

FEDERAL COURT OF AUSTRALIA

**Plaintiff S99/2016 v Minister for Immigration and Border
Protection and Another**

[2016] FCA 483

Bromberg J

28, 29 April, 6 May 2016

Private International Law — Choice of law — Torts — Proper law — Where putative duty of care required Minister of the Commonwealth to procure a safe and lawful abortion for a person assessed as a refugee offshore — Abortion made available in Papua New Guinea — Where apprehended breach of duty an omission to procure an abortion that is safe and lawful — Whether proper law of apprehended negligence the law of Australia or the law of Papua New Guinea.

Torts — Negligence — Duty of care — Unauthorised maritime arrival claimed refugee status having been transferred to Republic of Nauru — Found to be refugee and temporarily settled — Where rape occurred causing pregnancy and physical and psychological harm — Where dependence upon Commonwealth of Australia for financial and medical needs — Where abortion only able to be procured with the assistance of the Commonwealth — Whether duty of care to exercise reasonable care to procure a safe and lawful abortion — Consideration of whether Commonwealth voluntarily assumed responsibility for refugee — Consideration of statutory scheme giving rise to relationship between refugee and Commonwealth and refugee's continued presence on Nauru — Whether higher standard for the imposition of a duty of care on public authorities applicable to foreign public authorities — Migration Act 1958 (Cth), ss 198AA, 198AB, 198AD, 198AHA.

Torts — Negligence — Breach of duty — Standard of care — Duty to procure safe and lawful abortion for refugee — Abortion made available in Papua New Guinea — Where alleged legal risk attendant upon abortion in Papua New Guinea arising out of criminal law of Papua New Guinea — Where alleged medical risk attendant upon abortion in Papua New Guinea arising out of unavailability of medical equipment, experience, and expertise alleged to be required in order to adequately guard against risk — Where government policy not to bring person who was an unauthorised maritime arrival to Australia — Whether legal and medical risks of abortion in Papua New Guinea such that duty of care not discharged — Whether apprehended breach of duty.

Immigration — Jurisdiction — Privative clause decisions — Decision not to be challenged, appealed against, reviewed, quashed or called in question in any court — Decision not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account — Where injunction sought to restrain apprehended commission of tort of negligence — Where issue of injunction would require or prohibit the doing of conduct which would constitute the making of a decision that is a privative clause decision — Whether jurisdiction to issue injunction — Whether limitation on jurisdiction in relation to privative clause decisions limited to applications for judicial review — Migration Act 1958 (Cth), ss 198AHA, 198B, 474.

Equity — Equitable remedies — Injunctions — Injunctions quia timet — Whether injunction will issue to restrain apprehended commission of the tort of negligence — Whether requirements for issue of injunction to restrain action of the Commonwealth higher than that for private citizen.

Equity — Fiduciary duties — Relationship between Commonwealth and unauthorised maritime arrival found to be a refugee in Nauru — Whether relationship fiduciary — Whether breach of duty not to procure any abortion for the applicant that is not safe and lawful — Whether putative duty a fiduciary duty.

Section 198AA of the *Migration Act 1958* (Cth) (the Act) relevantly provided that the purpose of Subdiv B of Div 8 of Pt 2 of the Act, inter alia, was to provide a scheme for the processing of unauthorised maritime arrivals in Australia (so defined in s 5AA of the Act) that facilitated the taking of those persons, including unauthorised maritime arrivals in respect of whom Australia had or may have had protection obligations under the *Convention Relating to the Status of Refugees 1951*, done at Geneva on 28 July 1951, as amended by the *Protocol Relating to the Status of Refugees 1967*, done at New York on 31 January 1967 (the Refugees Convention), to any country designated as a regional processing country pursuant to s 198AB of the Act.

That scheme was given effect, inter alia, by s 198AD(2) of the Act, which relevantly required the Minister to remove an unauthorised maritime arrival from Australia to a regional processing country, and s 198AHA of the Act, which relevantly conferred on the Commonwealth the power to take any action, or cause any action to be taken, in relation to a regional processing arrangement or the regional processing functions of the other country to which a person was taken under s 198AD.

Pursuant to these provisions, the applicant, who arrived in Australia by boat and without a visa, was classified as an unauthorised maritime arrival and removed to the Republic of Nauru (Nauru), a designated regional processing country. There, the applicant was detained, but was found by the Nauruan authorities to be a refugee within the meaning of the Refugees Convention and was therefore granted a temporary settlement visa.

It was not in dispute that the applicant suffered from epilepsy, or another psychogenic disorder, which caused her to have seizures. During one such seizure, the applicant was raped, as a result of which she fell pregnant. The applicant sought that the Commonwealth procure for her an abortion, which it was admitted could not occur on Nauru nor without the Minister or the Commonwealth's assistance. The Minister made available for the applicant such a procedure in Papua New Guinea.

It was not in dispute that the Commonwealth could have procured an abortion in Australia or other nearby countries with an appropriate legal framework and

medical facilities. However, in relation to Australia, the Commonwealth had a policy which provided that the power conferred by s 198B of the Act, which permitted a person in the position of the applicant to be brought to Australia temporarily, would only be exercised in an exceptional case, and it had been determined that in this case the circumstances were not exceptional.

The applicant applied for injunctive (and associated declaratory) relief to restrain the Minister and the Commonwealth from breaching an alleged duty of care in negligence (and a corresponding fiduciary duty) to exercise reasonable care to procure for her a safe and lawful surgical abortion. She contended that this could not be done in Papua New Guinea because it was not certain that such a surgical procedure would be lawful, and because she was unable to receive proper psychiatric, neurological, surgical and anaesthetic care in Papua New Guinea.

It was not in dispute that the applicant was, as a result of agreements entered into between the Commonwealth and Nauru to facilitate Nauru's status as a regional processing country, wholly reliant on the Commonwealth financially, and that pursuant to those agreements, the Commonwealth had provided education, welfare, and health services to the applicant, including for the purposes of caring for the physical and psychological injuries which she suffered as a result of the rape.

Against this background, the Minister denied that the proper law of the putative tort was the law of Australia (contending instead that it was the law of Papua New Guinea), denied that a duty of care was owed (particularly given the higher threshold required to impose a duty of care on a statutory authority), and denied that any such duty would be breached by reason of the failure to procure an abortion outside Papua New Guinea.

In particular, in relation to whether or not the procuring of an abortion in Papua New Guinea constituted a discharge of the duty of care, the Minister contended that there was no legal risk to the applicant personally of obtaining an abortion in Papua New Guinea because such conduct, in the applicant's circumstances, would not constitute an offence against the *Criminal Code Act 1974* (PNG), and, whilst not generally challenging the applicant's case that absent proper neurological, psychiatric, anaesthetic and gynaecological expertise, she would be exposed to physical and psychological risks if she obtained an abortion, also contended that those risks did not arise. Thus, the determination of the apprehended breach of duty in part depended on whether, as a question of fact, the necessary expertise was available for the applicant in Papua New Guinea.

In any event, the Minister contended that if a duty existed and it were breached, whilst an action for damages may have lain against him once damages were suffered by the applicant, an injunction could not issue to restrain him from breaching the alleged duty of care because any such injunction would require the taking of action by the Minister or the Commonwealth, or would prohibit the taking of an action, which could be performed using statutory powers including those conferred by ss 198B and 198AHA of the Act. This, it was submitted, was beyond the Court's jurisdiction, because it would constitute the subjecting of a privative clause decision to an injunction.

Relevantly, s 474A(1) of the Act provided that a privative clause decision could not be challenged, appealed against, reviewed, quashed or called in question in any court, and was not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account. It was not in issue that, pursuant to s 474A(2), a decision to exercise a power conferred by s 198B or s 198AHA of the Act constituted a privative clause decision for the purposes of s 474A(1).

Finally, assuming that the Court had such jurisdiction, also in issue was whether a *quia timet* injunction would issue to restrain the commission of the tort of negligence, if it constituted final relief, and whether there was any difference in principle between the grounds upon which such an injunction would issue to the

Minister or the Commonwealth and the grounds upon which such an injunction would issue to a private citizen.

Held: Granting declaratory and prohibitory interlocutory relief: (1) The proper law of the apprehended tort is the law of Australia because the applicant's cause for complaint is the decision made by the Minister as to where the abortion should be performed and the steps that he takes (or fails to take) to procure that result. Those are acts of the Minister which occur in Australia. [158], [178], [182]

Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538, applied.

Amaca Pty Ltd v Frost (2006) 67 NSWLR 635; *Puttick v Tenon Ltd* (2008) 238 CLR 265, followed.

Obiter: (i) If the proper law of the tort were that of Papua New Guinea, no higher threshold for the imposition of a duty of care would apply to determine whether the Minister owed the applicant a duty of care, because the policy considerations underpinning the higher duty standard for domestic public authorities do not translate to the case of foreign public authorities. [195]-[197], [199]

(2) The Minister owes a duty of care to the applicant to exercise reasonable care, in the discharge of the responsibility that he assumed, to procure for the applicant a safe and lawful abortion. [243], [276]

Hunter Area Health Service v Presland (2005) 63 NSWLR 22; *Caltex Refineries (Qld) Pty Ltd v Stavara* (2009) 75 NSWLR 649; *Carey v Freehills* (2013) 303 ALR 445, followed.

Stuart v Kirkland-Veenstra (2009) 237 CLR 215, applied.

Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; *Pyrenees Shire Council v Day* (1998) 192 CLR 330; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; *Amaca Pty Ltd v New South Wales* (2004) 132 LGERA 309, discussed.

Per curiam: (i) The voluntary assumption of responsibility by a defendant, which assumption is relied upon by the plaintiff, is a potent consideration in favour of the imposition of a duty of care because it provides a clear basis for distinguishing the superimposition onto statutory powers of a duty to persons in an indeterminate class of persons from such a superimposition in the particular case of a plaintiff that has received and acted upon an assumption of responsibility. [242]

White v Jones [1995] 2 AC 207; *Watson v British Boxing Board of Control Ltd* [2001] QB 1134; *Kent v Griffiths* [2001] QB 36; *Michael v Chief Constable of South Wales Police* [2015] AC 1732, considered.

(ii) The statutory regime, to which the applicant became subject as an unauthorised maritime arrival, by reason of it conferring powers on the Minister to provide assistance to unauthorised maritime arrivals whose refugee status has been recognised and for those refugees to be dependent upon the Commonwealth, erects or facilitates a relationship between the Commonwealth and persons in the class of the applicant, sufficient, in the circumstances, to display characteristics answering the criteria for intervention by the tort of negligence, and is not inconsistent with the imposition of a duty of care. [244], [247]-[250], [269]-[271]

Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540, applied.

Hunter and New England Local Health District v McKenna (2014) 253 CLR 270, distinguished.

MM Constructions (Aust) Pty Ltd v Port Stephens Council (2012) 191 LGERA 292, considered.

Discussion of the principles relating to the imposition of a duty of care on a statutory authority. [200]-[231]

(3) A reasonable person in the Minister's position would have, and should have, alleviated the foreseeable, real, and not far-fetched or fanciful *legal and medical* risks to the applicant of obtaining an abortion in Papua New Guinea, having regard to the magnitude of those risks, the degree of probability of their occurrence, and the expense, difficulty, and inconvenience of taking the alleviating action. Therefore, the Minister's conduct in procuring an abortion for the applicant in Papua New Guinea did not constitute a discharge of the duty to exercise reasonable care in the discharge of the responsibility that the Minister assumed, and in the circumstances, there is a reasonable apprehension that the Minister will not do so. [284], [287]-[289], [304], [307], [380]-[389], [404]-[405]

Wyong Shire Council v Shirt (1980) 146 CLR 40, applied.

Obiter: (ii) Government policy can be an alleviating factor to be taken into account when determining whether there has been a breach of the requisite standard of care, but the extent to which such a policy may justify the non-alleviation of a risk will depend upon whether the policy relevantly stands in the way of the alleviation of the risk, to what extent it does so, and the weight to be given to the policy in the balancing out process required to be undertaken by the Court. [397]

Wyong Shire Council v Shirt (1980) 146 CLR 40, applied.

(4) Section 474 of the Act removes the jurisdiction of the courts to hear an application for judicial review in respect of a privative clause decision, and to issue prohibition, mandamus, certiorari, an injunction or a declaration on any account in respect of such a decision in an application for judicial review, but does not so preclude the issue of injunctive relief in the case of a tortious wrong. [412], [433], [459]

Bodruddaza v Minister for Immigration and Multicultural Affairs (2007) 228 CLR 651; *Tang v Minister for Immigration and Citizenship* (2013) 217 FCR 55, applied.

Fernando v Minister for Immigration and Citizenship (2007) 165 FCR 471; *MZYR v Secretary, Department of Immigration and Citizenship* (2012) 292 ALR 659, followed.

Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Mastipour (2004) 207 ALR 83; *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 217; *SBEG v Secretary, Department of Immigration and Citizenship (No 2)* (2012) 292 ALR 29, considered.

Beyazkilinc v Manager, Baxter Immigration Reception and Processing Centre (2006) 155 FCR 465; *SGS v Minister for Immigration and Border Protection* (2015) 34 NTLR 224, not followed.

(5) A quia timet injunction will issue to restrain, by way of final relief, the commission of the tort of negligence. [467]-[469], [473]-[474]

Prisoners A to XX Inclusive v New South Wales (1994) 75 A Crim R 205, followed.

Mastipour v Secretary, Department of Immigration and Multicultural and Indigenous Affairs [2003] FCA 952; *Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Mastipour* (2004) 207 ALR 83; *Hurst v Queensland (No 2)* [2006] FCAFC 151, considered.

(6) The requirements for the issue of an injunction, or a quia timet injunction, are not stricter when relief is sought against a co-ordinate branch of the Government. [482], [489]

R v Macfarlane; Ex parte O'Flanagan (1923) 32 CLR 518; *Minister for Immigration and Multicultural and Indigenous Affairs v VFAD* (2002) 125 FCR

249; *Hurst v Queensland (No 2)* [2006] FCAFC 151; *Apotex Pty Ltd v Les Laboratoires Servier (No 2)* (2012) 293 ALR 272, considered.

Obiter: (iii) If the relationship between the Minister and the applicant is properly characterised as one which is a fiduciary relationship, the Minister would not breach any duty not to procure any abortion for the applicant that is not safe and lawful, because such a duty is within the purview of the law of tort, not equity. [504], [516]-[518]

Cubillo v Commonwealth (2001) 112 FCR 455, applied.

Paramasivam v Flynn (1998) 90 FCR 489, followed.

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Application

R Merkel QC, **E Nekvapil** and OM Ciolek, for the applicant.

G Kennett SC, P Knowles and A Yuile, for the respondents.

Court issued summary

In accordance with the practice of the Federal Court in cases of public interest, importance or complexity, the following summary has been prepared to accompany the orders made today. This summary is intended to assist in understanding the outcome of this proceeding and is not a complete statement of the conclusions reached by the Court. The only authoritative statement of the Court's reasons is that contained in the published reasons for judgment which will be available on the internet at the Court's website. This summary is also available there.

This proceeding commenced in the High Court and was referred for hearing and determination by this Court. As will be apparent, it required an urgent hearing and an urgent determination. By reason of the exemplary efforts of the parties, their legal advisors and the staff of the Court, for which I am grateful, that has been achieved.

The applicant is a young African woman. The respondents are the Minister for Immigration and Border Protection and the Commonwealth of Australia (collectively, "the Minister").

The applicant arrived in Australia on 17 October 2013 having travelled by boat from Indonesia to Christmas Island. On arrival and by virtue of s 14 of the *Migration Act 1958* (Cth) ("the Act"), the applicant was designated an "unlawful non-citizen" and therefore an "unauthorised maritime arrival" within the meaning of s 5AA of the Act. On arrival, the applicant was detained by the Minister under s 189 of the Act. In the exercise of the power conferred by s 198AD of the Act, on 19 October 2013, the applicant was taken from Australia by an officer of the Minister and placed in the Republic of Nauru, a country designated to be a "regional processing country" under s 198AB(1) of the Act. Upon her removal from Australia, the applicant became a "transitory person" within the meaning of s 5 of the Act. She was detained in a detention centre in Nauru until November 2014. On being recognised as a refugee she was released from detention and is awaiting resettlement. She has no independent means. She has been and remains dependant on the Minister for food, shelter, security and healthcare.

Despite the nomenclature used by the Act to describe her, the applicant remains entitled to the protection of Australian law. Principally, that is because the Minister is bound by the law and, as my reasons explain, the Minister and the applicant are parties to a relationship recognised and enforced by the law out of which legal rights and obligations flow.

The applicant claims that by reason of a legal relationship recognised by the common law, the Minister must take reasonable care of her. She claims to be a vulnerable woman in desperate circumstances. It is undeniable that she needs care. On 31 January 2016, she was raped whilst unconscious and suffering a seizure likely to have been caused by epilepsy. As a result of the rape she is pregnant. The fact that she needs an abortion is not in contest. However, the medical evidence is that an abortion for the applicant is not straightforward. There are significant risks for the applicant because of her neurological condition, her poor mental health and the physical and psychological

complications caused by a procedure to which she was subjected as a young girl.

