup>327</sup> See *M68* (n 5) 124 [238] (Keane J).

<sup>328</sup> (2004) 223 CLR 575, 613 [84] (Gummow J), 648 [197] (Hayne J) ('*Fardon*').

<sup>329</sup> (2007) 233 CLR 307, 430 [353] (Kirby J) ('*Thomas*'), quoting *Fardon* (n 328) 613 [84] (Gummow J). See also *Thomas* (n 329) 356 [114] (Gummow and Crennan JJ), 468–9 [475]–[476] (Hayne J). See also *Criminal Code Act 1995* (Cth) sch 1 div 104 ('*Criminal Code*').

he was also prohibited from leaving Australia.<sup>330</sup> The Court determined, by majority, that these arrangements did not amount to ‘detention in custody’ for the purposes of *Lim*.<sup>331</sup> Although the point was not discussed in detail, this holding evinces acceptance of some threshold level of restraint relative to the ‘central constitutional conception of detention’ discussed in *Fardon*.<sup>332</sup> It is not necessary to discuss this point further, however, because ‘detention in custody’ could be found on the facts in *M68*, as was observed by Gageler J in that case:

The Regional Processing Centre was ... surrounded by a high metal fence through which entry and exit were possible only through a checkpoint. The checkpoint was permanently monitored ...<sup>333</sup>

As it was put by Bell J, therefore, ‘the detention to which the plaintiff was subject is not analogous to the *lesser forms* ... considered in *Thomas*’.<sup>334</sup>

The key issue with respect to regional processing, rather, is whether such detention in custody is ‘by the Commonwealth’. The plurality in *M68* said that the ‘exercise of governmental power’ inheres in this component of the statement in *Lim*.<sup>335</sup> Their Honours and Keane J held that the plaintiff in *M68* was not detained in custody by the Commonwealth because her detention was authorised by and implemented under the laws of Nauru.<sup>336</sup> Underpinning this reasoning is the suggestion that detention in custody is attributed by jurisdiction. As described by the plurality and Keane J in *M68*, it follows that detention in custody by the Commonwealth comes to an end upon the transfer of a person to another sovereign.<sup>337</sup>

However, the decision in *CPCF* supports the proposition that a person may be detained in custody by the Commonwealth outside Australia. Four judges in that case accepted that the plaintiff was detained in custody by the Commonwealth on the high seas,<sup>338</sup> although it is noted that the plaintiff was held on a

<sup>330</sup> *Thomas* (n 329) 323 [2] (Gleeson CJ), 492–5 [554] (Callinan J). See also *Criminal Code* (n 329) ss 104.5(1)(c), (3)(a)–(c).

<sup>331</sup> *Thomas* (n 329) 330 [18] (Gleeson CJ), 356 [114]–[116], 357 [121] (Gummow and Crennan JJ, Callinan J agreeing at 509 [600], Heydon J agreeing at 526 [651]).

<sup>332</sup> See above n 328 and accompanying text.

<sup>333</sup> *M68* (n 5) 108 [170]. See also at 84 [91] (Bell J), 152–4 [353]–[356] (Gordon J). See generally *A-G (Nauru)* (n 161) [52]–[55] (von Doussa J).

<sup>334</sup> *M68* (n 5) 84 [91] (emphasis added).

<sup>335</sup> *Ibid* 67 [30] (French CJ, Kiefel and Nettle JJ), citing *Lim* (n 7) 27 (Brennan, Deane and Dawson JJ).

<sup>336</sup> *M68* (n 5) 67 [31]–[32] (French CJ, Kiefel and Nettle JJ), 124 [239] (Keane J).

<sup>337</sup> *Ibid*.

<sup>338</sup> *CPCF* (n 185) 567–8 [149]–[150] (Hayne and Bell JJ), 600 [276] (Kiefel J), 625 [374] (Gageler J).

Commonwealth vessel.<sup>339</sup> The question raised by the regional processing arrangements concerns the interposition of another sovereign authority in the detention. The decision of the Federal Court in *Rivera v Minister for Home Affairs* is to the point.<sup>340</sup> There, the applicant was surrendered to a United States escort awaiting extradition from Australia.<sup>341</sup> He was subsequently returned to officers of the Commonwealth,<sup>342</sup> which he argued was without lawful authority.<sup>343</sup> It was submitted that his lawful detention in custody by the Commonwealth had ceased upon his initial surrender to the United States marshals.<sup>344</sup> Justice Edmonds held that the applicant remained in custody of the Commonwealth while being held by the escort.<sup>345</sup> His Honour said that '[t]o hold otherwise would lead to a farcical situation if the applicant was to escape from the custody of the escort' — namely, that 'he could not be held in lawful custody by [Commonwealth] authorities.'<sup>346</sup> It appears that, although the issue has not arisen elsewhere, the same has been assumed in other extradition cases.<sup>347</sup> The proposition that a person may be detained in custody concurrently by two sovereign authorities inheres in this reasoning. That proposition is supported by the reasons of Barton J in *Robtelmes v Brennan* ('*Robtelmes*'), which concerned deportation from Australia.<sup>348</sup> His Honour referred to a Canadian decision in which it was said that a person deported from Canada to the United States would remain 'under *actual constraint* imposed by' and, therefore, in the custody of, Canadian officers, beyond entering the territorial jurisdiction of the United States.<sup>349</sup> Justice Barton observed that, on appeal in that case, the Privy Council had highlighted the 'practical impossibility of expelling an alien from

