THE RED QUEEN'S LAW: JUDICIAL REVIEW AND OFFSHORE PROCESSING AFTER *PLAINTIFF S157/2001*

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In September 2001 at the height of the Tampa crisis the Australian parliament finally bowed to the will of the executive and passed legislation intended to restrict access to judicial review of migration and refugee decisions. The *Migration Act 1958* was amended to provide that all decisions of an administrative character[1] were to be 'privative clause decisions'.

To give effect to that intention, Part 8 – Judicial Review, s 474(1) was inserted into the *Act*. It provided:

> 474 Decisions under Act are final
> (1) A privative clause decision:[2]
> (a) is final and conclusive; and
> (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
> (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

A further amendment to the *Migration Act 1958* (s 486A) introduced strict and unrealistic time limits for applications even for whatever limited relief might remain. Applications filed after thirty five days from a decision could not be entertained by any court.

Those amendments were challenged in the High Court by proceedings commenced by writ of summons in the matter later reported as *Plaintiff S157/2002 v Commonwealth.*[3]

The proceedings in *Plaintiff S157/2002* were filed after the time prescribed by s 486A had expired.

The statement of claim filed by the plaintiff, Mr Sayed,[4] alleged that the decision of the Refugee Review Tribunal which had refused him a visa as a

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1 Save for narrow class specifically exempted—see s 474 ss (2)-(5).

2 Subsections (2)–(5) defined the term 'privative clause decision'. The provision can be summarised as encompassing every decision of an administrative character made under the *Migration Act*, except for a very limited class explicitly excluded by subsection (4) or specified by regulations under subsection (5).

3 (2003) 211 CLR 476.

4 s 91X of the *Migration Act 1958* directed the High Court, the Federal Court (and now the Federal Magistrates Court) not to publish (in electronic form or otherwise) the name of any person who has applied for a protection visa in related proceedings.

refugee was void. That was because the decision maker had, he contended, breached the rules of natural justice by failing to allow him an opportunity to comment on information the Tribunal had taken into account. Absent the privative clause the breach alleged ordinarily would result in any affected decision being set aside on judicial review. The plaintiff sought declarations that both s 474 and s 486A were invalid—because each was inconsistent with s 75(v) of the Constitution. He claimed the Constitution guaranteed him a right to seek judicial review of the Tribunal's decision. Mr Sayed's case came before the full court of the High Court of Australia in its original jurisdiction and not by way of an appeal.

The Commonwealth's case, as put to the High Court, was that the principles expressed by Dixon J in *R v Hickman; Ex parte Fox and Clinton*[5] about how to interpret privative clauses had become settled law.

The Solicitor-General submitted that applying that test and what had become known as the *Hickman* 'provisos' to the privative clause effectively abolished judicial review under the *Migration Act 1958* leaving proven bad faith as the only ground realistically available.

The provisos aside, the understanding of the law that the Commonwealth claimed had been settled by *Hickman* was that,

the effect of a privative clause [is] not to limit the jurisdiction of the court but to expand the power of the decision maker whose decision was affected by the privative clause.[6]

However, that understanding of the law was rejected decisively by the High Court.

Instead the court drew on what Gaudron and Gummow JJ had decided in *Darling Casino v New South Wales Casino Control Authority,*[7] a case in which their Honours had emphasised the distinction between a 'decision under the Act' and a decision 'under or purporting to be under the Act'. Their Honours noted:

> There is one point we should add, because the Court of Appeal appears to have proceeded on a contrary view. It concerns the content of the phrase in s 155(1), [the relevant privative clause] 'a decision of the Authority under this Act'. The phrase is not 'under or purporting to be under this Act'. Section 11 obliges the Authority to have regard to certain matters. Section 12 forbids the Authority to grant an application unless satisfied of the matters there specified and for that purpose the Authority is to consider the items specified in s 12 (2)(a)–(h). Section 13 contains a definition of 'close associate', a term used in s 12. Sections 11, 12 and 13 are central to the legislative scheme. Section 155 cannot fairly be construed as declaring an intention of the legislature that the Authority is empowered and protected in respect of determinations under

5 (1945) 70 CLR 598.