Expert medical evidence says that an abortion for the applicant should only be conducted where (broadly speaking) the treating doctors have available the following resources:

- (i) the neurological expertise of a neurologist and EEG diagnostic equipment;
- (ii) the mental health expertise of a psychologist and other professionals with experience in trans-cultural issues;
- (iii) the gynaecological expertise of a gynaecologist experienced in dealing with the consequences of the procedure experienced by the applicant as a young girl; and
- (iv) the expertise of an anaesthetist experienced with newer, safer anaesthetic drugs and anaesthetic techniques and familiar with anaesthesia in an MRI facility.

The Minister accepts that without his assistance the applicant cannot procure an abortion. An abortion for the applicant is not available in Nauru. It would not be safe and legal. The medical evidence is that an abortion in Australia would be safe, in the sense that the medical resources I have identified are available. However, the Minister has refused to bring the applicant to Australia.

The Minister has the legal capacity to bring the applicant to Australia for a temporary purpose. But the Minister has a policy. It is that a “transitory person” like the applicant, will not be brought to Australia other than in exceptional circumstances. The Minister does not regard the applicant’s circumstances as exceptional.

Nevertheless, the Minister is willing to assist. He has assumed responsibility for the applicant’s care and has made an abortion available to the applicant in Papua New Guinea. For that purpose, the applicant was taken to Port Moresby. That is where she is now.

In this proceeding the applicant alleges that an abortion in Papua New Guinea would be neither safe nor legal. Relying on the evidence of her medical experts, she claims that the absence of the medical resources in Papua New Guinea of the kind earlier listed, exposes her to grave risk. She also contends that an abortion in Papua New Guinea is illegal and would expose her to criminal liability.

Relying upon the existence of a legal relationship between her and the Minister recognised by the law of negligence, the applicant claims that the Minister has a duty of care to procure for her a safe and lawful abortion. She does not say that an abortion must be procured for her and conducted in Australia, but does say that the discharge of the Minister’s duty could be readily achieved in Australia. She apprehends that the Minister will fail to discharge that duty. She seeks declarations and orders designed to preclude the Minister from failing to discharge the duty of care she claims he has.

The Minister denies the existence of a duty of care to the applicant. He also says that if a duty of care exists, the procuring of an abortion for the applicant in Papua New Guinea is both safe and lawful and would discharge any obligation

owed. Additionally, the Minister contends that if there is a duty of care and an apprehended breach of it, the courts are powerless to grant the applicant injunctive relief. For that and other reasons, the Minister contends that the proceeding should be dismissed.

Complex issues are called up for determination, including:

- is the applicable law, Australian law or Papua New Guinean law?;
- is a duty of care established?;
- if so, is there an apprehended breach of that duty?;
- does s 474 of the Act preclude the Court from granting injunctive relief?;
- if not, is it appropriate that an injunction be granted?; and
- should declarations be made as well or instead?

For the reasons which follow, I have decided that:

- the Minister has a duty of care to the applicant to exercise reasonable care to discharge the responsibility he assumed to procure for her a safe and lawful abortion;
- the abortion in Papua New Guinea made available to the applicant is attended by safety and lawfulness risks that a reasonable person in the Minister's position would have avoided, and thus that the procuring of the abortion by the Minister did not discharge his duty of care;
- there is reasonable apprehension that the Minister will fail to discharge his duty of care;
- the Court is not precluded by s 474 of the Act from issuing injunctions in cases like the present;
- it is appropriate that declarations be made; and
- injunctions should issue to restrain the Minister from failing to discharge his duty of care to exercise reasonable care to discharge the responsibility he assumed to procure for the applicant a safe and lawful abortion.

The orders I will make will preclude the Minister from procuring an abortion in Papua New Guinea in the discharge of his duty of care but do not require the applicant to be brought to Australia.

There are other claims made by the applicant including that:

- she is owed a fiduciary duty by the Minister;
- that the Minister's decisions not to bring her to Australia for an abortion should be set aside as legally unreasonable; and
- that the Minister's failure to procure for her a safe and legal abortion would exceed the power conferred by s 198AHA of the Act and s 61 of the *Constitution of the Commonwealth*.

None of those claims succeed.

6 May 2016

Bromberg J.

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Introduction

- 1 This proceeding commenced in the High Court and was referred for hearing and determination by this Court. As will be apparent, it required an urgent hearing and an urgent determination. By reason of the exemplary efforts of the parties, their legal advisors and the staff of the Court, for which I am grateful, that has been achieved.
- 2 The applicant is a young African woman. The respondents are the Minister for Immigration and Border Protection and the Commonwealth of Australia (collectively, “the Minister”).
- 3 The applicant arrived in Australia on 17 October 2013 having travelled by boat from Indonesia to Christmas Island. On arrival and by virtue of s 14 of the *Migration Act 1958* (Cth) (“the Act”), the applicant was designated an “unlawful non-citizen” and therefore an “unauthorised maritime arrival” within the meaning of s 5AA of the Act. On arrival, the applicant was detained by the Minister under s 189 of the Act. In the exercise of the power conferred by s 198AD of the Act, on 19 October 2013, the applicant was taken from Australia by an officer of the Minister and placed in the Republic of Nauru, a country designated to be a “regional processing country” under s 198AB(1) of the Act. Upon her removal from Australia, the applicant became a “transitory person” within the meaning of s 5 of the Act. She was detained in a detention centre in Nauru between 19 October 2013 and 11 November 2014. On being recognised as a refugee she was released from detention and is awaiting resettlement. She has no independent means. She has been and remains dependant on the Minister for food, shelter, security and healthcare.
- 4 Despite the nomenclature used by the Act to describe her, the applicant remains entitled to the protection of Australian law. Principally, that is because the Minister is bound by the law and, as my reasons explain, the Minister and the applicant are parties to a relationship recognised and enforced by the law out of which legal rights and obligations flow.
- 5 The applicant claims that by reason of a legal relationship recognised by the common law, the Minister must take reasonable care of her. She claims to be a vulnerable woman in desperate circumstances. It is undeniable that she needs care. On 31 January 2016, she was raped whilst unconscious and suffering a seizure likely to have been caused by epilepsy. As a result of the rape she is pregnant. The fact that she needs an abortion is not in contest. However, the medical evidence is that an abortion for the applicant is not straight-forward. There are significant risks for the applicant because of her neurological condition, her poor mental health and the physical and psychological complications caused by a cultural practice to which she was subjected as a young girl.
- 6 Expert medical evidence says that an abortion for the applicant should only be conducted where (broadly speaking) the treating doctors have available the following resources:
- (i) the neurological expertise of a neurologist and EEG diagnostic equipment;

- (ii) the mental health expertise of a psychologist and other professionals with experience in trans-cultural issues;
- (iii) the gynaecological expertise of a gynaecologist experienced in dealing with the consequences of the cultural procedure experienced by the applicant as a young girl; and
- (iv) the expertise of an anaesthetist experienced with recent, safer anaesthetic drugs and anaesthetic techniques and familiar with anaesthesia in an MRI facility.

7 The Minister accepts that without his assistance the applicant cannot procure an abortion. An abortion for the applicant is not available in Nauru. It would be both unsafe and illegal. The medical evidence is that an abortion in Australia would be safe, in the sense that the medical resources I have identified are available. However, the Minister refuses to bring the applicant to Australia.

8 The Minister has the legal capacity to bring the applicant to Australia for a temporary purpose. But the Minister has a policy. It is that a “transitory person” like the applicant, will not be brought to Australia other than in exceptional circumstances. The Minister does not regard the applicant’s circumstances as exceptional.

9 Nevertheless, the Minister is willing to assist. He has assumed responsibility for the applicant’s care and an abortion is available for the applicant in Papua New Guinea. For that purpose, the applicant was taken to Port Moresby. That is where she now is.

10 In this proceeding the applicant alleges that an abortion in Papua New Guinea would be neither safe nor legal. Relying on the evidence of her medical experts, she claims that the absence of the medical resources in Papua New Guinea of the kind earlier listed, exposes her to grave risk. She also contends that an abortion in Papua New Guinea is illegal and would expose her to criminal liability.

11 Relying upon the existence of a legal relationship between her and the Minister recognised by the law of negligence, the applicant claims that the Minister has a duty of care to procure for her a safe and lawful abortion. She does not say that an abortion must be procured for her and conducted in Australia, but does say that the discharge of the Minister’s duty could be readily achieved in Australia. She apprehends that the Minister will fail to discharge that duty. She seeks declarations and orders designed to preclude the Minister from failing to discharge the duty of care she claims he has.

12 The Minister denies the existence of a duty of care to the applicant. He also says that if a duty of care exists, the procuring of an abortion for the applicant in Papua New Guinea is both safe and lawful and would discharge any obligation owed. Additionally, the Minister contends that if there is a duty of care and an apprehended breach of it, the courts are powerless to grant the applicant injunctive relief. For that and other reasons, the Minister contends that the proceeding should be dismissed.

13 Complex issues are called up for determination, including:

- is the applicable law, Australian law or Papua New Guinean law?;
- is a duty of care established?;
- if so, is there an apprehended breach of that duty?;
- does s 474 of the Act preclude the Court from granting injunctive relief?;

- if not, is it appropriate that an injunction be granted?; and
- should declarations be made as well or instead?

14 For the reasons which follow, I have decided that:

- the Minister has a duty of care to the applicant to exercise reasonable care to discharge the responsibility he assumed to procure for the applicant a safe and lawful abortion;
- the abortion made available to the applicant in Papua New Guinea is not safe or lawful and was not procured in discharge of the Minister's duty of care;
- there is reasonable apprehension that the Minister will fail to discharge his duty of care;
- the Court is not precluded by s 474 of the Act from issuing injunctions;
- it is appropriate that declarations be made; and
- injunctions should issue to restrain the Minister from failing to discharge his duty of care to exercise reasonable care to discharge the responsibility he assumed to procure for the applicant a safe and lawful abortion.

15 The orders I will make will preclude the Minister from procuring an abortion in Papua New Guinea in the discharge of his duty of care, but do not require the applicant to be brought to Australia.

16 There are other claims made by the applicant including that:

- she is owed a fiduciary duty by the Minister;
- that the Minister's decisions not to bring her to Australia for an abortion should be set aside as legally unreasonable; and
- that the Minister's failure to procure for her a safe and legal abortion would exceed the power conferred by s 198AHA of the Act and s 61 of the *Constitution of the Commonwealth* ("the Constitution").

17 None of those claims succeed.

The negligence claim

The essence of the negligence claim

18 In order to understand the applicant's claim it is necessary to start with her pleadings. In her amended statement of claim, the applicant pleaded (from [2]-[4]) the involvement of the Minister in her removal to Nauru, in her detention there, and in her day-to-day existence before and after having been accepted as a refugee. She pleaded, from [5]-[7], the fact of her rape and pregnancy, the existence of present harm, and the likelihood of future harm associated therewith. At [9] it is alleged that the applicant cannot have a safe and lawful abortion in Nauru and at [11] the facts leading to the applicant being in Papua New Guinea, including the Commonwealth's involvement therein, are pleaded.

19 All of those facts lead to an allegation that the Commonwealth is under a duty of care (at [12]). The duty was put in a number of ways:

- (1) at [12(a)], "to procure a safe and lawful abortion for [the applicant]";
- (2) at [18(b)], "to take all reasonable steps to ensure that [the applicant] has a safe and lawful abortion";
- (3) at [39] of the written submissions, "to ensure that reasonable care is taken of the Applicant to avoid serious harm of a kind which the Commonwealth or its agents are reasonably able to control and avoid";

(4) at heading D(iii) of the written submissions, “to exercise its power to procure a safe and lawful abortion for her,” and in the same way at [104] except specifying that the abortion is to be in Australia.

I will return to the various ways in which the duty has been put.

20 At [13], the applicant’s medical circumstances are pleaded. At [14] it is alleged that particular expertise is necessary in order that an abortion that is performed be a safe abortion. At [15] facts relating to the lawfulness of abortion in Papua New Guinea are pleaded. Those facts lead to the allegation that an abortion meeting the conditions set out in [14] cannot be obtained in Papua New Guinea, but can in Australia.

21 On the basis of the duties pleaded and other facts, particularly those in [14] and [15], relief relevantly sought by the applicant in her amended statement of claim, as orally modified in the course of hearing, is as follows:

B. A declaration that the proposed abortion of the applicant in Papua New Guinea will:

- (i) not be a safe or a lawful abortion and will not satisfy the conditions in paragraph 14 above; and
- (ii) be in breach of the said duty of care.

C. A mandatory injunction requiring the Commonwealth to procure for the applicant a surgical abortion at a teaching hospital in Australia.

D. Alternatively to C, a mandatory injunction requiring the Commonwealth to procure for the applicant a surgical abortion [otherwise than in Nauru or PNG, and meeting certain conditions].

E. An injunction restraining the Commonwealth from procuring or causing the applicant’s return to Nauru prior to taking all reasonable steps to ensure that the applicant has a safe and lawful abortion that meets the conditions set out in paragraph 14 above.

F. Alternatively, a mandatory injunction requiring the Commonwealth to procure for the Applicant a surgical abortion [otherwise than in Papua New Guinea, and meeting certain conditions].

G. Alternatively to F, an injunction restraining the Commonwealth from failing to procure for the Applicant a surgical abortion both at a place other than in Papua New Guinea and in a hospital [meeting certain conditions].

22 While in written submissions the duty on occasion was put in non-delegable terms, none of the relief related to ensuring that care was taken, or to a failure to ensure that care was taken. And, none of the evidence went to showing, for example, that the Papua New Guinean doctors would fail to take reasonable care. Rather, all of the relief relates to requiring the “procurement” of an abortion of a particular kind or the “taking of reasonable steps” to procure an abortion of a particular kind. The applicant’s complaint, as it seems to me, is not that an abortion on Papua New Guinea will be performed negligently, but instead that even a non-negligently-performed abortion on Papua New Guinea would breach the Minister’s duty. For the purposes of this proceeding it seems to me to be unnecessary to consider whether the Minister’s duty is non-delegable.

23 That entails, as I also discuss below at [171]-[182], that the applicant’s complaint is really that the Minister’s procurement of an abortion to be performed in Papua New Guinea failed to discharge his duty of care to provide a “safe and lawful abortion”. And, it entails the continuing complaint that, if the

Minister fails to procure an abortion that is “safe and lawful” in the sense alleged in the applicant’s pleading, he will continue to fail to discharge his duty of care.

24 In other words, the focus of the applicant’s allegations is on the Minister’s duty, thus far undischarged, to “take all reasonable steps” to ensure that the applicant has access to a safe and lawful abortion, or to “procure” for her a safe and lawful abortion. “Procure for,” in this sense, means “make available to.” It does not mean “procure” in the sense of “effect an outcome.” The applicant, of course, retains human agency. She might choose not to undergo an abortion that has been procured. On the applicant’s case, the discharge of the Minister’s duty does not require that the applicant actually undergo an abortion; it requires only that he make available to the applicant a safe and lawful abortion, should she choose to undergo it.

25 Thus, and again I refer to reasons that I have given below at [171]-[182], the essence of the applicant’s case is this:

- (1) the Minister’s duty is to exercise reasonable care in the discharge of the responsibility that he assumed to procure for the applicant a safe and lawful abortion (within the meaning of her pleading);
- (2) the abortion that has been made available to her on Papua New Guinea is not safe and lawful. Nor did its procurement constitute the exercise of reasonable care in the discharge of the Minister’s assumed responsibility. In consequence, there was, by that procurement, no discharge of the Minister’s duty of care;
- (3) there is a reasonable apprehension that the Minister will fail to discharge the putative duty of care; and
- (4) relief, including injunctive relief, should be provided to address that apprehended failure.

26 There is no breach of the putative duty of care pleaded. That, it seems to me, is because it is recognised that the time by which the putative duty of care must be discharged has not yet arrived. Accordingly, a complete cause of action in negligence has not yet accrued. In that event, as the applicant’s submissions recognise, a *quia timet* injunction would need to be issued if any injunctive relief is held to be appropriate.

27 Even if the applicant’s pleading was somewhat inexact, the applicant and respondents joined issue on all matters of fact and law in respect of which there was real contest. The way I have summarised the case is, I think, consistent with how it would have been understood by the Minister on the basis of the way in which the trial was run.

28 In the absence of prejudice — and I cannot see that any party has been prejudiced — I am prepared to address the parties’ cases as they were advanced at trial rather than as they were pleaded (to the extent there is a difference).

The statutory setting

Migration Act

29 Under s 198AD(2), unauthorised maritime arrivals must be taken, as soon as is reasonably practicable, to a “regional processing country.” For that purpose, officers were empowered to place the applicant on a vehicle or vessel, restrain her on a vehicle or vessel, remove her from the place at which she was detained or from a vehicle or vessel, and use such force as was necessary and reasonable (s 198AD(3)).

30 Regional processing countries are countries designated by the Minister under s 198AB(1). On 10 September 2012, the then Minister had designated Nauru as a regional processing country under s 198AB(1).

31 The purpose of the regional processing scheme, which had the above consequences for the applicant, was the following (s 198AA):

Subdivision B — Regional processing

198AA Reason for Subdivision

This Subdivision is enacted because the Parliament considers that:

- (a) people smuggling, and its undesirable consequences including the resulting loss of life at sea, are major regional problems that need to be addressed; and
- (b) unauthorised maritime arrivals, including unauthorised maritime arrivals in respect of whom Australia has or may have protection obligations under the Refugees Convention as amended by the Refugees Protocol, should be able to be taken to any country designated to be a regional processing country; and
- (c) it is a matter for the Minister and Parliament to decide which countries should be designated as regional processing countries; and
- (d) the designation of a country to be a regional processing country need not be determined by reference to the international obligations or domestic law of that country.