<sup>339</sup> Ibid 524 [2] (French CJ), 569–70 [156] (Hayne and Bell JJ), 573 [166] (Crennan J), 631 [399] (Keane J).

<sup>340</sup> [2008] FCA 10 ('*Rivera*').

<sup>341</sup> Ibid [2], [7] (Edmonds J). See also *Extradition Act 1988* (Cth) s 23.

<sup>342</sup> *Rivera* (n 340) [2] (Edmonds J).

<sup>343</sup> Ibid [6].

<sup>344</sup> Ibid.

<sup>345</sup> Ibid [7].

<sup>346</sup> Ibid.

<sup>347</sup> See, eg, *Schlieske v Minister for Immigration and Ethnic Affairs* (1988) 84 ALR 719, 720 (Fox J) (Full Court of the Federal Court of Australia) ('*Schlieske*'). Justice Fox stated: 'There is a handing-over of the extradited person ... to give effect to the extradition. It does not seem ... that the [Commonwealth's] power ... can be lost'. See also *R v Thames Metropolitan Stipendiary Magistrate; Ex parte Brindle* [1975] 1 WLR 1400, cited in *Re Bolton* (n 1) 519 (Mason CJ, Wilson and Dawson JJ), 527 (Brennan J).

<sup>348</sup> (1906) 4 CLR 395, 407 (Barton J) ('*Robtelmes*').

<sup>349</sup> Ibid 411 (emphasis added), quoting *Re Gilhula* (1905) 10 OLR 469, 478 (Anglin J) (Ontario High Court of Justice).

Canada into an adjoining country without such an exercise of *extra-territorial constraint* ... by the Canadian officer.<sup>350</sup>

Contrary to the view suffusing the judgments of the plurality and Keane J in *M68*, therefore, it is not apparent that detention in custody by the Commonwealth must necessarily come to an end in a regional processing country. It is suggested that ‘detention in custody by the Commonwealth’ remains to be identified by the ‘actual constraint’ discussed by Barton J in *Robtelmes*,<sup>351</sup> which may occur within another jurisdiction. Such conduct is sufficient to engage the *Lim* principle, so long as it satisfies the threshold level of restraint implied in *Thomas*,<sup>352</sup> and involves the ‘exercise of governmental power’,<sup>353</sup> such that it is detention ‘by the State.’<sup>354</sup> It has been suggested that the threshold level of restraint was satisfied on the facts in *M68*.<sup>355</sup> It remains to consider whether there was an identifiable ‘exercise of governmental power’ by the Commonwealth.

### 3 ‘Actual Constraint’: Governmental Power and Security Contractors

The facts in *M68* did not reveal any actual constraint by officers of the Commonwealth. Rather, it was apparent that the Commonwealth provided funding and governance support.<sup>356</sup> Importantly, however, Wilson Security could be seen to be effecting actual constraint. As previously described, Wilson Security staff monitored the sole point of entry to and exit from the RPC, and would seek assistance from Nauruan Police in respect of unauthorised departures.<sup>357</sup> Justice Gageler noted that this conduct was ‘within the scope of the ... services which the Commonwealth had contracted Transfield to provide and which Transfield had subcontracted Wilson Security to perform.’<sup>358</sup> This observation raised the question whether actual constraint by a contractor could be attributed to the Commonwealth,<sup>359</sup> such that there was identifiable ‘detention in custody by the Commonwealth.’

<sup>350</sup> *Robtelmes* (n 348) 411 (emphasis added), quoting *A-G (Canada) v Cain* [1906] AC 542, 545 (Lord Atkinson for the Judicial Committee). See also *Znaty v Minister for Immigration* (1972) 126 CLR 1, 12 (Walsh J, McTiernan J agreeing at 3, Owen J agreeing at 4), quoted in *Schlieske* (n 347) 727 (Wilcox and French JJ).

<sup>351</sup> *Robtelmes* (n 348) 411 (Barton J).