6 Written submissions of the first respondent on the construction and validity of s 474(1) of the *Migration Act 1958* para 8: citing *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, Hayne J [166].

7 (1997) 191 CLR 602.

s 18 reached other than upon satisfaction of the conditions which enliven its power. Those decisions would not have been made 'under this Act'.[8]

In consequence the privative clause in issue in *Darling Casino* was held to have no work to do in respect of a 'decision' made in disregard of those conditions. Any failure to comply with such conditions took the matter outside a decision maker's jurisdiction. Such a 'decision'—one infected by jurisdictional error—was no decision at all. It was only a purported decision—a legal nullity.

The Decision in *Plaintiff S157/2002*: The Constitution Entrenches Judicial Review

The High Court in *Plaintiff S157/2002* unanimously[9] applied this approach to the construction of s 474. The privative clause, whilst not constitutionally invalid as interpreted by their Honours, was held neither to expand a decision maker's jurisdiction, nor to validate error.[10] It simply did not apply to a 'purported' decision—that is a decision infected by jurisdictional error.

Section 75(v) was reaffirmed as having introduced into the Constitution 'an entrenched minimum provision of judicial review',[11] 'assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them'.[12]

A privative clause, so understood, cannot affect judicial review for jurisdictional error. It simply requires a judge to consider such a clause (and the terms in which it is expressed) as one factor, alongside other indications contained within the Act, that may assist the reviewing court to decide whether compliance with any express or implied provision of an Act is essential to a decision's validity.[13]

That task must be undertaken by applying ordinary rules of statutory interpretation[14] to ascertain whether or not the provision under

8 Ibid 635.

9 By a joint judgement of five justices, Gaudron, McHugh, Gummow, Kirby and Hayne JJ; the Chief Justice delivered a concurring but separate, and Callinan J a substantially concurring, but differently nuanced, judgement.

10 A possible alternative understanding of Hickman given its clearest expression in the joint judgement of Mason ACJ and Brennan J in *R v Coldham*; Ex parte Australian Workers Union (1983) 153 CLR 415: 'Consequently, the making of the award or order is the occasion for taking the privative clause into account in interpreting the Tribunal's authority or power more liberally. Before the award or order is made the Tribunal will be held to a strict construction of its powers uninfluenced by the clause, thereby enabling the grant of prohibition, notwithstanding that had the proceedings reached the stage where an award or order was made prohibition could not have been obtained (pp 418–19, italics added).

11 Gaudron, McHugh, Gummow, Kirby and Hayne J in Plaintiff S157/2002 [103].

12 Ibid [104].

13 Or expressed in the older language recently disapproved of by the High Court (see the cases cited by Callinan J at note 143 of his Honour's judgement), whether the provision is mandatory or directory.

14 Gleeson CJ [20] 31, Gaudron, McHugh, Gummow, Kirby and Hayne JJ [60].

consideration is, or is not, essential to validity. Express statutory provisions, which define or confine the ambit of a decision maker's powers, should not be read as subservient to the general intention expressed by a privative clause.[15] They accordingly remain inviolable limits and constraints.[16]

Their Honours' reasoning rejected the Commonwealth's submission that a privative clause took effect by expanding the jurisdiction of a decision maker.

The fundamental premise behind the introduction of the legislation was held to have been unsound[17] and founded on an incorrect understanding of *Hickman.*[18] Instead the High Court reaffirmed that jurisdictional error results in a legal nullity.

A privative clause cannot expand the jurisdiction of a decision maker. It does not apply to decisions purportedly, rather than lawfully, made nor does it validate what would otherwise have been an invalid decision. Indeed, only if construed in this way[19] will a privative clause not conflict with the Constitution.