32 However, the scheme need not necessarily have applied to the applicant: s 198AE permitted the Minister, if he thought it to be in the public interest to do so, to determine in writing that s 198AD did not apply to an unauthorised maritime arrival. Various procedural requirements applied in respect of such a determination including the obligation to lay the determination and the reasons for it before both Houses of Parliament (s 198AE(4) to (6)).

33 Section 198AHA of the Act deals with arrangements in relation to the regional processing functions of a country. Specifically, the Commonwealth may:

- (a) take, or cause to be taken, any action in relation to the arrangement or the regional processing functions of the country;
- (b) make payments, or cause payments to be made, in relation to the arrangement or the regional processing functions of the country;
- (c) do anything else that is incidental or conducive to the taking of such action or the making of such payments.

Section 198AHA(3) provides that subs (2) is intended to ensure that the Commonwealth has capacity and authority to take action, without affecting the lawfulness of the action. Subsection (4) provides that nothing in s 198AHA limits the Commonwealth's executive power. Subsection (5) defines terms, as follows:

action includes:

- (a) exercising restraint over the liberty of a person; and
- (b) action in a regional processing country or another country.

arrangement includes an arrangement, agreement, understanding, promise or undertaking, whether or not it is legally binding.

regional processing functions includes the implementation of any law or policy, or the taking of any action, by a country in connection with the role of the country as a regional processing country, whether the implementation or the taking of action occurs in that country or another country.

34 As Gageler J noted in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [181], s 198AHA(3) clarifies that s 198AHA(2) is directed to nothing other than conferring statutory capacity or authority on the Executive Government to undertake action which is or may be beyond the executive power of the Commonwealth in the absence of statutory authority.

35 Section 198B provides that “an officer may, for a temporary purpose, bring a transitory person to Australia from a country or place outside Australia”. The applicant is a transitory person: there is no issue that the section may apply to her. Subsection (2) provides thus:

- (2) The power under subsection (1) includes the power to do any of the following things within or outside Australia:
 - (a) place the person on a vehicle or vessel;
 - (b) restrain the person on a vehicle or vessel;
 - (c) remove the person from a vehicle or vessel;
 - (d) use such force as is necessary and reasonable.

Agreements as between the Commonwealth and Nauru

36 On 3 August 2013 a Memorandum of Understanding was executed on behalf of the Governments of Australia and Nauru (“MOU”). The MOU noted, *inter alia*, that Australia “appreciate[d] the acceptance by the Republic of Nauru to host Transferees in Nauru, including at one or more Regional Processing Centres or under community-based arrangements, and to provide Transferees who the Republic of Nauru determines to be in need of international protection with settlement opportunities.”

37 Clause 6 of the MOU, under the heading “Guiding Principles,” provided that the Commonwealth would “bear all costs incurred under and incidental to this MOU as agreed between the Participants”. By cl 7 the Commonwealth “may” transfer and Nauru “will” accept transferees. Administrative measures giving effect to the MOU were to be settled between the parties (cl 8). By cll 10-11 Nauru “will” host one or more Regional Processing Centres and “may” also host transferees under other arrangements including community-based arrangements.

38 By cl 12, transferees determined to be in need of international protection may settle in Nauru, subject to agreement between participants as to arrangements and numbers. Such agreement was to be reviewed on a 12-monthly basis. By cl 13, the Commonwealth would assist Nauru in settling in third countries those persons determined to require international protection but who were not permitted to settle in Nauru under cl 12. By cl 14, those persons not determined to need international protection might be returned, with the Commonwealth’s assistance, to their country of origin or a third country.

39 Clauses 21-22 provided for communications concerning day-to-day operations of the MOU to be between the Secretary for Justice and Border Control of Nauru and the Australian Department of Immigration of Citizenship, and for the establishment of a Joint Committee, to meet regularly, with responsibility for the oversight of practical arrangements required to implement the MOU.

40 On 11 April 2014, a document entitled “Administrative Arrangements for

Regional Processing and Settlement Arrangements in Nauru” was executed on behalf of Australia and Nauru (“Administrative Arrangements”). The Administrative Arrangements provided, *inter alia*, that:

- (1) the Commonwealth would bear all costs under and incidental to the MOU, excluding certain presently-irrelevant costs (cl 1.1);
- (2) the Commonwealth would conduct initial checks for transferees (cl 2.2.1) and that transferees would undergo a health assessment before being transferred to Nauru (cl 2.2.2);
- (3) the Commonwealth would lodge applications with Nauru for “Regional Processing Centre visas” for transferees under the applicable Nauruan regulations (cl 2.2.6);
- (4) Transferees would, on arrival at Nauru, be escorted by “Service Providers”, with assistance from Nauruan officials, to a regional processing centre (cl 3.4);
- (5) Refugee status determinations would be made under Nauruan law (cl 5.2.1);
- (6) the Commonwealth would engage and fund contractors, including interpreters, to assist in the refugee status determination process (cl 5.2.2);
- (7) merits review would be provided by Nauru (cl 5.3.1), with the cost of merits review to be met by the Commonwealth (cl 5.3.2);

41 Clause 4 of the Administrative Arrangements dealt with arrangements for regional processing centres. As the applicant is no longer in such a centre, having been accepted as a refugee, that is not necessary to set out in great detail. However, it is worthwhile noting the following matters:

- (1) the “Operational Manager” of a centre would be appointed by Nauru and would have the day-to-day management of the centre (cl 4.1.2);
- (2) the Operational Manager would be supported by “Service Providers and Staff Members,” who would provide welfare, care, security, health and medical, education, counselling, interpreter services and other relevant services (cl 4.1.3);
- (3) the Commonwealth would appoint a “Programme Coordinator” whose responsibility was to manage all Australian officers and services contracts in relation to a centre, in close liaison with the Operational Manager (cl 4.1.4);
- (4) the Operational Manager, with assistance from Service Providers, would monitor the welfare, conduct, and safety of transferees (cl 4.1.6). Service Providers would be contracted to provide adequate security to ensure the safety of those residing in the centre and the safety of the centre (cl 4.3.1).

42 There were various Service Providers. On 24 March 2014 the Commonwealth and Transfield Services (Australia) Pty Ltd (“Transfield”) entered into a “Contract in relation to the Provision of Garrison and Welfare Services at Regional Processing Countries.” On 2 September 2013, Transfield and Wilson Parking Australia (1992) Pty Ltd (“Wilson Security”) entered into a “Subcontract Agreement General Terms and Conditions in relation to the Provision of Services on the Republic of Nauru”. That was in effect until 28 March 2014. On 28 March 2014 Transfield and Wilson Security entered into another contract entitled “Subcontract Agreement General Terms and

Conditions in relation to the provision of Services on the Republic of Nauru.” The services provided under the two Wilson Security subcontracts were substantially the same. Approval was given by the Commonwealth for entry into both subcontracts.

43 The Commonwealth also entered into a contract with “Save the Children Australia”, the employees and contractors of which provided services relating to the welfare and engagement of transferees. It contracted with International Health and Medical Services Pty Ltd (“IHMS”), the employees and contractors of which provided health screening and assessment services, preventative health care, integrated primary health care, health advice, and referral to secondary and tertiary health services. It contracted with Craddock Murray Neumann Lawyers Pty Ltd, the employees and contractors of which assisted transferees in making protection claims in Nauru. And, as I explain in more detail below, it contracted with “Adult Multicultural Education Services” (trading as “AMES”) the employees and contractors of which provided settlement services to eligible refugees in Nauru.

Conditions relating to detention of asylum seekers on Nauru

44 It is not necessary for me to say a great deal in relation to the conditions of detention on Nauru. It is not in contest that the applicant is not in detention and has not been for some time. Also, it was admitted that the Commonwealth “participated in the detention, maintenance and care of the applicant while her claim for refugee status was being processed ... and paid for all aspects of her detention, care and maintenance during that time.”

45 Nevertheless, the applicant relied upon the conditions of her detention as going to the degree of control exercised by the Commonwealth over her during that time. So, some further detail is required.

46 The applicant referred me to the exposition of the facts by Gordon J in *M68* at [279]-[346]. Gordon J was in dissent in the result but most of the facts that her Honour there set out were agreed in a special case put before the High Court or in any event would not have been controversial on the face of documents available to her Honour (relevantly, most of which were also before me). At [353], her Honour concluded that the Commonwealth, by its acts and conduct, detained the plaintiff outside of Australia. Drawing from her earlier exposition, her Honour relied upon acts and conduct of the Commonwealth, being:

- (1) *making the directions on 29 July 2013 and 15 July 2014, pursuant to s 198AD(5) of the Migration Act, with respect to regional processing countries to which particular classes of unauthorised maritime arrivals must be taken and stipulating that Nauru was such a country;*
- (2) *signing the MOU with Nauru, whereby the Commonwealth could decide to transfer unauthorised maritime arrivals to Nauru, would bear all costs incurred under or incidental to the MOU, would put in place and participate in the Administrative Arrangements and the day-to-day practical arrangements for the implementation of the MOU on Nauru and would assist Nauru in removing Transferees not found to be in need of international protection;*
- (3) *removing the Plaintiff from Christmas Island to Nauru pursuant to s 198AD(2) of the Migration Act on 22 January 2014 and, for the purposes of effecting that removal, exercising powers in s 198AD(3) of the Migration Act;*

- (4) applying to the Nauruan Justice Secretary, without the consent of the Plaintiff, for the grant of a RPC Visa to the Plaintiff and paying to Nauru the fee payable for the grant of the RPC Visa to the Plaintiff, whilst knowing that the RPC Visa specified that the Plaintiff had to reside at the Nauru RPC *and that the RPC Act also required the Plaintiff to reside at the Nauru RPC*;
- (5) on the Plaintiff's arrival on Nauru, first the Service Providers contracted by the Commonwealth (with the assistance of Nauruan officials) escorting the Plaintiff to transport and taking her to the Nauru RPC and, then, the Commonwealth officials providing all the relevant documentation relating to the Plaintiff to Staff Members at the Nauru RPC;
- (6) having the power to contract with, contracting with, and paying for, Transfield to provide the Nauru RPC;
- (7) providing the "security infrastructure" at the Nauru RPC, which includes "perimeter fencing, lighting towers and an entry gate";
- (8) having the power to contract with, contracting with, and paying for, Transfield to ensure that the security of the perimeter of the Nauru RPC is maintained at all times in accordance with policies and procedures as notified from time to time by the Commonwealth;
- (9) "requiring" Transfield to "exercise use of force" within the Nauru RPC in certain circumstances;
- (10) having significant governance responsibilities and control at the Nauru RPC, including participation in the Joint Committee, participation in the Joint Working Group, *the power to appoint the Operational Manager responsible for the day-to-day operation of the Nauru RPC*, the power to appoint the Programme Coordinator responsible for managing all Australian officers and services contracts in relation to the Nauru RPC and the power to appoint the provider of the Nauru RPC;
- (11) having contracted for, and having, the power to terminate (at its own discretion) the contract for the provision of the Nauru RPC and to "Step In" and take over the Nauru RPC; and
- (12) having contracted for, and having, the power to control the content of and compliance with the OPC Guidelines.

47 With few exceptions, all of the documents to which Gordon J referred in her exposition of the facts at [282]-[346] were before me. I was not provided with a copy of the *Asylum Seekers (Regional Processing Centre) Act 2012* (Nauru) ("RPC Act"), which Gordon J discussed at [314]-[318], nor with a copy of the "RPC Rules", which Gordon J discussed at [319]-[320]. Also, for reasons that are not clear to me, paragraphs 5 and 6 of the *M68* special case, which was in evidence before me, are among those excised. They record that on certain dates the Minister made directions concerning where unauthorised maritime arrivals were to be taken. I cannot imagine why that is controversial, but in any event I do not rely on those matters. The matters that are italicised in the above extract are those in respect of which I do not have evidence, and upon which I do not rely. The un-footnoted facts to which Gordon J referred in her exposition were set out in the Special Case Pursuant to Rule 27.08 put before the High Court, which special case (subject to some excisions) was also before me.

48 Gordon J held that Plaintiff M68 was being detained by the Commonwealth. She was in the minority in that result. French CJ, Kiefel and Nettle JJ held at [36] that the plaintiff was detained by Nauru and not the Commonwealth. Keane J's conclusion was substantially the same (at [239]). However, Keane J also said that the Commonwealth's arrangements "procured or funded or caused

restraints over the plaintiff's liberty". Bell J held that the Commonwealth "exercised effective control" over the detention of transferees, and that the plaintiff's detention was, "as a matter of substance, caused and effectively controlled by the Commonwealth parties" (at [93]). Gageler J held that the Commonwealth had procured the plaintiff's detention (see [173]-[175]). Gordon J held that the Commonwealth "detained the Plaintiff" (at [353]).

49 The differences as between the various judgments on this question were, however, as to the conclusions of ultimate facts that ought to follow from fairly uncontroversial precursor facts. The content of the various documents put before the High Court and of the facts agreed in the special case were not in dispute. The dispute centred on whether those facts properly led to the conclusion that the Commonwealth detained the plaintiff on Nauru. The answer was that it did not. But that does not render incorrect the facts as summarised by Gordon J. Nor did it render incorrect the 12 points that I have quoted above from her Honour's judgment. In my opinion, those 12 points are also supported by the evidence before me (with the exception I have noted in relation to the italicised portions). They describe, non-exhaustively, the Commonwealth's involvement in the applicant's detention on Nauru.

Agreements as between the Commonwealth and Service Providers in relation to provision of services to refugees in Nauru

50 After the applicant ceased to be detained on Nauru, many of the facts set out under the previous heading ceased to apply to her. However, the Commonwealth continued to have involvement in the conditions of the applicant's existence on Nauru. It admitted that it paid for and continues to pay for her accommodation on Nauru. It admitted that it paid all of the applicant's visa and other fees payable in respect of her residence in Nauru. What is more, it admitted that it had provided certain settlement services to the applicant, as I will now detail.

51 The Commonwealth agreed with Nauru in the Administrative Arrangements to meet "Settlement support costs" for those settled in Nauru. "Service Providers" would ensure that refugees had access to health, education, counselling, interpreters, and other relevant services for day-to-day living (cl 6.2.3). A "Service Provider" was defined as a company or organisation/entity contracted to provide a service at a centre or in relation to transferees.

52 Ms Nerys Jones, a Commonwealth public servant, gave evidence of contracts with such service providers. She deposed that the Commonwealth had entered into agreements for contracted parties to provide "health and settlement services" for persons accepted as refugees by Nauru ([6]).

Settlement services

53 By letter of intent dated 16 May 2014, and letter of extension dated 18 July 2014, the Commonwealth agreed with "Save the Children Australia" to provide settlement services to refugees in Nauru.

54 On 5 December 2014, the Commonwealth entered into an agreement with AMES in place of Save the Children Australia to provide settlement services to refugees in Nauru.

55 AMES is the lead member of a consortium contracted to provide these services. The other member of the consortium is "Multicultural Development Association." Together, they trade under the name "Connect Settlement Services" ("Connect") in Nauru.

56 The settlement services contract requires Connect to provide services including the following: needs assessments and case management; English language training; local cultural orientation; access to vocational training; links to services including for education, health and employment services and vocational training; allocating accommodation and accommodation support; income support management; and links to other services and social and religious activities as required to assist refugees to integrate into Nauruan society.

57 Ms Jones deposed that each refugee is assigned case managers by Connect to assist in transition to living in the Nauruan community. Connect's case managers carry out initial needs assessments and develop Settlement Support Plans for each refugee. Connect is required to ensure that case managers regularly meet with refugees and update the plan with the aim of developing independence and self-agency for each refugee. Ms Jones deposed that the contract envisages that most refugees will have their settlement needs met, including the removal of all support including income support, and exit the service within 6-12 months.

58 All of the foregoing services are funded by the Commonwealth. In relation to accommodation, the Commonwealth sources or constructs accommodation and pays rent and utilities for that accommodation, and Connect manages the accommodation arrangements.

59 Connect is also responsible for reporting any incidents of which it becomes aware to the Department of Immigration and Border Protection. The Department manages the performance of Connect through contract management processes. Thus, neither the Department nor the Australian Border Force in Nauru has direct contact with refugees for the purpose of settlement service delivery.

Health services

60 By Heads of Agreement for the Provision of Settlement Health Services on Nauru, dated 2 December 2014, the Commonwealth contracted with IHMS to establish and maintain a "Settlement Health Clinic," being a health clinic staffed and run by IHMS and funded by the Commonwealth.

61 The Clinic is located at the Republic of Nauru Hospital. It is accessible by refugees in Nauru at no cost. It is staffed by IHMS General Practitioners, Registered Nurses, Mental Health Nurses, a Counsellor, and an Obstetrician. Psychiatrist and Psychologist services are also available, through IHMS. The Clinic dispenses medications as required. Interpreters are accessible to support consultations, and are arranged by the Department. Health care is otherwise available to refugees at the Republic of Nauru Hospital at no cost.