<sup>352</sup> See above nn 329–34 and accompanying text.

<sup>353</sup> *M68* (n 5) 67 [30] (French CJ, Kiefel and Nettle JJ).

<sup>354</sup> *Lim* (n 7) 27 (Brennan, Deane and Dawson JJ). See above n 335 and accompanying text.

<sup>355</sup> See above nn 333–4 and accompanying text.

<sup>356</sup> See *M68* (n 5) 71 [46] (French CJ, Kiefel and Nettle JJ), 115 [199] (Keane J).

<sup>357</sup> See above nn 70–1 and accompanying text.

<sup>358</sup> *M68* (n 5) 108 [171].

<sup>359</sup> *Ibid* 108 [172]–[174] (Gageler J).

Justice Gageler had initially said: ‘the executive power of the Commonwealth is and was always ... permitted to be exercised ... by ... officers of the Executive Government ... *or through agents*’.<sup>360</sup> His Honour supported this reasoning by reference to the ‘overall constitutional context’<sup>361</sup> — namely, the ‘political and practical background’ of government prior to Federation.<sup>362</sup> This context informed the framing of s 61 of the *Constitution*, from which the executive power of the Commonwealth emanates.<sup>363</sup> Thus, Gageler J held that Wilson Security ‘acted, in the relevant sense, as *de facto* agents ... of the Commonwealth in physically detaining the plaintiff in custody’.<sup>364</sup> Evidently, his Honour considered that Wilson Security was exercising the executive power of the Commonwealth.<sup>365</sup> As a result, this actual constraint, or as his Honour put it, conduct ‘in *physically* detaining the plaintiff in custody’,<sup>366</sup> involved the ‘exercise of governmental power’ discussed by the plurality. Thus, Gageler J’s analysis satisfied each of the preconditions to a finding of ‘detention in custody by the Commonwealth’ suggested above.

Admittedly, these were the reasons of one member of the Court, in circumstances where the contrary conclusion was reached by the plurality and Keane J, and where Bell J and Gordon J reasoned on alternative bases. The approval with which the reasons of Gageler J have been treated, however, is to be emphasised. His Honour’s construction of s 198AHA in *M68* has been adopted by a unanimous High Court,<sup>367</sup> and by the Full Court of the Federal Court.<sup>368</sup>

<sup>360</sup> Ibid 95 [128] (emphasis added). See also at 94 [125] (Gageler J), citing *James v Commonwealth* (1939) 62 CLR 339, 359–60 (Dixon J).

<sup>361</sup> *M68* (n 5) 95 [128].

<sup>362</sup> Ibid 92 [119], 95–6 [128].

<sup>363</sup> Ibid. See generally Peter Gerangelos, ‘Section 61 of the *Commonwealth Constitution* and an “Historical Constitutional Approach”: An Excursus on Justice Gageler’s Reasoning in the *M68* Case’ (2018) 43(2) *University of Western Australia Law Review* 103.

<sup>364</sup> *M68* (n 5) 108 [173].

<sup>365</sup> It remains undecided whether contractors are ‘officer[s] of the Commonwealth’ within the meaning of s 75(v), which could provide an alternative approach to this issue: see, eg, Matthew Groves, ‘Outsourcing and s 75(v) of the Constitution’ (2011) 22(1) *Public Law Review* 3, 5; Janina Boughey and Greg Weeks, ‘“Officers of the Commonwealth” in the Private Sector: Can the High Court Review Outsourced Exercises of Power?’ (2013) 36(1) *University of New South Wales Law Journal* 316, 318. See also Lindell (n 171) 81; Stellios, *The Federal Judicature* (n 37) 390–1 [7.61].

<sup>366</sup> *M68* (n 5) 108 [173] (emphasis added).

<sup>367</sup> *Plaintiff S195/2016* (n 4) 636 [27] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ), quoting *M68* (n 5) 110 [181] (Gageler J). See also *FRM17 (High Court)* (n 295) 400–1 [56] (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ).

<sup>368</sup> *FRM17 (Full Court)* (n 295) 301 [188] (Kennedy, Robertson and Griffiths JJ), quoting *M68* (n 5) 110 [181].