The five justices who delivered the leading joint judgement in *Plaintiff S157* 2002 explicitly stated that had s 474 been drafted to prevent the High Court reviewing a *purported* decision—in other words a decision infected by jurisdictional error—such a privative clause would have come into direct conflict with s 75(v) of the Constitution and, accordingly, would have been invalid.[20]

The result was that the High Court upheld the validity of s 474—but on the basis that a privative clause not only **does not**, but also **cannot**, mean what it appears to say.[21]

This adroit solution[22] avoided direct confrontation with the government—but perhaps at the price of using language with the same freedom as the Red Queen in *Alice through the Looking Glass.*

The outcome of the case was, in any event, a win for Mr Sayed. He was granted the right to seek judicial review. Applying the already well settled law that a breach of the rules of natural justice by an administrative tribunal

15 Gaudron, McHugh, Gummow, Kirby and Hayne JJ [65–66]; Callinan J [162].
16 Gaudron, McHugh, Gummow, Kirby and Hayne JJ [76].
17 Gaudron, McHugh, Gummow, Kirby and Hayne JJ [91].
18 Gleeson CJ [35] 35; Gaudron, McHugh, Gummow, Kirby and Hayne JJ [91]; Callinan J [162].
19 This is a way quite alien to both a natural reading of actual words of the statute and the intention of the parliament.
20 Gaudron, McHugh, Gummow, Kirby and Hayne JJ [75].
21 If the Federal parliament continues to enact such clauses, and even build on them, statutes will become impossible to read on their face. Already, with references now not only to privative clause decisions but also to purported privative clause decisions, only a lawyer skilled in constitutional law or someone who has learnt that, at least in this context, black can mean white, could navigate the complexities of the *Migration Act 1958*—or even have the faintest idea of what these provisions might mean.
22 See Kerr and Williams, 'Review of Executive Action and the Rule of Law under the Australian Constitution' (2003) 14 *Public Law Review* 219, 233.

constitutes jurisdictional error, the High Court held that the Refugee Review Tribunal's decision, if so defective, would be an invalid, merely purported, decision and thus not protected by the privative clause.

Similarly premised[23] findings were made with respect to the time limits imposed by s 486A. These time limits were held not to apply to decisions flawed by jurisdictional error.

However, in the immediate aftermath of *Plaintiff S157/2002* the Commonwealth Solicitor-General argued that the decision had 'come to very little' and had merely opened up a new debate about the scope of jurisdictional error.[24] That assessment proved to be wrong.

The hope the Commonwealth may have harboured that the High Court would cut back the effect of the decision in *Plaintiff S157/2002* by narrowing the scope of jurisdictional error was given short shrift when the High Court of Australia refused leave from decisions of the full court of the Federal Court of Australia in *MIMIA v Scargill, MIMIA v Lobo & Ors.*[25]

Instead the course of authority has continued to reinforce the broad proposition advanced by the unanimous bench of the High Court in *Craig v South Australia*[26] that if an administrative tribunal

> falls into an error of law which causes it to identify a wrong issue, to ask itself the wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers.[27]

Such an error of law is jurisdictional error. It results in the invalidity of any order or decision of the tribunal which reflects it.[28]

Privative Clauses and the Parliament since *Plaintiff S157/2002*

Following the High Court's decision in *Plaintiff S157/2002* the Government introduced changes to the *Migration Act 1958* by the *Migration Litigation Reform Bill 2005*.[29]

These amendments revealed a significant change of approach by the Commonwealth.

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23 Callinan J approached this aspect of the case slightly differently and held that s 486A was invalid 'to the extent that it purports to impose a time limit of 35 days within which to bring proceedings under s 75(v) in this court' [174]. That was because it went beyond regulation and was, in substance, a prohibition.

24 D Bennett, 'Privative Clauses—an Update on the Latest Developments' (2003) 37 *AIAL Forum* 20, 32

25 [2004] HCA 21 (13 February 2004).