62 IHMS is responsible, through its medical professionals, to treat those refugees who use the Clinic in accordance with professional obligations. IHMS is also required by contract to obtain informed consent to health care. As Ms Jones deposed, "[w]here the Department is advised by IHMS that medical treatment required for a refugee is not available on Nauru, the Department will facilitate the availability of treatment options either on Nauru or elsewhere through procedures established between the Department and IHMS."

63 Relevantly, the agreement between IHMS and the Commonwealth provides that the IHMS is to provide health services in a manner that promotes objectives including "address[ing] the health needs of individual Refugees to a standard

broadly commensurate with Nauruan standards” (cl A.1.1(g)), and “effectively manag[ing] risks associated with the Services” (cl A.1.1(h)). Services are to be provided through the Clinic on a needs-basis (cl A.2.2).

64 That includes “Primary Health Services (available to Refugees for the duration of the Agreement, or as advised by the Department) [including] facilitation of timely transfer of Refugees for urgent medical care not available in Nauru, location and extent of which to be agreed by the Department” (cl A.2.2(a)(vii)).

65 It also includes “Specialist Services”, involving the “develop[ment of referral] procedures to specialist services in conjunction with the Republic of Nauru Hospital” and “facilitation of specialist visits — leveraging off specialist visits to the Nauru Offshore Processing Centers where possible — based on Refugee need and/or as agreed by the Department” (cl A.2.2(c)).

66 The Settlement Clinic is open during business hours six days per week. Refugees are also able to access the Nauru Hospital. In particular, after-hours care is available for refugees who otherwise use the Clinic. The Nauru Hospital participates in an “Overseas Medical Referral” program which allows members of the Nauruan community, or refugees, to be referred overseas for medical treatment not available at the Nauru Hospital. When a refugee is referred under this program, the Operations Section processes the referral and, in the event it is approved, facilitates the medical transfer. The Commonwealth has no involvement when Nauruans are referred under the Overseas Medical Referral program.

67 Interestingly in the context of this case, IHMS was also responsible for ensuring that, in performing its obligations under the agreement, it complied and ensured compliance with “all applicable laws, including those applicable to Nauru and those Australian laws that are applicable to the Services or the Site” (cl 15.1.1).

Education services

68 The Commonwealth has entered into an agreement with the Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane trading as “Brisbane Catholic Education” to provide education support services to the Government of Nauru. Those services are provided to Nauruan children and children on regional processing centre visas and temporary settlement visas.

69 The applicant, being an adult, does not access these services. However, adult English language education and other adult education, including vocational training, is provided or facilitated by Connect.

The salient facts

70 It is necessary to record other salient facts and convenient to do that in chronological order. The evidence was almost entirely uncontroversial. There was a contest as to whether the applicant had consented to be taken from Nauru to Papua New Guinea and the quality of that consent. I will make some findings as to that issue. Otherwise, unless indicated to the contrary and insofar as the evidence dealt with the facts, the evidence which I recount is accepted.

71 Providing a full description of the evidence raises some sensitivity. Some of the facts concern information which is the subject of a non-publication orders made by me pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth) (“Federal Court Act”). The information the subject of those orders is:

- (a) the name of the Applicant.
- (b) the boat identification number of the boat on which the Applicant first arrived in Australia.
- (c) the age of the Applicant.
- (d) the country from which the Applicant came [applicant's ethnicity], and the country in which the Applicant lived prior to her arrival in Australia.
- (e) the procedure that the Applicant had when she was seven years old.

72 In view of the non-publication order, I have prepared two versions of my reasons for judgment, a redacted version for publication on the internet and a complete version which is to be provided to the parties.

73 The applicant is of [redacted] ethnicity. She was born in [redacted] and is currently about [redacted] years of age. At the age of about seven, she was subjected to [redacted]. An examination by Dr O'Connor, to whose evidence I shall later return, revealed a [redacted] which Dr O'Connor defined as:

[Block quote redacted.]

74 When the applicant was about 16, she witnessed her sister being murdered. She began to suffer seizures soon after. She had some schooling in [redacted] and learned some English from watching TV. While 16, she was taken to [redacted] where her father had arranged her marriage to a 45 year old man with other wives. She was mistreated. She was severely abused, physically, sexually, and emotionally. She said she was bashed and beaten by her first husband. She described the marriage as "very bad". After several years and when pregnant with her first and only child, the applicant ran away to [redacted] where her mother lived. Her son was born there.

75 The applicant's mother arranged her divorce from her first husband. The applicant met and married a second husband about two years later. Her second marriage was better. She returned to [redacted] with her second husband, but her first husband tried to force her to return to him. Her first husband accused her of adultery and threatened to inform the government and [redacted]. Assisted by her second husband, the applicant fled, fearing that she would be killed by stoning. She left her son with her mother. She sought refuge in Australia, where she thought she could be safe. With that objective, she travelled to Indonesia and then by boat to Australia. The applicant's son remains in [redacted] in the care of the applicant's mother.

76 When taken from Australia to Nauru, the applicant was detained in a camp called "Regional Processing Centre — 3" ("RPC3"). The Minister participated in the detention, maintenance and care of the applicant whilst her claim for refugee status was being processed and paid for all aspects of her detention, care and maintenance during that period.

77 Whilst at RPC3, the applicant was housed in tented accommodation. She said she was provided with food and security by guards from "Wilson Security". She described her conditions there as very tough but secure. Health services were also provided to the applicant. IHMS records show that the applicant attended the IHMS clinic regularly, usually at least weekly and often more frequently. Appointments categorised as "mental health" commenced in November of 2013 and became regular thereafter. Furthermore, a case worker was allocated to the applicant whilst she resided at RPC3. She was also given the assistance of a lawyer to help her apply for refugee status. As I have said, it is admitted that the

Commonwealth participated in the detention, maintenance, and care of the applicant, and paid for all aspects of her detention. I have already described the level of the Commonwealth's involvement in the applicant's detention.

78 On 11 November 2014, the applicant was found by Nauruan authorities to be a refugee within the meaning of the *Convention Relating to the Status of Refugees 1951*, done at Geneva on 28 July 1951, as amended by the *Protocol Relating to the Status of Refugees 1967*, done at New York on 31 January 1967 ("the Refugees Convention"), and was granted a temporary settlement visa. At that point the applicant was given a document that confirmed that she had been given refugee status. From that time, she could travel anywhere on the island of Nauru. The document she was given did not enable her to leave Nauru.

79 As a refugee, she moved out of RPC3 and first lived in a house that she shared with eight other women. The Commonwealth has paid and continues to pay for the applicant's accommodation on Nauru. She had also been given a card that she used to obtain cash. She said that she was given an allowance of \$200 but did not specify the period of time the \$200 related to. Often because she was sick, the applicant's case manager from Connect, Ms Bernice Beaucaine, would bring her money. The money provided was used for basic needs such as food and clothing. The applicant met with Ms Beaucaine often.

80 The applicant found life in the house provided to her very difficult. The main difficulty was security. Thieves came in and stole the residents' belongings. As a result, the applicant was moved to other premises which she was told would be safer. Security guards were provided in the new premises but were ineffective. The guards were "always drunk". In the applicant's evaluation these premises were less safe.

81 I will deal with the medical evidence about the applicant in more detail later, but it is not in contest that the applicant suffers from epilepsy or a psychogenic disorder and has regular seizures. At the time that she lived outside of RPC3, the applicant had seizures often. The applicant could only describe what people told her about her seizures because she does not remember what happened to her whilst experiencing a seizure. If she experienced a seizure, people would call "emergency" and she would be given help. Sometimes she would be taken to the Settlement Clinic and sometimes she would be taken to the Republic of Nauru Hospital ("the Hospital"). Ordinarily, the applicant obtained her medicine from the Settlement Clinic. On occasions she was admitted into the Settlement Clinic and discharged after a day.

82 For the purposes of this proceeding, the Minister has admitted that in about February 2016, the applicant was raped while or shortly after suffering a seizure and became pregnant as a result. Other evidence, to which I shall shortly refer, suggests that the applicant was raped on 31 January 2016. The Minister has further admitted, again for the purpose of this proceeding only, that the applicant has suffered physical and mental harm and continues to suffer mental harm as a result of having been raped.

83 The applicant deposed that whilst having a seizure she was raped. She has no recollection of the rape itself. She realised she had been raped after it had happened. She came to that realisation because there was blood "in my body ... and also ... a lot of ... male discharge". The applicant later reported to Dr O'Connor that the effects of the rape were vaginal bleeding and a painful perineum with no other physical injuries.

84 Further details of the rape are contained in a report produced by Connect on

31 January 2016. At approximately 12 noon on that day, the applicant contacted the on-call case manager to report that she had been raped. She told her case manager that she had stepped outside of her room to make a phone call and became unconscious due to a seizure. Transport to the Nauru Hospital was arranged by Connect. After initial medical testing, an assessment was conducted at the Hospital together with an initial counselling session conducted by the Victims Support Service. Thereafter, the applicant was taken to the Nauruan police force where she made a statement.

85 Dr Joseph Songco has been employed as a medical doctor by IHMS at the Settlement Clinic since May 2015. He deposed that he saw the applicant at the Settlement Clinic on 7 March 2016. She told him that she had missed her period. He asked whether she was pregnant and the applicant said she was not. There is some controversy as to whether Dr Songco asked the applicant to take a pregnancy test but the applicant did agree to an ultrasound being conducted and that occurred. Medical records show that an ultrasound was conducted on 18 March 2016. The ultrasound confirmed that the applicant was pregnant.

86 Also on 7 March 2016, Mr George Newhouse, the applicant's solicitor, emailed Dr John Brayley concerning the applicant. Dr Brayley is the Chief Medical Officer and Surgeon General of the Australian Border Force. Mr Newhouse attached a video of the applicant. He said that "[she] is at risk of serious injury. She is fitting regularly and cannot safely even cook for herself because she has fitted in the middle of cooking with the potential for a fire and burns." He said that "[s]he requires urgent trauma and psychological care, an assessment by a neurologist in relation to her fits and this should take place in Australia." He said that "[the applicant] was raped after collapsing after a Grand mal Fit. She has not been adequately cared for as a consequence. ... It is obvious that she needs treatment in Australia."

87 On 8 March 2016, Dr Brayley said to Mr Newhouse that he had forwarded Mr Newhouse's email with attachments to a Regional Medical Director at IHMS.

88 Also on 8 March 2016, Dr Brayley emailed Mr Newhouse again and said that he had had a detailed conversation with Dr Peter Rudolph, the Medical Director for Offshore Centres. Dr Brayley said that Dr Rudolph had previously looked at the applicant's case but was "following up again today," and would provide to Dr Brayley an update. Dr Brayley said that he would be in touch with Mr Newhouse shortly — probably the following morning.

89 On 9 March 2016, Dr Rudolph emailed Dr Brayley concerning the applicant. The subject matter of the email was the applicant's seizures and how they ought to be diagnosed. Dr Rudolph said (*inter alia*) as follows:

As we discussed previously, the diagnosis of epilepsy is essentially a clinical diagnosis in Nauru as there is no access to EEG services; nor is there access to EEG services at PIH [Pacific International Hospital, Port Moresby]. I suppose that Mr Newhouse and Dr Newman need to be aware that [the applicant] is now a Nauruan refugee who will receive good quality primary care and mental health support via the Settlement clinic but will be reliant on the Nauru Hospital for specialist services in accordance with Nauru community standard — and there are obvious limitations when compared to Australian standards.

90 More emails were exchanged as between Dr Rudolph and Dr Brayley on 9, 11, 12, and 14 March 2016 but these are not of any particular moment. As part

of the same email chain, on 14 March 2016 Dr Jo Holdaway, a Medical Director of Mental Health Service at IHMS, emailed Dr Brayley. Relevantly, she said this:

There is also a significant and potentially contentious issue of service delivery to refugees “to a Nauruan standard” and the harm potentially created by providing services to refugees that would not be also available to Nauruans (such as weekend welfare visits), and the lack of automatic right by the Australian government to refugee clinical information.

These complex issues certainly complicating [sic] this case — but too complex to debate in email. It is not simply a case of IHMS leading this patients [sic] care in the same way that might happen on the mainland.

Perhaps this is the type of case we could usefully spend an hour discussing as an example of a complex case, in one of the new Clinical Governance forums.

91 Two days earlier, on 12 March 2016, and in a different email chain, Dr Brayley emailed Mr Newhouse, saying (amongst other things) that the applicant was booked in for a “comprehensive review by a senior IHMS doctor on Tuesday”, ie on 15 March 2016. An email later that day from Dr Brayley to Mr Newhouse advised the latter that a pregnancy test would be offered to the applicant.

92 Also on 12 March 2016, the email chain containing the two emails to Mr Newhouse was forwarded to Dr Rudolph.

93 On 17 March 2016, as part of the same chain of emails, Dr Brayley emailed Dr Rudolph asking whether there was “any news” about the applicant’s comprehensive assessment, which had occurred two days prior. Dr Brayley had received information from a Ms Pamela Curr, concerning the applicant, to the effect that the applicant had been told that she was pregnant, and that she wished to have the pregnancy terminated. He requested that that information be confirmed as accurate.

94 In reply, on 17 March 2016 at 4:46 pm Dr Rudolph emailed Dr Brayley. It does not appear that he had yet confirmed whether the applicant was pregnant. The email is lengthy and not all of it need be set out. He commenced thus:

As you have indicated, further information is required regarding the pregnancy plus a clear indication from the patient as to her wishes and I believe that this is taking place.

Also, as you are aware, if this or any other refugee wishes to have a termination of pregnancy, serious legal and ethical questions are raised. Whilst in Australia termination of pregnancy is widely accepted as an appropriate therapeutic intervention, in Nauru termination of pregnancy is illegal. One might also assume that an individual, as part of the acceptance to become a refugee in a particular country, also accepts to abide by the laws of that nation. Therefore any refugee in Nauru seeking to obtain a termination of pregnancy or others (including health professionals) facilitating the process may be considered as participating in a felony and may be charged; in addition, the action may be seen as an insult to Nauru which has kindly agreed to take these individuals as refugees and allowed Australian government officials and Australian government contractors (e.g. IHMS) to work in Nauru under Nauruan laws and regulations.

(Emphasis added.)

Dr Rudolph continued, later in the same email, as follows:

With regard to [the applicant’s] seizures: whilst the assessment this week was not that of a specialist in seizures, it was undertaken by a very experienced general practitioner. The physical examination was normal and it was recognised that there

is a significant functional component to the presentation. *However, certain elements of the history are such that epilepsy cannot totally be ruled out. As we previously discussed, if this lady were in Australia, she would have an EEG and probably admitted to a neurology ward for observation if the EEG was inconclusive.* As you know, this is not available in Nauru and referral to the Nauru hospital for “specialist” assessment was totally unsatisfactory. *There is no EEG or neurology capability at PIH either. Under the current arrangements for specialist medical care for Nauruan refugees, [the applicant] will not get the care that I believe she requires (using Australian standards as a baseline); nor would a Nauruan local with the same presentation for that matter. If she were a transferee, there would be additional options although I suspect that ultimately IHMS would be requesting transfer to Australia for EEG and possible admission to a neurology ward for observation to identify a definitive diagnosis (and institute appropriate treatment).*

(Emphasis added.)

95 On 18 March 2016 at 11:12 am, Dr Brayley replied to Dr Rudolph’s email, saying (*inter alia*) the following:

I can reply in more detail at a later stage — we certainly have details of the laws in different countries.

I haven’t seen it as inconsistent that Nauru while not offering termination of pregnancy through its own health system is prepared to see people travel to another country for this procedure similar to a practitioner in one hospital who conscientiously objects and refers a patient to another hospital.

PNG has been prepared to provide this procedure subject to a review of the circumstances of each patient to ensure that their legal requirements are met.

96 Also on 18 March 2016, at 9:19 pm, Mr Newhouse emailed Dr Brayley saying that he was extremely concerned about the fact that the applicant was pregnant and required a termination, and said that he “wonder[ed] whether her case could be fast tracked.”

97 On 19 March 2016 at 10:24 am, Dr Brayley replied to Mr Newhouse’s 18 March email, saying that Dr Brayley was aware of the applicant’s request for a termination of pregnancy, that he expected that the overseas medical referral for that termination would be “actioned expeditiously by the doctors and manager on Nauru at the IHMS settlement clinic” and that he would confirm that.

98 On 21 March 2016 at 9:00 pm, Dr Rudolph replied to Dr Brayley’s 18 March email, extracted under [95] above. Dr Rudolph’s email states that the applicant received an ultrasound on 18 March 2016 and the ultrasound showed that she was pregnant. He also said that the “IHMS mental health team will be following [the applicant] up in relation to her psychological state and the IHMS gynaecologist will be following [the applicant] up in relation to the viability of the pregnancy and [the applicant’s] intentions.”

99 On 22 March 2016 at 12:02 pm, Dr Brayley emailed Mr Newhouse saying that the applicant had undergone an ultrasound on 18 March 2016 and was confirmed to have a “very early pregnancy,” which could not be identified as viable or dated as yet. He said that a repeat ultrasound was planned in around 1-2 weeks. He indicated that an IHMS gynaecologist would follow up with the applicant in relation to the pregnancy’s viability and the applicant’s intentions, and that a mental health team would follow up with the applicant concerning her mental state.