Further, and relevantly, Gageler J's approach to the issue of executive power and security contractors was discussed in *Tanioria v Commonwealth [No 3]* ('*Tanioria [No 3]*').<sup>369</sup> There, the applicant was detained within an onshore immigration detention centre.<sup>370</sup> The Commonwealth had contracted Serco Australia Pty Ltd ('Serco') to operate the centre.<sup>371</sup> The applicant argued that ch II of the *Constitution* is subject to a *Boilermakers' Case*-type limitation, that the executive power of the Commonwealth may only be exercised by the Commonwealth executive.<sup>372</sup> Ultimately, the decision turned upon provisions of the *Migration Act*.<sup>373</sup> The observations of Gageler J in *M68*, however, were adopted in obiter to reject any constitutional limitation of the kind contended by the applicant.<sup>374</sup> Justice Thawley accepted the nub of Gageler J's reasoning, but it was unnecessary to decide whether Serco was exercising the executive power of the Commonwealth.<sup>375</sup>

Justice Thawley's reasons in *Tanioria [No 3]* may in fact supply a second approach to attributing actual constraint to the Commonwealth. His Honour said: '[t]he unlawful non-citizen is kept in detention by the officer [of the Commonwealth], not the [contractor]; it is the officer who has caused the detention.'<sup>376</sup> His Honour noted that, in expounding the seminal holding in *Lim*, the plurality in that case referred not only to detention in custody *by* the Commonwealth, but also detention *directed* by the Commonwealth.<sup>377</sup> Justice Thawley appeared to suggest that 'detention in custody by the Commonwealth' may be established in circumstances where the Commonwealth directs detention by its contractors.<sup>378</sup> On this approach, the 'governmental power' exercised is that conferred upon the executive by a law of the Commonwealth Parliament, which the executive in turn directs to be exercised by its contractors.

Thus, it is suggested that 'detention in custody by the Commonwealth' may be established under the regional processing arrangements where actual (or

<sup>369</sup> (2018) 266 FCR 610 ('*Tanioria [No 3]*').

<sup>370</sup> *Ibid* 612 [1] (Thawley J).

<sup>371</sup> *Ibid* 612 [2].

<sup>372</sup> *Ibid* 616–17 [27]. See also *Boilermakers' Case* (n 19).

<sup>373</sup> *Tanioria [No 3]* (n 369) 621 [47] (Thawley J).

<sup>374</sup> *Ibid* 624 [59].

<sup>375</sup> *Ibid* 624 [58].

<sup>376</sup> *Ibid* 621 [48], citing *Nolan v Ward* [1920] VLR 604, 607–8 (Mann J), *Re Frazer; Ex parte McCarroll* (1951) 51 SR (NSW) 234, 239 (Street CJ).

<sup>377</sup> *Tanioria [No 3]* (n 369) 622 [52], quoting *Lim* (n 7) 32 (Brennan, Deane and Dawson JJ).

<sup>378</sup> It is noted that the majority in *M68* (n 5) rejected the extension of this kind of reasoning to detention implemented by another sovereign, although their Honours did not deal with the question in relation to contractors: see above Part II(B)(3).

physical) constraint is implemented by a contractor of the Commonwealth. This Part has identified two possible approaches to the attribution of such conduct to the Commonwealth. On both approaches, and consistently with the preliminary holding in *Lim*, the ‘governmental power’ that is said to be exercised by the contractor must emanate from a law of the Commonwealth Parliament. Justice Gageler’s approach, pursuant to which the contractor was said to have been exercising the executive power of the Commonwealth, was preceded by the finding that there existed ‘an inherent constitutional incapacity’ of the executive to detain a person where the detention is ‘*not affirmatively authorised by statute*’.<sup>379</sup> Justice Thawley’s approach draws attention directly to the seminal holding in *Lim*, which concerns the constitutional validity of laws conferring upon the executive authority to detain (or, relevantly, to direct the detention of) an alien in custody. On both approaches, it is necessary to establish a nexus between the detention in custody by the Commonwealth and a law of the Commonwealth Parliament. It is suggested that, upon establishing such a nexus, the seminal holding in *Lim* is properly engaged, and the validity of the relevant law arises for determination. As has been discussed, that law in the present context is s 198AHA(2) of the *Migration Act*.

#### 4 *The Nexus between Detention in Custody by the Commonwealth and s 198AHA(2) of the Migration Act*

Section 198AHA(2) raises a novel issue in *Lim* jurisprudence. The plurality in *Lim* said that the principle in that case would invalidate laws ‘which sought to divorce ... detention in custody from ... punishment’.<sup>380</sup> As to such laws, their Honours emphasised that ‘the *Constitution’s* concern is with substance and not mere form’.<sup>381</sup> The plurality in *Lim* cannot be taken, however, to have contemplated arrangements under which the Commonwealth itself is ‘divorced’ from the detention. That is to say, s 198AHA(2) does not deal with, or ‘authorise’, detention in the relevant sense, in that it does not confer upon the executive ‘the ability to interfere with the rights of ... persons’.<sup>382</sup> Rather, it confers bare capacity to take action in relation to regional processing arrangements.<sup>383</sup> It is

<sup>379</sup> *M68* (n 5) 105 [159] (emphasis added).