26 (1995) 184 CLR 163.

27 Ibid, 179.

28 *Craig v South Australia* (1995) 184 CLR 163, 179.

29 Earlier more draconian proposals set out in the Migration Amendment (Judicial Review) Bill 2004 did not secure passage through the Parliament.

The new approach accepted the inevitability of judicial review—but sought to limit 'abuse' by various means.

The key change gave the recently formed Federal Magistrates Court an exclusive statutory jurisdiction identical to the entrenched jurisdiction of the High Court under s 75(v) of the Constitution.[30]

As part of the strategy of conferring mirror jurisdiction on the Federal Magistrates Court, the Commonwealth's previous approach[31] denying the High Court power to remit cases was abandoned. That ban had resulted in a backlog of litigation in the High Court and in long delays in resolution of appeals. The prohibition had been, understandably, resented by the justices of the High Court—forcing them to undertake first instance work unsuited for a final constitutional court of appeal and which ordinarily would have been devolved to other courts.

The Government's reform package also backed away from further exploring another avenue the Commonwealth had previously contemplated—legislating to restrict or remove commonly utilised grounds of review.

There is considerable speculation that the secret Penfold Review[32] that the Attorney-General had commissioned after the High Court's decision in *Plaintiff S157/2002* included warnings similar to the public advice he later received from the Administrative Review Council in its report, *The Scope of Judicial Review.*[33]

Noting that this remained 'an unresolved question' the Administrative Review Council nonetheless doubted that, following *Plaintiff S157/2002,* it would be open to the parliament to enact a law that purported to remove one or more of the grounds of review commonly associated with the issuing of a constitutional writ.[34]

This appears to be the likely explanation of why these reforms did not take that direction.

Instead abuses were to be checked by imposing personal liability for costs on lawyers who filed unmeritorious applications for review—and by rewriting s 486A to preserve a final time limit for commencing proceedings.

The latter was intended to be achieved by legislating so that the time limits would apply not only to 'privative clause decisions' but also to 'purported privative clause decisions'.

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30 To prevent multiplicity of forums the Federal Court was left with only appellate jurisdiction.

31 *Migration Amendment (Judicial Review) Act 2001.*

32 The common abbreviation referring to the committee chaired by Hilary Penfold QC was formally the Migration Litigation Review. Notwithstanding requests the report of this Review has never been publicly released. The reason given for keeping it secret was that the Penfold Review was prepared for the purposes of a Cabinet decision—see the Attorney General, Answer to Question on Notice 903, *Hansard* 10 May 2005, 368.

33 Report No. 47 (April 2006).

34 At 3.4.2. See also D Kerr, 'Deflating the *Hickman* Myth: Judicial Review after *Plaintiff S157 v The Commonwealth*' (2003) 37 *AIAL Forum* 1, 13–14.

However, it was problematic from the outset that it was open to the executive and parliament to get around the ineffectuality of the time bar by recasting s 486A in that way.[35] Doubts by leading academics and the Law Council of Australia were highlighted in the Parliamentary Library's Bills Digest on the *Migration Litigation Reform Bill 2005*.[36]

The Bills Digest concluded as follows:

> Placing a maximum time on use of the High Court's discretion in migration matters, amounts to an absolute ban on appeals under s 75 outside this time with no allowance for the circumstances of any particular case. The difficulty the Federal Government faces in proposing a set, non-extendable maximum period for appealing to the High Court is, as Chief Justice Gleeson noted in *Plaintiff S157*, that some grounds for review might not be discovered until after any fixed time limit expires. Any people in such a position would therefore be denied their constitutional right to appeal to the High Court against the actions of the Commonwealth. To the extent that provisions in the current bill [now enacted] have this effect, they are likely to be constitutionally invalid.[37]

Amendments proposed by the Opposition to exempt matters in which an applicant alleged malice or fraud by the decision maker—the grounds of review most likely to be revealed after the expiry of the time limit—from the time bar were defeated.[38]

The issue eventually came before the High Court in *Bodruddaza v MIMIA*.[39] The recast s 486A was unanimously held to be invalid. A joint judgment was delivered by Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ. Callinan J delivered a separate concurring judgment.