100 As earlier stated, there is some conflict in the evidence about whether the applicant was taken by the Minister from Nauru to Papua New Guinea for the purpose of having an abortion with her consent or her informed consent. The following evidence is recounted including because it is relevant for resolving that issue.

101 The applicant deposed that sometime after the ultrasound was conducted, she went to the Hospital because she wasn't feeling well. At that time she was told she was pregnant. It was suggested to the applicant that a female doctor, Dr Sewell, informed her that she was pregnant and that she told Dr Sewell that she wanted to have an abortion. The applicant did not recall any appointment with any female doctor. She said she told Dr Songco that she wanted an abortion. The applicant denied that during the appointment suggested to her with Dr Sewell she was told by a mental health officer that an abortion might take place in Papua New Guinea. The applicant insisted in her evidence that she had only discussed an abortion with two male doctors, Dr Songco and another doctor whom she called "Dr Nick". On her evidence each of those doctors had said to her that she would be going to "a third country" to have an abortion. She denied that she had been told that an abortion might take place in Papua New Guinea and that she had said that she did not care, that she just wanted the abortion or words to that effect.

102 The Minister did not call Dr Sewell. He relied upon a record of an appointment for the applicant at the Settlement Clinic. The record appears to detail a consultation that "Sewell SMD" had with the applicant. It does provide some foundation for the allegations put in cross-examination as to what the applicant was told, but the record is not clear. There are other records in evidence which support the Minister's position that the applicant was seen by a psychologist Ms Margaret La Freng on 21 and 23 March 2016, and also on 30 March 2016, and a psychiatrist Dr Argyle on 24 March 2016. I accept that in those consultations an abortion was discussed with the applicant. To the extent that that evidence contradicts what the applicant said in cross-examination, I prefer the documentary evidence.

103 Whilst the following evidence of Ms Noora Ali supports a finding that a mental health officer said an abortion might take place in Papua New Guinea, neither Ms Ali or the record of the appointment with Dr Sewell suggests that the comment was made whilst the applicant saw Dr Sewell.

104 Ms Ali is an interpreter working in Nauru. She deposed that she remembered translating for meetings or appointments that the applicant had on at least two occasions. She does not remember the dates of those meetings. She recollects that one was at the applicant's home and that the other was at the Hospital. She recalls that each meeting was with a person from the Settlement Clinic mental health unit and a psychologist. Ms Ali deposed that she recalls that the applicant told the mental health unit person and the psychologist that she was pregnant. She described to them how the pregnancy had happened. The applicant said that she wanted to have an abortion as soon as possible. Ms Ali does not recall a reply given to the applicant but thinks that something was said along the lines that they would do their best or that they needed to work on it. Ms Ali also deposed that on the second occasion she translated for the applicant. The applicant again said she was pregnant and that she wanted to have an abortion as soon as possible. The applicant said it needed to happen quickly. Ms Ali

recalls that the mental health unit person said that maybe the abortion would happen in Papua New Guinea. Ms Ali deposed that the applicant said in response that she didn't care, wherever.

105 The applicant accepted that during an appointment with Dr Songco she was given some forms to sign. She did not recall the date of the meeting but other evidence confirms that the appointment occurred on 22 March 2016. The two forms in question are in evidence. The first is headed "Consent for Medical Transfer to Port Moresby". Relevantly it purports to record the applicant's agreement to "transfer to Port Moresby for the purposes of medical treatment/investigation". The document states:

I have made this decision on my own free will, with no threat or punishment made to me. I understand I will return to Nauru upon completion of medical treatment/investigation.

There is no issue that the signature of the applicant is shown on the form. The form is dated 23 March 2016.

106 The second form is headed "Consent to Share Medical Information". This form also contains the applicant's name and her signature. It records the following consent:

I give my consent for Pacific International Hospital (PIH) &/ Port Moresby General (POMG) Hospital to share my personal medical information with the Department of Immigration and Border Protection, the Australia Border Force, and International Health and Medical Services, whilst I am undergoing treatment or assessment in the PIH or POMG Hospital.

The form is dated 22 March 2016.

107 The applicant denied that prior to arriving in Papua New Guinea, she had any understanding that she would be transferred to Papua New Guinea in order to have an abortion. She said that prior to arriving in Papua New Guinea she did not know where Port Moresby was. She said that she did not read either of the consent forms when she signed them. Although she accepted that an interpreter was present during her appointment with Dr Songco, she denied that the content of the consent forms had been interpreted for her. Her evidence was that Dr Songco discussed with her health issues including her mental health, her seizures and her dental health and told her that these would be addressed in another country and that she needed to sign the consent forms. To the applicant's recollection, she signed both of the consent forms at the same time. She did not recall coming back on a later occasion to sign one of the forms. She denied that Dr Songco read out the content of the forms and told her that by signing the forms she was agreeing to a medical transfer to Port Moresby. She insisted that all that Dr Songco did in relation to the forms was point to the spot on the forms where she should put her name and sign.

108 Dr Songco deposed that he had an appointment with the applicant on 22 March 2016. Prior to the appointment, another doctor at the Settlement Clinic had told him that the appointment had been made because the applicant was going to be transferred to Port Moresby so that she could receive an abortion and that she needed to sign the consent forms to be transferred. He said he had not spoken to the applicant about the abortion and was not involved in the decision to transfer her to have that procedure. It is not in dispute that the applicant attended the appointment with her case officer and an interpreter. Dr Songco says that at the beginning of the appointment the applicant told him that she wanted to have an abortion as soon as possible. He deposed that he did

not discuss the abortion procedure itself with her. He said that he told the applicant that he had been informed that she was to be transferred “to another country” to have the abortion done. He deposed that he then gave the interpreter the consent form for the transfer to Port Moresby and the second consent form for the sharing of medical records. He deposed that he then told the applicant that the forms “were for her to be transferred to Port [Moresby] General Hospital, for the abortion”. He asked the interpreter to translate the consent forms and for the applicant to put her name and signature on the forms if she agreed. He further deposed that he heard the interpreter reading both consent forms to the applicant. When the interpreter had finished he saw the applicant print her name on the consent form for the sharing of medical information and saw her sign that form. He says he also saw her print her name on the consent to be transferred to Port Moresby. However, he deposed that the applicant did not sign the consent to be transferred form and that he did not notice that at the time. The forms were then given back to Dr Songco and he deposed that he asked the applicant about her condition. He discussed referrals with the applicant and ultimately referred her to a psychologist, a psychiatrist and also an obstetrician/gynaecologist.

109 Dr Songco deposed that, later, when he realised that the consent to transfer form had not been signed he contacted the applicant and asked her to come in the next day to the Settlement Clinic. He said that she came in on 23 March 2016 for her appointment with the psychologist. Before that appointment he spoke to her and again told her that she had forgotten to sign the second consent form. He said he gave her the form and asked her to sign it. He deposed that she then wrote her name on the form and signed it. The applicant was not accompanied by an interpreter on 23 March 2016.

110 There is one possible inconsistency in Dr Songco’s evidence. He said that he saw the applicant print her name on the consent to transfer form on 22 March. He also said that she did that again on the next day. That is unlikely and inconsistent with what appears on the form. However, Dr Songco was not cross-examined. I have no reason to reject the substance of his account of his meetings with the applicant on 22 and 23 March 2016. But, given the applicant’s background and limited education, I do not have a basis for disbelieving the applicant’s evidence that she did not know at the time where Port Moresby was. Perhaps the name Papua New Guinea might have been more familiar to her but nothing in what was said to her either by Dr Songco nor in the consent forms mentioned by name the country of intended destination. Nor, given her state of mental health at the time, would it be surprising if the applicant misunderstood the detail of what was being put to her.

111 The evidence does support a finding that the Minister offered and the applicant agreed to be taken to another country so that her pregnancy could be terminated. There is no suggestion that the applicant was removed from Nauru against her will or misled as to where she would be taken. The evidence does not support a finding that the applicant was offered a choice of destinations, or had any choice other than that provided by the Minister, as to obtaining a termination of her pregnancy. It was not in contest that an abortion was not safe and lawful in Nauru, and could not be there obtained. The Minister admitted that it would not be possible for the applicant to obtain an abortion without the assistance of the Commonwealth. In other words, if an abortion was to be procured, the Commonwealth had to procure it in a country other than Nauru.

The evidence does not support a finding that the applicant was given any opportunity to make an informed decision that Port Moresby was an appropriate location for the abortion that she desired. Dr Songco was told that the applicant “was going to be transferred to Port Moresby” before he saw her. He was not there to consult with the applicant about possible alternatives and did not do so. Nor did he explain to the applicant the standard of care that would be available to her or say anything about the lawfulness of the applicant’s pregnancy being terminated in Papua New Guinea. Whilst the applicant gave her consent to be taken to another country, she did not give her approval to having an abortion in the medical and legal setting in relation to which she now complains. In that regard she did not give informed consent.

112 When a refugee requests a termination of pregnancy, a Request for Medical Movement (“RMM”) is prepared by IHMS. It is approved by an IHMS Medical Director, and submitted to the Offshore Health Operations Section (“Operations Section”) of the Detention Services Division (“Division”) of the Australian Border Force for approval. That is consistent with cl A.2.2(a)(viii) of Sch 1 to the Agreement entered into between the Commonwealth and IHMS, which provides as follows:

A.2.2 The Services available to Refugees under the Agreement, to be delivered by the Service Provider in the Nauruan community at the Settlement Health Clinic(s) on a needs-basis, comprise:

a. Primary Health Services (available to Refugees for the duration of the Agreement, or as advised by the Department):

...

viii. facilitation of timely transfer of Refugees for urgent medical care not available in Nauru, *location and extent of which to be agreed by the Department*, and where required and available provide Referral to an appropriate medical assistance provider and medical escort services.

(Emphasis added.)

113 An RMM contains the following information:

- (1) the refugee’s personal information including name and date of birth;
- (2) the refugee’s current location;
- (3) the recommended timeframe for movement;
- (4) the recommended destination for medical treatment;
- (5) the reason for referral; and
- (6) the refugee’s provisional diagnosis and relevant medical history.

114 On receipt of an RMM, an officer of the Australian Border Force checks the request to ensure that all required details have been provided. The officer checks scheduled upcoming charters, timetables for visiting medical specialists, and “Departmental policy about medical transfers”. If “everything is in order,” the request is escalated for approval, ultimately to the First Assistant Secretary of the Division.

115 Mr Nockels is the First Assistant Secretary of the Division. Mr Nockels has been in his position since 4 April 2016. Prior thereto, he was Commander of the Immigration and Customs Enforcement Branch of the Australian Border Force. That involved the management of around 130 investigators in Australia’s capital cities. Investigations focused on customs and immigration offences, including importation of prohibited items and identity fraud. Earlier, commencing in

around January 2014, he had been Assistant Secretary in the Offshore Infrastructure Branch. He described his expertise as being “primarily around public policy.”

116 A responsibility of the Operations Section is the arrangement of medical transfers and medical evacuations of transferees and refugees located in Nauru and Manus Island in Papua New Guinea. This requires liaison with Australian Border Force health officers in those locations, as well as with IHMS.

117 It is ordinarily Mr Nockels’s responsibility to determine whether an RMM should be approved. If approved, the Operations Section informs IHMS by email of the approval and informs other areas of the Department which organise transfer logistics and government approvals. The Operations Section is not responsible for informing a refugee about transfer details.

118 Mr Nockels’s expectation was that IHMS would make an RMM only after a refugee had been fully informed of their medical condition and health care options, and had consented to the treatment proposed by IHMS. He stated that it was not the role of the Operations Section to discuss a refugee’s health care options or treatment plan with a refugee.

119 On 4 April 2016 at 4:52 pm, Ms Antonia Graham, registered nurse with IHMS, emailed “RPC HLO” — which evidently stands for “Regional Processing Centre Health Liaison Officer” — attaching an RMM, described in the email as being “semi-urgent.” That RMM contained under a heading “Clinical Condition of Client, Treatments to Date & Recommendations” a statement to the effect, “IHMS are requesting urgent transfer to Australia.” The evidence was that the reference to Australia was a mistake. At 5:11 pm the same day, Ms Graham sent another email to RPC HLO saying “[a]pologies for the mistake!” and attaching an updated RMM in relation to the applicant. The updated RMM appears to be identical save that the first line of the “Clinical Condition” section read “IHMS are requesting urgent transfer to Port Moresby.” I will call the updated RMM sent 4 April 2016 “the First RMM.”

120 The First RMM gave 1 April 2016 as the date of recommendation. It was authorised by Dr Rudolph. The “Recommended Destination” was “Pacific International Hospital — PNG (based on DIBP policy to utilise PIH where possible).” The applicant’s “provisional diagnosis” was a gestational age as at 1 April 2016 of seven weeks. Under the “Clinical Condition” heading, the First RMM provided thus:

IHMS are requesting urgent transfer to Port Moresby on behalf of [the applicant] for the requested procedure. *Termination of pregnancy (TOP) is not legal in Nauru.* As per update provided to IHMS by ABF on 28/01/16; ABF have advised that Pacific International Hospital have agreed to perform the termination of pregnancy for transferees and refugees. *As per ABF — PIH are able to perform the requested procedure under current legal requirements.*

A medical termination of pregnancy is a safer way to terminate an early pregnancy using medication instead of surgery. *A medical termination of pregnancy can only be performed when the pregnancy is less than 7-9 weeks depending [on] the provider’s protocol, after which surgical termination would be required.*

Should there be delays in performing the termination of pregnancy at an early stage, there are increased risks of mental health issues as well as intraoperative and post-operative complications such as bleeding and infection. [The applicant] is also at risk of significant mental health issues prenatally and postnatal which includes potential risks of post-natal depression and disengagement from the baby,

should the termination not proceed.

(Emphasis added.)

121 Lower in the RMM, under the heading “Pacific International Hospital Treatment Options” appears the following:

Comments: Termination of pregnancy is not legal in Papua New Guinea unless two doctors agree a woman life [sic] is at risk. *ABF have advised that Pacific International Hospital have agreed to perform the termination of pregnancy for transferees and refugees. As per ABF — PIH are able to perform the requested procedure under current legal requirements.*

(Emphasis added.)

122 On 4 April 2016 at 5:22 pm, Ms Karen Newton, the Assistant Director, Health Capability and Scrutiny Section, of the Australian Border Force, emailed Ms Leonie Nowland, an Assistant Secretary within the Detention Health Services Branch of the Australian Border Force. Ms Newton attached an “approval spreadsheet” in relation to the applicant. The content of the spreadsheet appears to have been drawn from the First RMM. In particular, under a heading “Clinical Summary,” there appeared everything that I have set out under [120] above.

123 Also on 4 April 2016, Ms Nowland forwarded the approval spreadsheet, and it seems also the First RMM, to Mr Nockels, saying “Please see attached for your approval; I have approved this at my level.” Mr Nockels approved the First RMM at 6:38 pm that day.

124 “PIH” is reference to the Pacific International Hospital located in Port Moresby. PIH is a private hospital which operates 24 hours a day, seven days a week, and provides a range of private emergency and hospital services. It has specialists in general surgery, general medicine, thoracic, orthopaedics, cardiology, urology, ear, nose and throat, ophthalmology, anaesthesia, radiology, dental, paediatrics and OBGYN. The hospital has 79 beds and four fully-equipped operating theatres and a catheterization laboratory. The theatres are fully staffed, including by three anaesthetists and specially-trained nurses and technicians. There is also a maternity wing, a blood bank service, laboratory services and medical imaging facilities. PIH is licensed by Papua New Guinean authorities as a “Level 7” hospital which is the highest level of tertiary health care facilities available in Papua New Guinea. Transferees and refugees from Manus Island and Nauru are regularly treated at PIH and staff at the hospital are familiar with the use of interpreters and cross-cultural treatments. All four operating theatres at PIH are fully equipped for a surgical abortion, including with suction cutterage equipment.

125 As Mr Nockels records in his affidavit, “[t]he Operations Section then took steps to add the applicant to the next available charter ... and to liaise with PIH about the Applicant. In particular, on 5 April 2016, Ms Carol Crivici contacted Dr Sapuri at PIH about the applicant.”

126 On 5 April 2016, at 10:01 am, Ms Crivici of the Australian Border Force emailed Dr Kishor Pujari and Dr Mathias Sapuri, both of PIH. The email contained the following:

I would like to enquire about the ability for PIH to treat a patient who is currently a refugee on Nauru and is requesting a termination of pregnancy. Below is the summary of her current condition:

- the patient is a [redacted] year old female

- the patient is approx. 7 weeks and 4 days pregnant (as of 05/04/2016)
- patient has requested the procedure, advice received overnight from IHMS on Nauru indicates a decline in the patients mental health (self harm attempt).

IHMS have also provided clinical advice indicating that the patient is at risk of significant mental health issues prenatally and postnatal which includes potential risks of post-natal depression and disengagement from the baby, should the termination not proceed.

Also on 5 April 2016, Dr Pujari asked Dr Sapuri to respond to the inquiry.

127 On 5 April 2016 at 11:45 am, Dr Sapuri replied, saying (*inter alia*) as follows:

I am happy to assist and PIH can manage this case as we have done in the past. Please send me details of the self harm report. This is necessary to comply with our Laws in PNG.