<sup>380</sup> *Lim* (n 7) 27 (Brennan, Deane and Dawson JJ).

<sup>381</sup> *Ibid.* See also Appleby and McDonald (n 38) 84, 95.

<sup>382</sup> *FRM17 (Full Court)* (n 295) 304 [198] (Kenny, Robertson and Griffiths JJ). On appeal in that case, the High Court agreed with this construction of s 198AHA(2): *FRM17 (High Court)* (n 295) 400–1 [56]–[57] (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ). See above n 295. See also Explanatory Memorandum (n 87) 7 [15].

<sup>383</sup> *FRM17 (High Court)* (n 295) 400–1 [56]; *M68* (n 5) 110 [181] (Gageler J). See above nn 83–7 and accompanying text.

those arrangements, and the laws of the regional processing country, that deal with detention. In this, s 198AHA(2) is unlike s 189(1) of the *Migration Act*, with which most *Lim* jurisprudence has been concerned.<sup>384</sup> The latter section expressly provides that officers ‘must *detain*’ aliens within Australia in certain circumstances.<sup>385</sup>

It might be asked, therefore, how s 198AHA(2) in its terms can engage the seminal holding in *Lim*, which is concerned with laws that ‘authorise’ executive detention, such as s 189(1). Now, the distinct nature of the inquiry of this article is to be highlighted. On an application for a writ of habeas corpus, the requisite nexus between the detention in custody by the Commonwealth and s 198AHA(2) could be established, because the Commonwealth would be required to adduce lawful justification for the detention upon making a return.<sup>386</sup> It is reiterated that ‘the *Constitution*’s concern is with substance and not mere form’ in this context.<sup>387</sup> Upon adducing s 198AHA(2) as the requisite justification for the detention, the true character of that provision would be brought to bear — namely, that it in substance authorises ‘detention in custody by the Commonwealth’ for the purposes of *Lim*. Relevantly, Gageler J in *M68* saw

no principled reason to distinguish between a law which confers a power of executive detention and a law which confers a capacity for executive detention so as to allow for the exercise of power from another legislative source.<sup>388</sup>

It is suggested that the seminal holding in *Lim* would be engaged through this procedural step, raising for determination the validity of s 198AHA(2).

### 5 *Postscript: Habeas Corpus and the Preliminary Holding in Lim*

The analysis propounded by this Part has proceeded upon the two-step formulation of the *Lim* principle introduced above.<sup>389</sup> The two holdings in that case were referred to as the preliminary holding and the seminal holding. The plurality and Keane J in *M68*, however, appeared to accept the Commonwealth’s submission that the seminal holding alone supplied the ‘true principle’ for which *Lim* is authority, and the starting point of any constitutional analysis of

<sup>384</sup> See, eg, *Al-Kateb* (n 34) 574 [10]–[11] (Gleeson CJ); *Behrooz* (n 39) 492 [1]–[2] (Gleeson CJ); *Re Woolley* (n 39) 7 [1] (Gleeson CJ).

<sup>385</sup> *Migration Act* (n 53) s 189(1) (emphasis added).

<sup>386</sup> See above Part III(A)(3).

<sup>387</sup> *Lim* (n 7) 27 (Brennan, Deane and Dawson JJ).

<sup>388</sup> *M68* (n 5) 111 [184].

<sup>389</sup> See above nn 26–7 and accompanying text.

detention arrangements.<sup>390</sup> An argument concerning detention under the regional processing arrangements that begins with the seminal holding — that is, the principle of constitutional validity applicable to laws that ‘authorise’ executive detention of aliens — cannot be made good, because s 198AHA(2) does not in its terms ‘authorise’ detention. Rather, this Part has adopted the contrary approach of beginning with the preliminary holding in *Lim*, which directs attention to the question whether there is identifiable ‘detention in custody by the Commonwealth’. As has been argued, the requisite nexus between detention in custody — which, pursuant to the preliminary holding, must be affirmatively authorised by statute — and s 198AHA(2) would be supplied by the Commonwealth making a return on an application for habeas corpus, thus engaging the seminal holding in *Lim*.