The joint judgment noted:

> The fixing upon the time of notification of the decision as the basis of the limitation structure provided by s 486A does not allow for supervening events which may physically incapacitate the applicant or otherwise, without any shortcoming on the part of the applicant, lead to a failure to move within the stipulated time period. The present case, where the plaintiff was one day late, apparently by reason of a failure on the part of his migration adviser, is an example.[40]

A fixed time limit cast in the manner of s 486A of the Act was held to subvert the constitutional purpose of s 75(v) to make it certain that there

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35 My reasoning can be found at Ibid, 12. The conclusion was contended for in reliance not only on Callinan J's express findings at [174–75] but also on Gaudron, McHugh, Gummow, Kirby and Hayne JJ's reasoning at [75] and their Honours' strong comments at [98] and [103–04] that differences in understanding about privative clauses between the submissions of the Commonwealth and the decision of the Court were real and substantive and not mere verbal quibbles.

36 Bills Digest 4 August 2005, No. 9 2005–06, 16–19.

37 Ibid, 18–19.

38 Senate Journals No. 55 7/11/05.

39 (2007) 234 ALR 114; [2007] HCA 14.

40 sub-s [57].

would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding their power.[41]

The principle confirmed by *Bodruddaza* is that any law with respect to the commencement of proceedings under s 75(v) of the Constitution will be invalid if it either 'directly or as a matter of practical effect' ... 'curtail[s] or limit[s] the right or ability of applicants ... so as to be inconsistent with the place of that provision in the constitutional structure, as explained in *Plaintiff S157/2002.*'[42]

With that important exception the amended scheme (transferring the bulk of *Migration Act* matters to the Federal Magistrates Court and penalising the filing of wholly unmeritorious applications) appears to be working tolerably well—preserving the right to judicial review with lessened inconvenience and delay.

Supervisory Jurisdiction over an Officer of the Commonwealth

Although the Australian legal environment since *Plaintiff S157/2002* has proven resistant to inroads on judicial review it is important always to bear in mind that there is a threshold requirement for jurisdiction under s 75(v) of the Constitution—and any statutory mirror of it—because the High Court's constitutional supervisory jurisdiction runs only in respect of a person properly described as an 'officer of the Commonwealth'. While that term has been given a wide reading, not restricted to members of the executive,[43] it cannot apply to persons who are not at all, or insufficiently, linked to the Commonwealth.[44]

Further, the High Court's supervisory jurisdiction runs only to compel proper compliance by such officers with their statutory and common law duties—it does not itself impose those substantive obligations.

An example of the consequences of the latter limitation was revealed in the way in which the Australian Government handled the 2001 Tampa incident.

The team planning the Howard government's response to the Tampa crisis[45] made sure that the distressed asylum seekers who had been rescued

41 sub-ss [44]–[46], [58].

42 Ibid [53].

43 *The Tramways Case (No. 1)* (1914) 18 CLR 54; *R v Drake-Brockman; Ex parte National Oil Pty Ltd* (1943) 68 CLR 51.

44 Thus neither a governor of a state (*R v Governor of the State of South Australia* (1907) 4 CLR 1497) nor a judge of an inferior court of a state invested with, and purporting to exercise federal jurisdiction, (*R v Murray and Cormie; Ex parte the Commonwealth* (1916) 22 CLR 437) falls within that description.