128 On 5 April 2016 at 12:10 pm, Ms Crivici responded to Dr Sapuri's email. She provided the self-harm report and said that she would "advise transfer details as soon as they have been confirmed." Dr Sapuri responded that same day that he was "[h]appy to progress as planned" and that he would book a room at PIH, on being told the applicant's arrival time.

129 Dr Sapuri said that "since that time," a Dr Rageau had reviewed the applicant's case and agreed that the termination was necessary to preserve her life. Also, Dr Sapuri had considered the psychiatric assessment report of a Dr Priscilla Nad, dated 9 April 2016, in relation to the applicant, which stated that the applicant had an Adjustment Disorder with Depressive Features and Acute Stress Disorder.

130 Mr David Thompson is an officer of the Australian Border Force stationed in Nauru who is employed as part of its Nauru Operations Support area. On the morning of 5 April 2016, he received an email telling him that the applicant was to be included on a charter flight travelling to Papua New Guinea and leaving on 6 April 2016. He included the applicant's name on the manifest for the 6 April flight. Also on the plane were seven other people who had been determined to be refugees. Mr Thompson made a number of arrangements in relation to the applicant's travel. He contacted and obtained from IHMS a fitness to travel certificate in relation to the applicant. He arranged for Connect to bring the applicant to the airport. He prepared a Statement of Identity document for the applicant. Such a document is required to allow a person travelling to leave Nauru and to enter another country.

131 On 6 April 2016, Mr Thompson travelled to the airport with another Australian Border Force officer. He met with the applicant and her case manager and provided the applicant with a boarding card and a consent form relating to the applicant's medical records. He told the case manager that it was important that she go through all parts of the card and the consent form with the applicant and that these be completed and signed. After witnessing the case manager talking to the applicant with an interpreter, although not hearing the conversation, Mr Thompson deposed that the signed card and consent form were returned to him and he countersigned the passenger card. He then assisted with checking in the luggage of the applicant after clearing immigration. He gave to the applicant her Statement of Identity document which he had prepared.

132 The applicant confirmed that she was brought to the airport by her Connect case manager. She said that at the airport she was met by a man and a woman from Australian Immigration. I presume the man was Mr Thompson. She was given a “paper” by the Immigration officials. She stated that she did not know where she was going. She did not initially remember signing any document at the airport. However on being shown an outgoing passenger card, the applicant agreed that her signature appeared on that document. She accepted the card as the document that the two immigration officers had asked her to sign. The applicant denied that the document had been given by the immigration officers to the interpreter and that it had been interpreted to her. The boarding pass in question was in evidence. Next to the subject “Country of destination”, a hand written entry is made which mistakenly states “Port Moresby”. The applicant deposed that she boarded the plane.

133 When the plane landed she was met by a “security lady” who took her from the airport to the hotel. This person was called Susie and worked for “Wilson”.

134 The Minister admitted that the Commonwealth facilitated the applicant travelling to Papua New Guinea including by facilitating the transport of the applicant from the airport in Port Moresby to a hotel in Port Moresby, procuring a visa for the applicant to enter and remain in Papua New Guinea for the purpose of having an abortion, and admitted that the Commonwealth has paid all costs of and incidental to the applicant’s travel to, and care and maintenance in, Papua New Guinea. Furthermore, the Minister has admitted that the Commonwealth made arrangements for the applicant to have an abortion in Papua New Guinea.

135 On 7 April 2016 a Writ of Summons was filed in the High Court of Australia. The transcript of the hearing before Keane J shows it commenced at 3:28 pm and ended at 3:56 pm. Before that, at 12:56 pm an email had been sent by Ms Crivici to “IHMS Assistance”, copying various others including Ms Newton and Ms Nowland, saying “[p]lease suspend (halt) all arrangements for medical appointments or procedures for [the applicant] at PIH.” Perhaps that was done upon the respondents becoming aware of the commencement of proceedings.

136 On 7 April 2016 interim orders were made by Keane J. On 14 April 2016 I made similar orders and set down a timetable to hearing.

137 The applicant deposed that since arriving in Port Moresby she has been living in a hotel. Food is delivered to her by Wilson Security. She is provided with three meals a day. The security guards have a master key to her room which they use to enter her room if it is locked. After arriving in Port Moresby two people came to see the applicant and said to her that she was going to have an abortion. She deposed that she told those persons about her other issues and was told that she would have all of her other health matters checked. Some 10 days prior to giving her evidence the applicant deposed that she felt sick. Her illness was noticed by the security guards who took her to the hospital. The evidence of Dr Sapuri confirms that she was taken to PIH. The applicant’s recollection of events at PIH are unclear. She deposed that she was not well and has little recollection of what occurred. She was told by the security guards at the hotel and others that whilst at PIH she removed a drip that had been inserted into her hand and left the hospital. She has no recollection as to how she got back to the hotel.

138 On 12 April 2016 at 3:42 pm, Mr Ben Willis, an Assistant Director of the

Health Capability and Scrutiny Section of the Australian Border Force, emailed “IHMS Assistance” concerning the applicant’s case. He asked for a response to the following questions:

1. Was [the applicant] afforded adequate psychological counselling prior to agreeing for the terminations of pregnancy procedure, please provide details of recent psychiatric assessments.
2. *Could you please confirm there is a qualified neurologist to treat [the applicant’s] epilepsy at PIH, PNG and on her return to Nauru.*
3. If [the applicant] wishes to proceed with the terminations of pregnancy what steps will be taken and what support will IHMS provide.

RE: terminations of pregnancy at PIH

Grateful if you could advise on the following:

1. *Current psychological counselling services at PIH, PNG*
2. What are the requisite steps to be taken in order to facilitate a termination in PNG
3. *Can a termination be lawfully perform under PNG law*

(Errors in original; emphasis added.)

139 On 13 April 2016 at 3:41 pm, Ms Sybil Wishart, the Director of Corporate Affairs for IHMS, sent a rather lengthy email in reply to Mr Willis’s. Ms Wishart said as follows in relation to Mr Willis’s question concerning whether there was a neurologist at PIH:

Specialist neurology services are not currently available at PIH or on Nauru. Furthermore, electroencephalograms (EEGs) are not able to be performed at PIH or on Nauru. An MRI brain could be performed at PIH however this comprises only one part of the work-up for epilepsy. It should be reiterated that epilepsy is just one possible diagnosis that might explain [the applicant’s] history / presentations she has not been definitively diagnosed with epilepsy.

Ms Wishart said as follows in relation to Mr Willis’s question in relation to psychological services:

PIH does not currently offer psychological counselling services. Mental health support will be provided by IHMS clinicians in POM [Port Moresby].

Importantly, she said as follows in relation to Mr Willis’s question concerning legality of abortion under Papua New Guinean law:

IHMS has previously expressed its concern to the Department around the legality of performing terminations of pregnancy under PNG law. It is our understanding that such procedures are illegal unless certain conditions are met. The Department has advised IHMS that PIH is responsible for ensuring that any termination it provides is in accordance with PNG law and any other relevant PNG Government and medical authority requirements and that if PIH, following clinical review, accepts a patient for termination of pregnancy, then IHMS is not to concern itself with the legality or otherwise of the procedure. Please refer to supporting attachments.

140 There is then a reference in Ms Wishart’s email to a “separate email” from Mr Willis of 13 April 2016. That email does not appear to be in evidence. However, Ms Wishart’s email adopted the course of re-stating, in bold type, the questions that she had been asked by Mr Willis in his email and so it appears that the question Mr Willis asked in his separate 13 April email was as follows:

4. In your response to this request could you please confirm the below.

To my understanding grounds on which termination of pregnancy is permitted in PNG:

To save the life of the woman Yes

To preserve physical health Yes

To preserve mental health Yes

Rape or incest No

Foetal impairment No

Economic or social reasons No

Available on request No

Additional requirements:

A legal abortion is permitted within 12 weeks of gestation. It should be performed by a registered physician in a government health-care institution.

To that, Ms Wishart replied as follows:

IHMS has on numerous occasions requested clarification from DIBP as to grounds on which termination of pregnancy is legal in PNG. IHMS has not recommended terminations of pregnancy in PNG due to lack of confirmation. Please refer to supporting attachments.

141 On 15 April 2016 the applicant filed her statement of claim. That statement of claim included allegations, *inter alia*, that:

- (1) the applicant suffers from epilepsy or psychogenic disorder and has regular seizures, was subject to [redacted] as a child;
- (2) the applicant was raped while or shortly after suffering a seizure, became pregnant as a result, and as a consequence had suffered and continued to suffer serious mental and physical harm;
- (3) the Commonwealth had a duty of care to procure for her a safe and lawful abortion;
- (4) a safe and lawful abortion required a surgical abortion carried out with reasonable care and skill, after receiving proper psychiatric and neurological examination and counselling, and with the necessary neurological, surgical, and anaesthetic expertise made available to her;
- (5) abortions were legal in Papua New Guinea only if performed in good faith and with reasonable care and skill, for the preservation of the mother's life, and where reasonable having regard to the patient's state at the time and all the circumstances of the case; and
- (6) a safe and lawful abortion could not be procured in Papua New Guinea.

142 The applicant's material, including expert reports, was filed on 21 April 2016. That included the reports of Professor Louise Newman, Professor Caroline de Costa, Dr Miriam O'Connor, Associate Professor Ernest Somerville, and Dr Gregory Purcell.

143 On 22 April 2016 at 6:06 pm, Ms Laura Zhai, a Co-ordinating Registered Nurse with IHMS, emailed "RPC HLO", copying Dr Rudolph, saying:

Please find attached, updated RMM, Summary of Clinical Risks and obstetric USS report for [the applicant].

Transfer to Australia.

144 Attached was a document dated 22 April 2016 headed "Summary of Clinical Risks." It contained the following:

The risks to [the applicant] if she is not transferred for the termination are risk of deterioration in mental health and increased psychological distress. [The

applicant] has expressed thoughts of self-harm if her pregnancy is not terminated. These mental health issues will be significant in the antenatal and postnatal period.

[The applicant] will require transfer to Australia to undergo the termination of pregnancy. [The applicant] is currently 9 weeks and 5 days as confirmed by obstetric ultrasound on 18/04/16. Her pregnancy is beyond the timeframe for a medical termination of pregnancy, therefore a surgical termination will be required.

Surgical termination is associated with higher clinical risk with post-operative complications such as bleeding and infection. These risks increase with gestational age.

It is therefore recommended [the applicant] is transferred as soon as possible, in order for this procedure to occur.

145 Also attached was an RMM (“Second RMM”). It continued to be dated 1 April 2016, but under the heading “recommended destination,” the words “Pacific International Hospital — PNG (based on DIBP policy to utilise PIH where possible” had been struck out and “Australia” inserted. Further, under the “Clinical Condition” heading, underneath the material that had been set out in the First RMM (quoted at [120] above), there had been inserted a further three paragraphs, as follows:

Update 19/04/16:

[The applicant’s] gestational age is currently 9 weeks and 5 days as confirmed by obstetric ultrasound on 18/04/16. [The applicant] has verbalised that she would like to proceed with the previously requested termination of pregnancy.

IHMS are requesting urgent transfer to Australia on behalf of [the applicant] for the requested procedure. Termination of pregnancy (TOP) is not legal in Nauru.

Further delays in performing the client’s requested termination of pregnancy will lead to increased risks, as previously outlined. These include mental health issues as well as intraoperative and post-operative complications such as bleeding and infection. [The applicant] is also at risk of significant mental health issues prenatally and postnatal which includes potential risks of post-natal depression and disengagement from the baby, should the termination not proceed (Update compiled by IHMS CRN, M Enrile; Approved by OPC MD Dr Katie Gardner).

146 There had been other minor alterations including that under the heading “In-patient admission,” information relating to PIH had been deleted and “Hospital: TBC” inserted.

147 Mr Nockels’s evidence was that the Operations Section had been in close contact with IHMS about the applicant’s situation after her transfer to Port Moresby, but “there was no indication from IHMS”, as far as he was aware, “that they were considering amending their recommended destination for the applicant’s medical treatment.”

148 Mr Nockels then arranged a meeting for the following day with Mr Damien Johnson, the Operations Director – Offshore at IHMS, Ms Nirvana Luckraj, the Medical Director – Offshore at IHMS, and Ms Nowland, to discuss the updated RMM.

149 At around 3:00 pm on 23 April 2016, a teleconference occurred between those people. Mr Nockels said that he wanted to understand why IHMS had changed its recommendation. Mr Johnson and Ms Luckraj said that the amended recommendation was due to the applicant now requiring a surgical rather than a medical abortion, and also because a delay in the termination could “impact her mental health issues.” Mr Nockels said that “it was not clear to

[him] that the Applicant's situation had changed aside from her pregnancy being more advanced." He asked IHMS to make the basis of its opinion clear in writing. He also asked IHMS to advise whether there were countries other than Australia where the applicant could undergo a termination procedure.

150 A few hours later, at 5:30 pm on 23 April 2016, Ms Graham of IHMS emailed "RPC HLO", Ms Nowland, and Mr Nockels, attaching an "updated urgent recommendation for movement" ("Third RMM"). The Third RMM was the same as the Second RMM except that, under the "Clinical Condition" heading and under the 19 April update, had been inserted these paragraphs:

Update 23/04/16:

[The applicant's] gestational age is currently 10 weeks and 3 days as confirmed by obstetric ultrasound on 18/04/16.

IHMS wish to advise DIBP that an urgent solution needs to be found to accommodate [the applicant's] request to have a termination of pregnancy as a legal abortion is permitted within 12 weeks gestation in PNG. The mental health risks are greater the longer the pregnancy proceeds against her will.

[The applicant] could be referred to a country where her termination could be facilitated with her full consent and the minimum requirements that a termination would be accepted within the legal regulatory framework of that country, with all necessary visa and entry requirements in place as the standard pre-requisite for transfer to a third country.

(Update compiled by IHMS Senior Medical Director, Dr. N. Luckraj)

151 Mr Nockels said in his affidavit that the Third RMM "did not explain to [his] satisfaction why the amendment to the recommendation destination was required." He continued:

In particular, it still did not make clear what had changed in terms of the Applicant's medical condition or circumstances such that an urgent transfer to Australia was needed. The further updated RMM also did not address whether there were countries other than Australia in which the Applicant could potentially receive the medical treatment she requires. Further, it had also been my understanding that an abortion could be legally carried out in PNG after 12 weeks' gestation, and I was uncertain whether the reference in the RMM to 12 weeks was correct.

152 He also considered the applicant's medical evidence, as filed in the proceeding. He said, "In light of these uncertainties in the updated RMM, and the clinical issues raised by the medical evidence in this proceeding, I have decided that I require more information and further input from Dr Brayley and the relevant medical practitioners at PIH before making a decision about the recommendation in the updated RMM." As at the making of his affidavit on 25 April 2016, he said that he was "in the process of seeking that information."

153 At around 8:00 pm on 25 April 2016, Mr Nockels telephoned Dr Sapuri to discuss the applicant's case. He said, "Dr Sapuri explained to me that PIH had the necessary facilities and resources to perform a surgical termination of pregnancy on the Applicant." He continued:

He also mentioned that he had performed the procedure around 1 month ago on a woman who had been transferred from Nauru, and that there had been no complications. I asked Dr Sapuri if it was his understanding that 12 weeks' gestation was the legal limit in PNG for a termination of pregnancy to be performed. Dr Sapuri told me that he could perform the operation up to 20 weeks' gestation.

154 Mr Nockels read the affidavit of Dr Sapuri filed in this proceeding. At [5] of his second affidavit, Mr Nockels said that, “based on [his] discussion with Dr Sapuri and [his] understanding of the facilities and resources at PIH, I am satisfied that the applicant can obtain the medical treatment that she requires to terminate her pregnancy in PNG”.

155 On 26 April 2016, Mr Nockels decided to reject a request that the applicant be transferred to Australia for the purpose of her having an abortion in this country. At 9:02 pm that day, he wrote to Ms Graham of IHMS, saying this:

I refer to your email below (23 April 2016 at 5.30pm) and the updated Request for Medical Movement. I note your “Recommended Destination” of “Australia”.

After careful consideration, I am still of the the [sic] view that the Pacific International Hospital in PNG remains the appropriate place for [the applicant’s] treatment, and accordingly I do not propose to follow your recommendation at this time.

156 On 28 April 2016 Mr Nockels affirmed his second affidavit which detailed the matters set out in the previous three paragraphs. On 29 April 2016 he gave oral evidence in this proceeding. In his oral evidence he indicated that, because of information that had come to his knowledge during the course of the proceeding, he intended to speak further with IHMS and Dr Sapuri and consider whether he abided by his original decision.

157 Later that evening, sometime around 6:30 pm, I was informed from the bar table by Senior Counsel for the Minister that Mr Nockels had looked at the further material and decided not to change his position on the proposal to bring the applicant to Australia.

Proper law of the tort

158 The applicant advanced her case on the unspoken assumption that the law of the tort was that of Australia. In written submissions, the respondents contested that assumption. They argued that the substantive law of the claim in negligence is to be determined by the law of the place of the wrong, or threatened wrong — the *lex loci delicti* — and that in this case it was Papua New Guinea. There would have been a fair argument that that should have been pleaded: *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at [70] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). However, the applicant did not take that point. Nor, really, was it fully argued. In large part, that is because presumptions as to foreign law displace most of the significance of the point. Nevertheless, it is appropriate that I express a view on the question.