As discussed above, Gageler J in *M68* also began the analysis from the preliminary holding. That is because his Honour recognised the law of habeas corpus as being part of ‘our contemporary constitutional structure.’<sup>391</sup> This elevated the preliminary holding in *Lim* to ‘an inherent constitutional incapacity’ of the executive.<sup>392</sup> This article gives further force to his Honour’s reasoning, in that such an approach would be compelled on an application for habeas corpus, due to the nature of the inquiry on such an application. As previously discussed,<sup>393</sup> the inquiry begins with identification of the detention of which the applicant complains. Where the named respondent is amenable to the court’s writ in respect of that detention, the respondent must adduce lawful justification.<sup>394</sup> As Gageler J in *M68* suggested, the preliminary holding in *Lim* assumes central importance on an application for habeas corpus.<sup>395</sup>

This Part has argued that *Lim* could be engaged on an application for a writ of habeas corpus in respect of detention under the regional processing arrangements. That is because: (i) the Commonwealth and the Minister would be amenable to habeas corpus; (ii) there was identifiable ‘detention in custody’ on the facts in *M68*; (iii) that detention could be attributed to the Commonwealth on the approach either of Gageler J in *M68* or of Thawley J in *Tanioria [No 3]*; and (iv) upon making a return by adducing s 198AHA(2) as the lawful justification for the detention, the Commonwealth would supply the requisite nexus between the detention and s 198AHA(2). That would be sufficient to raise for

<sup>390</sup> *M68* (n 5) 69–70 [38]–[41] (French CJ, Kiefel and Nettle JJ), 124–5 [238]–[241] (Keane J).

<sup>391</sup> *Ibid* 103 [155], citing *Re Bolton* (n 1) 520–1 (Brennan J).

<sup>392</sup> *M68* (n 5) 105 [159] (Gageler J).

<sup>393</sup> See above Part III(A)(3).

<sup>394</sup> See above n 188 and accompanying text.

<sup>395</sup> See *M68* (n 5) 105 [159].

determination the constitutional validity of s 198AHA(2) under the seminal holding in *Lim*.

In order to canvass the issues likely to arise within this setting, the analysis of this Part has been undertaken by reference to the facts in *M68*, which detailed the specific arrangements in Nauru. Although the argument of this Part is more broadly applicable, it is necessary to describe briefly the significance of more recent changes to the arrangements in Nauru and in Papua New Guinea.

### C The ‘Open Centre Arrangements’

Following the institution of the *M68* proceedings, it was announced that freedom of movement would be afforded at the Nauru RPC.<sup>396</sup> Since the hearing of that case, ‘open centre arrangements’ have been implemented under Nauruan legislation,<sup>397</sup> pursuant to which ‘residents of the Centre may enter or leave ... at their will’.<sup>398</sup> Similar arrangements have been implemented in Papua New Guinea.<sup>399</sup> While habeas corpus may lie in cases of lesser forms of restraint upon liberty not amounting to detention in custody,<sup>400</sup> the dicta in *Thomas* provide a clear indication that *Lim* could not apply in such circumstances for want

<sup>396</sup> See Nauru, *Government Gazette*, No 142, 2 October 2015.

<sup>397</sup> See, eg, ‘Detainees in Nauru to Be Granted Full Freedom of Movement 24 Hours a Day’, *ABC News* (online, 3 October 2015) <<https://www.abc.net.au/news/2015-10-03/nauru-to-grant-asylum-seekers-full-freedom-of-movement/6825482>>, archived at <<https://perma.cc/8HH5-82CS>>; Daniel Hurst, ‘Nauru Centre Opening Has “Dramatic Effect” on Detention Challenge, Court Told’, *The Guardian* (online, 7 October 2015) <<https://www.theguardian.com/australia-news/2015/oct/07/nauru-open-centres-asylum-seeker-fighting-offshore-detention-high-court>>, archived at <<https://perma.cc/4W2T-Y4RQ>>.

<sup>398</sup> *Asylum Seekers (Regional Processing Centre) Act 2012* (Nauru) s 18C(3), as amended by *Asylum Seekers (Regional Processing Centre) (Amendment) Act 2015* (Nauru) s 8. But see Tom Allard, ‘Nauru’s Move to Open Its Detention Centre Makes It “More Dangerous” for Asylum Seekers’, *The Sydney Morning Herald* (online, 9 October 2015) <<https://www.smh.com.au/politics/federal/naurus-move-to-open-its-detention-centre-makes-it-more-dangerous-for-asylum-seekers-20151008-gk4kbt.html>>, archived at <<https://perma.cc/K6R5-GDRL>>.

<sup>399</sup> All persons previously detained on Manus Island were relocated to ‘residential accommodation’ in Port Moresby in late 2019. They are ‘not ... subject to immigration detention’ under those arrangements: ‘Manus Island Refugees Offered Voluntary Relocation to Port Moresby’, *ABC News* (online, 20 August 2019) <<https://www.abc.net.au/news/2019-08-20/manus-island-asylum-seekers-voluntary-relocation-port-moresby/11430778>>, archived at <<https://perma.cc/NB7Z-HKRT>>.