45 *Tampa*, a Norwegian freighter, had rescued a group of people from their sinking vessel. Those rescued had been intending to seek refugee status in Australia. The captain of *Tampa*, honouring international maritime conventions regarding rescue at sea, proposed taking the group to the nearest port—Christmas Island. The Australian government refused to permit this, sending the military to prevent the vessel docking. See <www.abc.net.au/new/indepth/yr2001/politics9.htm>.

by *Tampa* were never able to contact any Australian official who might have had a legal responsibility to process a claim for refugee status. The vessel was boarded by SAS (Defence) troops and not by Australian Federal Police, customs nor immigration officials.

Defence personnel were undoubtedly 'officers of the Commonwealth' but the military had no relevant statutory or common law duties under the *Migration Act 1958*. The supervisory jurisdiction of the High Court under s 75 (v) of the Constitution was not relevant in their instance.

Other 'officers of the Commonwealth'—particularly immigration officials, who had or may have had substantive responsibilities under that Act—and who, accordingly, may have been amenable to the jurisdiction of the High Court had proceedings been brought—were not permitted near the vessel.

Expanded Offshore Processing

The Howard government's strategy of avoiding judicial review by keeping officers of the Commonwealth away from possible legal engagement with refugee claimants was fundamental to the offshore processing regime[46] it first introduced in 2001. The three key elements were, first, removing all relevant legal rights under Australian domestic law from would be asylum seekers who arrived in an excised area; second, removing any concomitant legal obligations of Commonwealth officials to process any claims for refugee status they might make; and, third, shifting the subsequent processing of these 'unauthorised arrivals' offshore to other countries—ensuring that that task, if it was undertaken, was undertaken by persons who were not 'officers of the Commonwealth'. The strategy was introduced by a package of legislation that included the *Migration Amendment (Excision from Migration Zone) Act 2001*, the *Migration Amendment (Excision from Migration Zone)(Consequential Provisions) Act 2001* and the *Migration Legislation Amendment (Transitional Movement) Act 2002*.

That legislation 'excised' certain offshore territories (the most important being Christmas Island) from the legal definition of the Australian migration zone.[47] This meant that officers of the Commonwealth, including migration officers, henceforth had no duty under Australian domestic law to apply the refugee provisions of the *Migration Act 1958* to persons arriving by boat unless its passengers reached the Australian mainland. Such persons were to be processed offshore.

46 For a more comprehensive account of the way in which the 'Pacific Solution' operated see Crock, Saul and Dastyari, *Future Seekers II: Refugees and Irregular Migration in Australia* (2006).

47 A more extreme proposal contained in the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002, which would have extended the excision to islands across the north of Western Australia, the Northern Territory and Queensland, failed to pass in the Senate.

Nauru and Manus Island in Papua New Guinea were declared countries under s 198A of the *Migration Act 1958* (as amended) and offshore processing facilities were established in those countries on 19 September 2001 and 21 October 2001 respectively.

Extremely generous financial arrangements were offered to the governments of Papua New Guinea and Nauru to induce those foreign governments to establish notionally independent facilities for accepting and detaining any asylum seekers Australia turned away. This was designed to shield against the possible intervention of Australian courts notwithstanding that de facto policy responsibility for the schemes remained with Canberra.

The scheme however remained subject to its validity under the constitutions of Papua New Guinea and Nauru.

NAURU

The Supreme Court of Nauru is constituted by one judge only. Access to the detainees enabling an action in the Supreme Court of Nauru on behalf of the detainees was initially problematic[48] but eventually an action on their behalf was commenced. That action was dismissed, Connell CJ ruling that the special visas that were issued restricting the asylum seekers to a detention facility law were authorised by law and did not constitute an illegal detention for the purposes of a complaint under article 5(4) of the Constitution of Nauru.[49]

An appeal in respect of Connell CJ's decision in so far as it involved the interpretation or effect of the Constitution was not available[50] and the High Court of Australia rejected a secondary challenge to His Honour's findings regarding the application of the ordinary statute law of Nauru.[51]

PAPUA NEW GUINEA

There are substantial reasons to doubt that the scheme would survive a similar challenge in Papua New Guinea. Legal proceedings on behalf of detainees were commenced in the National Court of Justice before Kandakasi J[52] but were not further pursued after all of those represented

48 The Parliamentary Library's *Bills Digest*, Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (22 May 2006) No. 138, 2 points out that Nauru would not give visas allowing lawyers to access the detainees.