Applicable principles

159 Preliminarily, there can be no doubt that, after *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 and *Zhang*, it is correct to say that the *lex loci delicti* should be applied to foreign torts and that there is no “flexible exception”: *Zhang* at [75]. That, of course, leaves the more difficult question: what was the place of the tort alleged by the applicant?

160 It is appropriate to start with general principles. In *Amaca Pty Ltd v Frost* (2006) 67 NSWLR 635, Spigelman CJ (with whom Santow and McColl JJA agreed) started by citing the then most-recent enunciation of the principle, in *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 at [43]:

Reference to decisions such as *Jackson v Spittall*, *Distillers Co (Biochemicals) Ltd v Thompson* and *Voth v Manildra Flour Mills Pty Ltd* show that locating the place

of commission of a tort is not always easy. Attempts to apply a single rule of location (such as a rule that intentional torts are committed where the tortfeasor acts, or that torts are committed in the place where the last event necessary to make the actor liable has taken place) have proved unsatisfactory if only because the rules pay insufficient regard to the different kinds of tortious claims that may be made. Especially is that so in cases of omission. In the end the question is “where in substance did this cause of action arise”? In cases, like trespass or negligence, where some quality of the defendant’s conduct is critical, it will usually be very important to look to where the defendant acted, not to where the consequences of the conduct were felt.

(Citations removed.)

161 Spigelman CJ noted that the relevant passage in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 was this, at 567:

One thing that is clear from *Jackson v Spittall* and from *Distillers* is that it is some act of the defendant, and not its consequences, that must be the focus of attention. Thus, in *Distillers* the act of ingestion of the drug Distaval by the plaintiff’s mother was ignored, the place of that act being treated like the place of the happening of damage, as one that might have been “quite fortuitous”.

162 Spigelman CJ continued (at [13]) that focusing attention on the act of the defendant — which the High Court has said is a matter that “it will usually be very important to look to” (*Dow Jones* at [43]) — requires first that one identify the relevant “act.” That involves questions of characterisation which, “notoriously, are matters on which judgments can and do reasonably differ.” At [14], Spigelman CJ drew the following from *Jackson v Spittall* (1870) LR 5 CP 542 (his Honour’s emphasis): “determination of a place of a tort was said to involve identifying ‘the act on the part of the defendant which gave the plaintiff his cause of complaint’”. At [15], his Honour quoted the following passage from *Distillers Company (Biochemicals) Ltd v Thompson* [1971] 1 NSWLR 83 at 90, to the following effect (again with Spigelman CJ’s emphasis):

... It is not the right approach to say that, because there was no complete tort until the damage occurred, therefore the cause of action arose wherever the damage happened to occur. The right approach is, when the tort is complete, to look back over the series of events constituting it and ask the question, *where in substance did this cause of action arise?*

163 At [18]-[20], Spigelman CJ quoted the joint judgment of Mason CJ, Deane, Dawson and Gaudron JJ in *Voth*, interspersing his commentary, as follows:

[18] In *Voth*, the joint judgment of Mason CJ, Deane J, Dawson J and Gaudron J adopted the test in *Jackson v Spittall*, as explained in *Distillers Co (Biochemicals) Ltd*. With respect to the former case their Honours said (at 567):

... It may sometimes be that the “cause of complaint” is the failure or refusal of the defendant to do some particular thing — in other words, an omission. It makes no sense to speak of the place of an omission. However, it is possible to speak *of the place of the act or acts of the defendant in the context of which the omission assumes significance* and to identify that place as the place of the “cause of complaint”. That is what was done by Goddard LJ in *George Monro Ltd v American Cyanamid and Chemical Corp* ([1944] KB 432, at p 439), where the failure to warn as to the nature of goods was treated as an aspect of their sale. Sale took place outside the jurisdiction and accordingly, in the view of his Lordship, the tort

was committed outside the jurisdiction.

(Emphasis added)

[19] With respect to *Distillers Co (Biochemicals) Ltd* their Honours said (at 567):

The approach formulated in *Distillers* does no more than lay down an approach by which there is to be ascertained, in a commonsense way, that which is required by *Jackson v Spittall*, namely, the place of “the act on the part of the defendant which gives the plaintiff his cause of complaint”. That approach has particular point if, as was the case in *Distillers*, it is necessary to ascribe a place to an omission for the purpose of determining where, if at all, a tort was committed.

[20] Each case turns on its facts and it will rarely be appropriate to try to reason on the basis of factual analogies. Product liability cases, where there is movement from one jurisdiction to another, pose the issue in an acute form.

The warning against reasoning by analogies was adopted by French CJ, Gummow, Hayne and Kiefel JJ at [23] of *Puttick v Tenon Ltd* (2008) 238 CLR 265.

164 At [23]-[24] of *Amaca*, Spigelman CJ’s said this:

[23] The thrust of contemporary doctrine is that the Court must focus on issues of substance. It is necessary not to be distracted from this task by the ingenuity of a pleader.

[24] In such cases it is often necessary to look beyond a prolix smorgasbord of particulars to identify what is the true nature of the cause of action: for example, “in reality” (*Buttigeig* (at 629, line 28)) or “in truth” (*James Hardie & Co Pty Ltd v Hall* (at 573.3)). It is often necessary to set aside particulars which are “unreal” or “artificial” (*Buttigeig* (at 629, line 37 and at 629, line 41) and *MacGregor v Application des Gaz* (at 177)). ...

165 The final passage from *Amaca* that I wish to set out is the following, from [38] of the Chief Justice’s reasons for judgment:

Expressed, as they necessarily must be expressed, at a high level of generality, the authoritative tests for determining the place of a tort are to identify the place:

- Which gives the plaintiff cause for complaint (*Jackson v Spittall*).
- Where in substance the cause of action arose (*Distillers Co (Biochemicals) Ltd*).
- Where the act or omission assumes significance (*Voth*).

166 *Puttick*, which I mentioned above, was an appeal from the Victorian Court of Appeal in *Puttick v Fletcher Challenge Forests Pty Ltd* (2007) 18 VR 70. That was an appeal from a judgment of a single judge of the Victorian Supreme Court in which, including because the law of the tort was that of New Zealand, the primary judge had permanently stayed the proceeding on the ground of *forum non conveniens*. The Court of Appeal by majority dismissed an appeal. The High Court held that the Court of Appeal had erred in attributing determinative weight to a finding, not open on the material then available, that the *lex causae* was the law of New Zealand. The point of the foregoing is only to say that, while the judgment of Warren CJ in the Court of Appeal was overturned as to its result, there was no issue as to her Honour’s statement of the applicable principles.

167 Having set out *Voth* at 566-567, much of which was also quoted by Spigelman CJ above, Warren CJ said (at [17]) that “the general tenor of the passage is straightforward: the place of the tort is where the negligent act occurred. To suggest otherwise is to subvert the basic principle that the law governing the substantive dispute in an action for negligence is the *lex loci delicti commissi*, that is, *the law of the place where the wrong was committed*” (the emphasis is her Honour’s).

168 Warren CJ set out Spigelman CJ’s three tests, which I quoted above. She said, “[e]ach of these tests will lead to the same result. *The common theme is a concern with substance, not form*” (emphasis added). Her Honour then quoted a passage from 569 of *Voth*, which is useful in the resolution of the issue in this case, and so will be quoted fully:

[T]here are cases where, when information is being imparted, the failure to draw attention to some particular matter is, for practical purposes, the same as a positive statement as to that matter. That was the situation in *Shaddock & Associates Pty. Ltd. v. Parramatta City Council [No. 1]*. And it would seem that that is also the present case, for, in a context in which the appellant was providing professional accountancy services on the basis that withholding tax was not payable, the failure to draw attention to the requirement that it be paid was, for all practical purposes, equivalent to a positive statement that it was not payable. *When the case is approached on that basis it is clear that, in substance, the cause of complaint is the act of providing the professional accountancy services on an incorrect basis. The same is true if the matter is approached as an omission, for the omission takes its significance from that same act of providing those services.*

(Emphasis supplied; citations removed.)

169 Warren CJ stated, at [19], that the import of that passage was that “the omission is not considered to have satisfied these tests where damage occurs, but rather the omission is considered to have satisfied these tests where that thing which was not done (that is omitted) should have, in fact, been carried out.”

170 I interpose that *Voth* concerned negligent accountancy work done by a Missouri, USA accountant and in Missouri, though for a corporation in New South Wales, Australia. The *lex causae* was that of Missouri. The majority in that case stated thus (at 568):

If a statement is directed from one place to another place where it is known or even anticipated that it will be received by the plaintiff, there is no difficulty in saying that the statement was, in substance, made at the place to which it was directed, whether or not it is there acted upon. And the same would seem to be true if the statement is directed to a place from where it ought reasonably to be expected that it will be brought to the attention of the plaintiff, even if it is brought to attention in some third place. *But in every case the place to be assigned to a statement initiated in one place and received in another is a matter to be determined by reference to the events and by asking, as laid down in *Distillers*, where, in substance, the act took place.*

(Emphasis added.)

Discussion — lex loci delicti

171 I take the course counselled by Spigelman CJ and start by identifying *the act* on the part of the Minister *which gave* the applicant her *cause of complaint*.

This is, as I have said, a matter of substance. I should not be distracted by the ingenuity of a pleader. Rather, my task is to identify the true nature of the cause of action.

172 The applicant's cause of action is in negligence. That cause of action has three elements: duty, breach, and causation of damage: *Wallace v Kam* (2013) 250 CLR 375 at [7] (French CJ, Crennan, Kiefel, Gageler and Keane JJ).

173 The Minister's duty is pleaded at [12(a)] of the applicant's amended statement of claim as being to "procure a safe and lawful abortion for her." It is put at [18(b)] that the duty is to "take all reasonable steps to ensure that she has a safe and lawful abortion." As I have said, breach is not pleaded, nor is it pleaded that the applicant has suffered damage caused by any such breach.

174 The essence of the applicant's claim is that she apprehends breach by the Minister of the duty that he owes to exercise reasonable care in procuring for her a safe and lawful abortion. The breach that she apprehends is that he will fail to so procure. The relief that she seeks which forms the essence of her claim is twofold: the declaration that the procuring by the Minister of an abortion to be performed in Papua New Guinea would breach his duty; and, the issue of a prohibitory injunction (paragraph G of the relief) that would have the effect that the Minister be restrained from failing to discharge his duty.

175 It seems to me that the act of which the applicant complains is not located in Papua New Guinea at all. That can be illustrated through consideration of two questions: what would be the applicant's cause of complaint if she suffered damage as a consequence of abortion performed in Papua New Guinea?; what would be the applicant's cause of complaint if she suffered damage as a consequence of no abortion being procured at all?

176 Suppose damage is occasioned because, for want of adequate trans-cultural psychiatric expertise post-termination in Papua New Guinea or somewhere else, the applicant develops serious psychiatric illness and harms herself. The applicant's complaint against the Minister would not be that the psychiatric services provided post-termination were negligently provided; it would be that the Minister procured an abortion in a setting where services of a particular standard were not available. Or, damage might be occasioned because, for want of adequate neurological expertise, a seizure occurring during the termination is not adequately managed and the applicant suffers brain damage. Again, the complaint would not be that whatever services were provided were negligently provided; it would be that the Minister procured an abortion in a setting where adequate neurological expertise was unavailable.

177 What brings the nature of the applicant's case into clearest focus, in my view, is to suppose that the applicant is, post-termination, prosecuted and jailed. Her complaint against the Minister clearly would not arise out of any negligent act occurring during or after the abortion itself; it would be that the Minister procured that her abortion occurred in a country in which abortion bore the risk of criminal prosecution.

178 If the applicant were to undergo an abortion in Papua New Guinea, damage and steps in the causal chain necessary for damage may occur there. But the acts of which the applicant complains would not be the physical acts constituting the termination of her abortion. It may well be that no step (after the Minister's decision) in the process leading up to and following her abortion is negligently taken. The perioperative actions may be perfectly adequate discharges of the duties of care of those who take them. For example, it may be

that a failure by PIH to make available specialist neurologist services or an EEG does not breach a duty of care owed by PIH or any of its staff because such provision may be beyond what the reasonable person in the position of PIH would do to avoid foreseeable risk to the applicant (including because the cost of such provision may be prohibitive for PIH). The applicant's complaint against the Minister would be that he procured an abortion in that setting in the first place. The applicant's cause for complaint is the decision made by the Minister as to where the abortion should be performed and the steps that he takes (or fails to take) to procure that result. Those acts occurred in Australia.

179 This shows that, even if damage was suffered due to acts occurring in Papua New Guinea, Papua New Guinea would not be the law of the tort. *A fortiori* if no relevant acts occur in Papua New Guinea because the Minister fails to procure any abortion at all. In that instance, or where the Minister procures only an abortion that is unsafe or unlawful, if the applicant suffered damage as a consequence of not undergoing an abortion, her cause of complaint would not relate to any particular location in which a safe and lawful abortion might have been *performed*; it would relate to the location *from* which the safe and lawful abortion *was not procured*. The act of which the applicant complains is an apprehended failure by the Minister to exercise reasonable care in the discharge of the responsibility that he assumed to procure for her a safe and lawful abortion. The applicable law is the law of the place from which (it is apprehended) the Minister will omit to procure the procedure. It is not the (necessarily hypothetical and indeterminable) place in which the procedure, which (it is apprehended) the Minister will fail to procure, would be performed were it to be procured. The latter would in many cases be unknown and unknowable. That would have the potential to create absurdities.

180 One of the more important justifications for the *lex loci delicti* rule is that reliance on the legal order in force in a law area in which people act or are exposed to risk of injury gives rise to expectations that should be protected. This is similar to the values underlying estoppel, the presumption against *ex post facto* laws, and the doctrine of *stare decisis*: *Pfeiffer* at [75] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). This would not be undermined by the outcome that Australia is, in this case, the law of the tort. Quite the contrary: in a case such as the present neither party had, prior to the Minister's decision to procure an abortion in Papua New Guinea, any "expectation" worthy of protection that Papua New Guinean law would apply to any tort.

181 Another justification is that application of the *lex fori*, or some other rule, would lead to forum-shopping: *Zhang* at [118] (Kirby J); [194] (Callinan J); *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at [172] (Kirby J), [89] (Gummow and Hayne JJ); see also *Pfeiffer* at [128] (Kirby J). There is no risk of that here. Indeed, the Minister's submission would lead to something like an obverse injustice. Were the applicable law the law of the place in which the abortion was *performed*, it would be open to a prospective defendant to control its liability in tort by negligently procuring a service in a country with a tort law favourable to defendants, or in which it had the benefit of a defence. Or, where the tort is one of omission the point is clearer: a wrongdoer might attempt to avoid or limit liability by alleging that, had the procedure been procured, or were it to be procured, it would have been (or will be) procured in a jurisdiction in which negligence laws favourable to defendants obtain. This is effectively reverse forum-shopping.

182 I accept, of course, that there may be many legitimate reasons why a person acts or omits to act in one jurisdiction instead of another jurisdiction, and considerations of that kind might almost never be relevant. But, on the facts of this case, it seems to me to disclose more clearly that the location of the apprehended breach that is the subject matter of the applicant's complaint is Australia. The applicable law is that of Australia.

What if the applicable law is that of Papua New Guinea?

183 It is necessary to consider the consequences if I am wrong in holding that the applicable law is that of Australia.

184 I have no evidence concerning the tort law of Papua New Guinea. As the parties were agreed, that is a question of fact: *Neilson* at [115] (Gummow and Hayne JJ). And, if there is a deficiency in the evidence, "the 'presumption' that foreign law is the same as the law of the forum comes into play" (*Neilson* at [125] (Gummow and Hayne JJ)). The consequence of there being no evidence as to the law of Papua New Guinea is as follows (*Zhang* at [70] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ)):

[70] The first question is whether it is *necessary* for the plaintiff to plead the foreign law in order to establish a cause of action. The answer preferred by Dicey is in the negative. In *Walker v W A Pickles Pty Ltd*, Hutley JA explained:

An action of tort may be brought in New South Wales courts irrespective of where the facts founding the action may have occurred, even if they occurred in a place where there may be no law at all: see *Mostyn v Fabrigas*. A pleading of a cause of action in tort which did not allege that the facts occurred in any particular law district would be formally valid. On the basis that the utmost economy is enjoined by the rules, it would seem to me that pleading of a foreign element in the initiating process in a claim in tort can never be necessary ...

This approach is reinforced by the principle that foreign law, which is, except between the States and the Territories of the Commonwealth, a fact, is presumed to be the same as local law; and a fact presumed to be true does not have to be pleaded: see Supreme Court Rules, Pt 15, r 10(a).

On the other hand, if the defendant seeks to rely upon a foreign *lex causae*, then, in the ordinary way, it is for the defendant to allege and prove that law as an exculpatory fact.

(Citations removed; emphasis in original.)