<sup>400</sup> Applications have failed in cases of ‘territorial restraint’, that is, confinement to a particular location: *Farbey, Sharpe and Atrill* (n 227) 183. See also *Mwenya* (n 15) 245–6 (Sir Reginald Manningham-Buller QC A-G and JR Cumming-Bruce) (during argument); *Wales v Whitney*, 114 US 564, 566, 575 (Miller J for the Court) (1885). An argument of this kind was rejected in

of meeting the threshold level of restraint.<sup>401</sup> The open centre arrangements, therefore, are a complete answer to the question whether *Lim* may be engaged in the current situation on Nauru. They are not a complete answer to the value of this article, however. Just as the situation within this setting has evolved markedly since the *Tampa* incident,<sup>402</sup> it remains that cases of offshore detention may well arise under the regional processing arrangements in the future,<sup>403</sup> arrangements to which the Commonwealth government has ‘said it remain[s] committed.’<sup>404</sup> Indeed, the Minister for Home Affairs said in 2020: ‘if a new boat arrived tomorrow, those people would go to Nauru.’<sup>405</sup> Were cases of detention to arise, it has been argued that there is a good remedy in habeas corpus that, directed to the Commonwealth and the Minister, would raise for determination the validity of s 198AHA(2) under the *Lim* principle.

## V CONCLUSION

This article has argued that a person detained under the Commonwealth’s regional processing arrangements could seek a writ of habeas corpus. Such an application could be supported by the *Lim* principle, so that the constitutional validity of s 198AHA(2) of the *Migration Act* would arise for determination. The result is different to that reached by the plurality in *M68* — namely, that *Lim* has ‘nothing to say’ about the regional processing arrangements. To the contrary, it may be that *Lim* has much to say about those arrangements on an application for habeas corpus.

the *Tampa Case* (n 47): at 548 [213] (French J, Beaumont J agreeing at 514 [95]). See also at 547 [209] (French J), citing *Lo Pak* (n 134) 247–8 (Windeyer J), *Ex parte Leong Kum* (1888) 9 LR (NSW) 250, 256–7 (Darley C).

<sup>401</sup> See above n 331 and accompanying text.

<sup>402</sup> See above Part II(B)(1).

<sup>403</sup> At the time of writing, a contract between the Commonwealth and Canstruct International Pty Ltd, for the provision of services at the Nauru RPC, remains on foot: see, eg, Angus Grigg, ‘Nauru Detainees Cost \$10,000 Each per Day in Contract Bonanza’, *The Australian Financial Review* (online, 12 February 2021) <<https://www.afr.com/politics/federal/nauru-detainees-cost-10-000-each-per-day-in-contract-bonanza-20210211-p571io>>, archived at <<https://perma.cc/5UU3-7LEC>>; Ben Doherty, ‘Brisbane Company Paid \$1.4bn to Run Offshore Processing on Nauru despite No Arrivals since 2014’, *The Guardian* (online, 10 April 2021) <<https://www.theguardian.com/australia-news/2021/apr/10/brisbane-company-paid-14bn-to-run-offshore-processing-on-nauru-despite-no-arrivals-since-2014>>, archived at <<https://perma.cc/97QZ-MS8Y>>.

<sup>404</sup> Doherty (n 403).

<sup>405</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 29 October 2020, 8893 (Peter Dutton).

This position was reached as follows. It was recognised that, although it is not named in the *Constitution*, habeas corpus issues on questions of constitutional law. It was then observed that habeas corpus may issue in cases of detention outside the jurisdiction, as established by the authorities in England and Wales and in the United States. The differing approaches in those jurisdictions were examined. This article argued that Australian courts should continue to follow the English approach. That is because the exercise of the High Court's jurisdiction under s 75(v) of the *Constitution* is similar to the English approach — that is, the Court's jurisdiction is attracted in respect of action taken by officers of the Commonwealth, wherever that action is taken. Questions concerning the territorial status of the place where action has been taken do not arise, which is to be contrasted with the approach to the reach of habeas in the United States.

This article then argued that the Commonwealth would be amenable to habeas corpus in respect of detention under the regional processing arrangements. Although it appears that the Commonwealth's power to transfer a transitory person to Australia is not unilateral, there is enough doubt on the evidence to justify the issue of a writ at the initial stage. It was then argued that *Lim* could supply the ground of review on such an application. The question was raised whether 'detention in custody by the Commonwealth' could be found under the regional processing arrangements. It was suggested that the detention in custody by Wilson Security on the facts in *M68* was *by* the Commonwealth, in that it involved the 'exercise of governmental power'. This article left open two possible approaches to the attribution of detention by a contractor to the Commonwealth. The first was the reasoning of Gageler J in *M68*, that the contractor exercised the executive power of the Commonwealth as its agent.<sup>406</sup> The second was that of Thawley J in *Tanioria [No 3]*, that detention by a security contractor is 'directed' by the Commonwealth.<sup>407</sup> On both approaches, the question was then raised whether the detention is supported by a law of the Commonwealth Parliament. It was noted that s 198AHA(2), the statutory authority for the Commonwealth's action in relation to regional processing, does not deal with detention in the sense contemplated in *Lim*. It was argued, however, that, upon making a return on an application for habeas by adducing lawful authority for the detention, the Commonwealth would supply the requisite nexus between the detention and s 198AHA(2). Thus, the true character of s 198AHA(2) as a law authorising detention, as a matter of 'substance and not mere form', would emerge.