49 *Ruhani v Director of Police* (No 2) (2005) 219 ALR 270, 16.

50 *Nauru (High Court Appeals Act)* 1976 s 5, sch article 2(a).

51 *Ruhani v Director of Police* (No 2) (2005) 219 ALR 270; the High Court of Australia is constituted as the court of appeal from the Supreme Court of Nauru in the limited circumstances set out in the *Nauru High Court Appeals Act 1976*. As to the validity of this mechanism see *Ruhani v Director of Police* (2005) 222 CLR 489.

52 Enforcement Pursuant to Constitution Section 57: Application by Patrick Harricknen and Powes Parkop for and on behalf of 124 children, 232 adults and other persons detained in Manus Province; and a complaint under s 42(5), 57(1) of the Constitution MP No. 120/2002.

pro bono[53] were released from detention.[54] Manus has not been used since that time as a detention centre.

It seems unlikely that, despite the vast sums spent on the Manus centre's construction, that the strategy of transferring unwanted asylum seekers to be detained on Manus could survive a future challenge in Papua New Guinea. The *Constitution of the Independent State of Papua New Guinea* provides both comprehensively and in exclusive terms for the limited circumstances in which the liberty of a person can be restricted.[55] Those circumstances would not appear to be engaged by the arrangements entered into between the government of that country and Australia in respect of the 'Pacific Solution'. There is no reason to suggest that the Papua New Guinea courts would defer to unconstitutional arrangements entered into between the two governments. Its judiciary has repeatedly demonstrated robust independence.

An Australian Government Budget 2006 fact sheet announced that offshore processing would be consolidated on Nauru—and Manus retained only as a contingency facility.

Migration Amendment (Designated Unauthorised Arrivals) Bill, 2006

The 2001 offshore detention regime, whilst draconian in respect of those to whom it applied, was limited—it affected only those making first landfall on Australia's furthest territories and had no application to anyone who made it through to arrive on mainland Australia. The minister dismissed suggestions that an extension to mainland Australia might be a logical next step as a red herring—and unthinkable.

But that is precisely what the Australian Government proposed in 2006 following controversy and anger occasioned in Jakarta after most of the crew of a vessel from West Papua (Indonesia) obtained temporary protection visas after fleeing Indonesia and landing in far north Queensland.

The background and a fuller account of the measure can be found in the Parliamentary Library's Bills Digest *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006,* 22 May 2006 No. 138 2005–06.

Despite the bill's passage in the House of Representatives it continued to attract powerful opposition from Labor, the Greens, the Democrats and several of the government's own most influential dissidents. Facing defeat in the Senate the government did not proceed with the bill.

Perhaps one of the very few amusing ironies of this generally bleak saga is that the ultimate reason that the *Migration Amendment (Designated*

53 Filed by Papua New Guinea lawyers, Patrick Harricknen and Powes Parkop.

54 No connection between the litigation and the releases has been conceded by either government.

55 See *Constitution of the Independent State of Papua New Guinea* s 42. See also B Brunton and D Colquhoun-Kerr, *The Annotated Constitution of Papua New Guinea* (1984) 152–66.

Unauthorised Arrivals) Bill 2006 failed was that the government could not provide any plausible guarantees to its backbench critics that detainees would be treated fairly if sent offshore to centres in Manus or Nauru. The very design of the system—planned as it was to ensure that decisions about offshore detention would be the sole responsibility of other governments and would be (as a matter of legal form—if not substance) at arms length from any officer of the Commonwealth of Australia—proved impossible to reconcile with undertakings to the Parliament. A system so constructed could give no guarantees.