<sup>406</sup> See above nn 364–6 and accompanying text.

<sup>407</sup> See above nn 376–8 and accompanying text.

The discussion herein may be more broadly applicable in cases of detention of aliens outside Australia, where another sovereign authority is ostensibly interposed in the detention, but the Commonwealth, directly or by its agents, continues to exercise ‘actual constraint’, or directs such constraint by a third party. Although this article has not engaged with the ultimate question whether s 198AHA(2) is valid under the seminal holding in *Lim*, it is noted that, of the three judges in *M68* who decided the question, a majority held that the law was valid.<sup>408</sup> It follows that the question, were it to fall for determination by all seven members of the Court, would not be clear cut, particularly in light of Gordon J’s strong dissent in *M68*.<sup>409</sup> Were s 198AHA(2) held invalid, the Commonwealth would be required to release from detention the applicant or person on behalf of whom habeas was sought. Such a result might have broader implications for regional processing, however, as was contemplated by junior counsel for the plaintiff in *M68*: ‘[T]he Commonwealth would have ... difficulties in restructuring the scheme ... to support offshore processing.’<sup>410</sup>

It might be wondered why, on the same facts, a different result should be reached on an application for habeas corpus than that on application for a declaration and for judicial review in *M68*. As observed by Lord Kerr JSC in *Rahmatullah (Supreme Court)*, applications for habeas corpus and for judicial review are ‘two quite different bases of claim.’<sup>411</sup> This distinction was more recently drawn by Gordon and Gleeson JJ and Edelman J in *AJL20*.<sup>412</sup> Indeed, habeas is concerned principally with the liberty of the individual, and not with executive accountability.<sup>413</sup> It is acceptable, therefore, that a different result should be reached.<sup>414</sup> That is particularly so in the context of the separation of powers that inheres in the text and structure the *Constitution*, from which *Lim* emerges. As has been observed, the object of the separation of powers is the

<sup>408</sup> See above n 16. Justice Keane said in obiter that the law was valid: *M68* (n 5) 130–1 [260]–[264].

<sup>409</sup> See above nn 121–6 and accompanying text.

<sup>410</sup> Hume (n 6).

<sup>411</sup> *Rahmatullah (Supreme Court)* (n 15) 644 [73].

<sup>412</sup> *AJL20* (n 14) 588–9 [93], 590 [96] (Gordon and Gleeson JJ), 604 [143] (Edelman J).

<sup>413</sup> See above nn 186–93 and accompanying text. See also Eatwell (n 254) 728.

<sup>414</sup> *Rahmatullah (Supreme Court)* (n 15) 644 [71]–[72] (Lord Kerr JSC for Lords Dyson MR, Kerr and Wilson JJSC, Lord Phillips agreeing at 653 [107]). See also *Hicks* (n 15) 598 [80] (Tamberlin J).

protection of individual liberty.<sup>415</sup> Thus, Gageler J in *M68* said that habeas corpus has come ‘to play “a structural role”’ within this constitutional context.<sup>416</sup> By highlighting that role, this article has demonstrated ‘the contemporary and undiminished force’ of habeas corpus of which Brennan J in *Re Bolton* spoke.<sup>417</sup> Concomitantly, this article is a reminder that the protections of individual liberty afforded by the *Constitution* are immutable, both within Australia and offshore. This article has, therefore, given a fuller expression to the ‘protective principle’ in *Lim* in respect of detention under the regional processing arrangements, relative to the approach of the plurality and Keane J in *M68*.

<sup>415</sup> See, eg, *M68* (n 5) 86 [97] (Gageler J). See also above nn 43–5 and accompanying text.

<sup>416</sup> *M68* (n 5) 104 [156] (emphasis added), quoting Jonathan L. Hafetz, ‘The Untold Story of Non-criminal Habeas Corpus and the 1996 Immigration Acts’ (1998) 107(8) *Yale Law Journal* 2509, 2526.

<sup>417</sup> See above nn 1–2 and accompanying text.