185 *Dyno Wesfarmers Ltd v Knuckey* [2003] NSWCA 375 was a case concerning a fatal accident in Papua New Guinea. At [25], Mason P (with whom, on this point, Handley JA and Young CJ in Eq agreed) summarised the holding in *Zhang* thus:

In *Zhang*, the High Court held that it is not necessary for a plaintiff to plead the *lex loci delicti* in order to establish a cause of action justiciable under Australian law. If the plaintiff refrains from pleading the foreign law in the statement of claim then he or she will be taken to have invoked the principle that foreign law is presumed to be the same as local law. In so concluding, the Court approved *Walker v WA Pickles Pty Ltd* [1980] 2 NSWLR 281 at 284-5 and statements to similar effect in Collins (ed), *Dicey and Morris on the Conflict of Laws* 13th ed (2000), vol 2 p1568-9, applying them in the current legal context where choice of the *lex loci delicti* has replaced double actionability (see *Zhang* at 518-9

[69]-[71]). It was held that a party seeking a forensic advantage in the foreign law must invoke it by specific pleading, otherwise the trial will proceed on the basis that the applicable foreign law is identical to the law of the forum.

186 There is other intermediate appellate court authority on this question. In *Nicholls v Michael Wilson & Partners Ltd* (2010) 243 FLR 177, Lindgren AJA (with whom Basten and Young JJA agreed on this issue) said as follows at [323]:

It follows that the onus is on a party asserting that foreign law is applicable and is different from the law of the forum to plead and prove those matters, including what that foreign law is, and that MWP was entitled to rely on the presumption that the law of the forum would be applied unless the appellants pleaded and proved both the applicability and the content of the relevant part of foreign law: see [*Zhang*] at [70]-[71] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; [*Dyno*] per Young CJ in Eq at [49]-[56]; and see *Neilson* at [125] per Gummow and Hayne JJ.

187 *Nicholls* was overturned on appeal, but choice of law was not in issue: *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427.

188 Were it necessary (ie, if, contrary to my view, the applicable law is that of Papua New Guinea), I would presume that Papua New Guinea tort law is the same as Australian law.

189 Two issues are thereby raised. The first can be disposed of quickly. In oral argument the Minister tentatively advanced the submission that, if the *lex causae* was the law of Papua New Guinea, Australia (as a foreign state) would be immune from tort liability. In a note provided post-hearing, the Minister said that he “[did] not rely on the benefit (if any) of foreign state immunity under the substantive law of PNG as applied in these proceedings”. Accordingly, that is not necessary to consider further.

190 The second issue is this: as I will outline in dealing with duty of care, for policy reasons statutory authorities have the benefit of a higher threshold for the imposition of a duty of care. I would presume, were it necessary, that Papua New Guinea had the same principle. I asked the Minister whether, if the law of Papua New Guinea applied, it would recognise the same higher threshold in respect of foreign (ie, Australian) statutory authorities in respect of which a putative duty of care was sought to be established.

191 The Minister’s answer was that it would so recognise. His rationale was that the existence and scope of any duty of care depends on the character of the defendant and the relationship between it and the plaintiff. The Court would take into account conflicting duties to which a defendant may be subject. Accordingly, “a Court of PNG applying PNG law would take account of the statutory context that governs the relationship between the applicant and the Respondents even though the relevant statutes are Australian law and not the law of PNG.” Further, the Court would not “impose a duty that would be inconsistent with the powers and obligation of the Respondents under Australian law.” The cases cited concerned domestic statutory authorities. I am not aware of any authority dealing with whether there is a higher standard for the imposition of a duty of care on foreign public authorities.

192 I accept that a court would look to the relationship of the parties including any contractual relationship. That would be true whether or not a defendant was a public authority. I also accept that a court would, in determining the applicable standard of care, look to any conflicting duties. That, too, is true for any

defendant. However, the Minister's submissions go a step further and say that, because the relationship between applicant and Minister is statutory, principles concerning duties of public authorities apply. Those principles are based on public authorities being, for reasons of policy, in a recognised special category. The Minister's unstated assumption is that the same policies that underpin local authorities having the benefit of a higher test for duty also underpin foreign authorities having that benefit.

193 As I say below, the principal rationale for the differential treatment of public authorities in tort law appears to be the scarcity of public resources. That is explained in some detail in S Deakin, A Johnston and B Markesinis, *Markesinis and Deakin's Tort Law* (6th ed, 2008), at pp 399-405. As the authors write (emphasis in original, footnotes not reproduced), "[i]f *substantial* claims for economic compensation are made by a particular group of claimants, the cost has to be met either by a diversion of resources away from general expenditure or by an increase in taxation. It is not obvious that the loss is better borne by the local authority (or by the taxpayers or community at large) than by the plaintiffs." A second rationale advanced by the authors of *Markesinis and Deakin* is "the wish to avoid the situation in which public authorities become inundated with frivolous and unmeritorious claims ... because ... local authorities cannot (normally) become insolvent or bankrupt" (at p 400). Thirdly, the authors identify the "fear of courts unduly restricting the policy-making functions of the body in question and interfering with decisions that are not susceptible to judicial control" (at p 401). Fourth, the fear that "the threat of legal liability will give rise to 'defensive' or wasteful practices by potential defendants," though "[t]his has to be weighed against any 'deterrent' effect or raising of standards of performance which judicial intervention may bring in its wake" (at p 401).

194 Apart from those factors, the authors observe that most activities of public bodies are underpinned by statute (at p 402) and that statute may create specific immunity from common law liability in tort (at p 402). Relatedly, there is the possibility of alternative statutory or administrative remedies (at p 403) or the intervention of (eg) an Ombudsman (at p 404).

195 I am not persuaded that a court in one country, in considering liability for torts committed within its borders, would allow a higher threshold for the imposition of a duty than it otherwise would have out of concern for the diversion of resources away from general expenditure in another country, or for fear that to fail to so impose might lead to increased taxation in that other country. Similarly, though the relationship between branches of government in one country might lead to a reluctance in courts to digress into issues of policy, I cannot think that similar concerns would constrain a court in relation to foreign public authorities. The concerns about inundation with unmeritorious claims and the possibility of wasteful practices by defendants seem to me not to apply: cases of the present kind are unlikely to often arise, irrespective of the test for duty, because public authorities generally act (or omit to act) within their own law areas rather than in other countries.

196 Finally, it seems to me that consideration of matters such as a "specific immunity from common law liability" under the laws of the putative tortfeasor's country would fall foul of the principle that the *lex causae* is the law of the location of the wrong. An ability to avoid liability in another country, in

which the tort was not committed, seems to me to be largely irrelevant. So, too, the availability of administrative relief or an Ombudsman in that country.

197 In my opinion the policy considerations underpinning the higher duty standard for domestic public authorities do not translate to the case of foreign public authorities.

198 The Minister also put that failing to apply the higher public-authority standard for duty is inconsistent with two choice of law principles, namely that “the same substantive law [should] apply in relation to the proceeding regardless of the forum,” and that the applicant should not obtain an unfair advantage by its choice of forum. In my view, this submission is misconceived. Either the proper law of the subject tort is that of Papua New Guinea or it is that of Australia. If the *lex loci delicti* and hence the *lex causae* is that of Papua New Guinea, then on my approach it would not matter whether a proceeding was commenced against an Australian statutory authority in Papua New Guinea or in Australia: the law of Papua New Guinea would apply and a higher public-authority standard for imposition of a duty would not. Alternatively, if the *lex loci delicti* is that of Australia, then, again, whether the claim is brought in Papua New Guinea or in Australia the law of Australia applies and so, too, the higher public-authority standard for duty. There is nothing in my approach that is inconsistent with choice of law principles. The commission of a tort in one country rather than another does not enable the plaintiff to forum-shop.

199 If I had held that the proper law of the tort was that of Papua New Guinea, I would have held that the standard approach applied to the determination of whether the Minister owed a duty of care, rather any the stricter approach derived from the local-authority cases.

Is there a duty of care?

Legal principles

200 The applicant argued that the Minister owed her a duty of care, the scope of which was variously expressed as extending to:

- (1) “exercis[ing] its statutory and non-statutory executive power under s 198AHA and s 61 of the Constitution to procure a safe and lawful abortion for her” ([12(a)] of the statement of claim); and
- (2) “tak[ing] all reasonable steps to ensure that she has a safe and lawful abortion” ([18(b)] of the statement of claim).

201 Of course, the existence of a duty of care is a necessary condition of liability in negligence: *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185 at [19] (French CJ). The applicant does not point to authority holding that a duty of care exists in directly-comparable factual circumstances. Her submissions turn on establishing a novel duty of care. The applicant submits that the existence of a duty of care “turns most critically on two factors: the existence and nature of the statutory power exercised by the Respondents in respect of the applicant, and the facts relevant to the ‘salient factors’ that are critical to ascertaining the existence and scope of any duty in the exercise of those powers” (at [20]).

202 A “salient features” approach was set out by Allsop P (with whom Simpson J agreed) as applicable to determining whether a novel duty of care exists, in *Caltex Refineries (Qld) Pty Ltd v Stavara* (2009) 75 NSWLR 649, at [102]:

This rejection of any particular formula or methodology or test the application of which will yield an answer to the question whether there exists in any given

circumstance a duty of care, and if so, its scope or content, has been accompanied by the identification of an approach to be used to assist in drawing the conclusion whether in novel circumstances the law imputes a duty and, if so, in identifying its scope or content. If the circumstances fall within an accepted category of duty, little or no difficulty arises. *If, however, the posited duty is a novel one, the proper approach is to undertake a close analysis of the facts bearing on the relationship between the plaintiff and the putative tortfeasor by references to the “salient features” or factors affecting the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury.*

(Emphasis added.)

203 At [103] his Honour set out a list of 17 such “salient features”. They are these:

- (a) the foreseeability of harm;
- (b) the nature of the harm alleged;
- (c) the degree and nature of control able to be exercised by the defendant to avoid harm;
- (d) the degree of vulnerability of the plaintiff to harm from the defendant’s conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself;
- (e) the degree of reliance by the plaintiff upon the defendant;
- (f) any assumption of responsibility by the defendant;
- (g) the proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant;
- (h) the existence or otherwise of a category of relationship between the defendant and the plaintiff or a person closely connected with the plaintiff;
- (i) the nature of the activity undertaken by the defendant;
- (j) the nature or the degree of the hazard or danger liable to be caused by the defendant’s conduct or the activity or substance controlled by the defendant;
- (k) knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff;
- (l) any potential indeterminacy of liability;
- (m) the nature and consequences of any action that can be taken to avoid the harm to the plaintiff;
- (n) the extent of imposition on the autonomy or freedom of individuals, including the right to pursue one’s own interests;
- (o) the existence of conflicting duties arising from other principles of law or statute;
- (p) consistency with the terms, scope and purpose of any statute relevant to the existence of a duty; and
- (q) the desirability of, and in some circumstances, need for conformance and coherence in the structure and fabric of the common law.

204 *Stavar* has been followed in intermediate appellate courts (*Makawe Pty Ltd v Randwick City Council* (2009) 171 LGERA 165 at [17] and [92]-[94]; *Hoffmann v Boland* [2013] Aust Torts Reports 82-134 at [31] and [127]-[130]) and in this Court (*Hopkins v AECOM Australia Pty Ltd (No 3)* (2014) 102 ACSR 393 at [26] (Nicholas J); *Carey v Freehills* (2013) 303 ALR 445 at [310]-[317] (Kenny J)). Support for a multi-factorial approach is also found in *Brookfield* at [24] (French CJ), where his Honour said (citing *Sullivan v Moody* (2001) 207

CLR 562 at [50]) that “different classes of case raise different problems”, requiring a “judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle.”

205 Kenny J’s discussion in *Carey* bears specific attention. Her Honour said as follows at [313]:

Where a duty of care is claimed to have arisen in a *new* circumstance or with respect to a new category of relationships, Australian law now requires a multi-factorial approach in assessing whether a duty of care has indeed arisen. As the New South Wales Court of Appeal noted in *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649; 259 ALR 616; [2009] NSWCA 258 at [101] (*Caltex*), the High Court has rejected the doctrine of proximity as a determinative factor in deciding whether a duty of care existed, as well as “the two stage approach in *Anns v Merton London Borough Council* [1978] AC 728; [1977] 2 All ER 492 based on reasonabl[e] foreseeability, the expanded three stage approach in *Caparo Industries Plc v Dickman* [1990] 2 AC 605; [1990] 1 All ER 568; (1990) 1 ACSR 636 (*Caparo Industries*) and any reformulation of the latter two”. See, for example, *Hill [v van Erp]* (1997) 188 CLR 159] at CLR 210; ALR 725 per McHugh J, at CLR 237-9; ALR 747-8 per Gummow J, *Perre v Apand Pty Ltd* (1999) 198 CLR 180; 164 ALR 606; [1999] HCA 36 at [9]-[10] per Gleeson CJ, at [25]-[27] per Gaudron J, at [70]-[83] and [93] per McHugh J, at [245]-[247], [255] and [280]-[287] per Kirby J, at [330]-[335] per Hayne J, at [389], [398]-[400] and [406] per Callinan J; *Sullivan v Moody* (2001) 207 CLR 562; 183 ALR 404; 28 Fam LR 104; [2001] HCA 59 at [43]-[53] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; 194 ALR 337; [2002] HCA 54 at [99] per McHugh J, at [234]-[236] per Kirby J; and *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215; 254 ALR 432; [2009] HCA 15 at [132] per Crennan and Kiefel JJ.

(Emphasis in original.)

206 Her Honour described *Stavar* as an exemplar of the multi-factorial approach to novel duties. She referred (at [314]) to the statements of Allsop P at [100] as follows:

[the current approach] recognises what has been said to be the use of foreseeability at a higher level of generality and the involvement of normative considerations of judgment and policy. This approach requires not only an assessment of foreseeability, but also attention to such considerations as control, vulnerability, assumption of responsibility and nearness or proximity.

There followed in *Carey* a quotation from [102] of *Stavar*, which I have set out above. Kenny J then quoted from [106] of *Stavar* to the effect that, in a novel area:

... reasonable foreseeability of harm is inadequate alone to found a conclusion of duty. Close analysis of the facts and a consideration of these kinds of factors will assist in a reasoned evaluative decision whether to impute a duty. Whilst simple formulae such as “proximity” or “fairness” do not encapsulate the task, they fall within it as part of the evaluative judgment of the appropriateness of legal imputation of responsibility.

207 Kenny J stated, by reference to *Makawe* and *Hoffmann*, that the salient factors listed by Allsop P were not exhaustive. It is not necessary to make findings in relation to each factor. Rather, as Basten JA said at [31] of *Hoffmann*, the features provide a “valuable checklist” of the kinds of factors that can be of

assistance. “Each involves considerations of varying weight; some will be entirely irrelevant.” It is necessary to “focus upon the considerations which are relevant in the circumstances of the particular case.”

208 The Minister’s submissions drew upon *Stavar* and discussed certain of the “salient features.” The submissions were predicated on two factors being of especial relevance: the consistency of the putative duty with the statutory scheme (see, eg, [50] of the written submissions), and policy considerations (see, eg, [52]). I agree that those factors are of particular significance in this case. The submission is consistent with authority concerning the imposition of duties of care in connection with the exercise of statutory power.

209 The applicant emphasised assumption of responsibility by the Minister, the degree of control exercised by the Minister, and the applicant’s vulnerability. The cases concerning the exercise of statutory power also identify that the presence of those relational features is relevant in determining whether a duty of care exists. I turn now to discuss those cases.

Exercise of statutory duty

210 It is recognised in the authorities that cases in which the defendant is a repository of a statutory power or discretion are in a special class of case (see, eg, *Sullivan v Moody* at [50] (the Court); *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270 at [18] (the Court)). Liability in special cases is sometimes limited or negated, for reasons of policy (cf *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [102] (McHugh J)).

211 Intermediate appellate courts have recognised that “there is no authoritative guidance from the High Court for the determination of when a common law duty of care exists with respect to the exercise of statutory power” (*Hunter Area Health Service v Presland* (2005) 63 NSWLR 22 at [7] (Spigelman CJ), see also *Sutherland Shire Council v Becker* (2006) 150 LGERA 184 at [19] (Giles JA), [82] (Bryson JA)). The absence of a guiding principle has also been recognised by Crennan and Kiefel JJ in *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215:

[131] No guiding principle, by which an authority might be considered to be obliged to exercise its powers at common law, has been identified; the search continues. There is agreement that the statutory powers in question must be directed towards some identifiable class or individual, or their property, as distinct from the public at large.

[132] Different factors have been identified, from time to time, as relevant to the existence of a duty of care. Not all have continued to be regarded as useful. Notions of proximity and general reliance are no longer considered to provide the answer to the question of whether an authority should be considered to have been obliged to exercise its powers. In this case the majority in the Court of Appeal identified as of particular relevance the vulnerability of the plaintiff’s husband and the control that the officers had over the risk of harm which eventuated, because of the powers given by s 10. The majority emphasised that the Act intended those powers to be used to protect a person such as him.

[133] The vulnerability of a plaintiff was referred to in *Pyrenees Shire Council v Day* as an aspect of the plaintiff’s supposed reliance upon an authority to use its powers. A focus on vulnerability may in part explain the decision in *Crimmins v Stevedoring Industry Finance Committee*. It has not been universally accepted as a useful analytical tool. In *Graham Barclay Oysters Pty Ltd v Ryan*, Gummow and Hayne JJ treated the degree of a plaintiff’s vulnerability as part only of an evaluation as to whether a

relationship may be seen to exist between a statutory authority and the class of persons in question. Establishing the existence of a relationship between a plaintiff and a public authority has the advantage of coherence with the exceptions, already recognised by the common law, to the general rule that there is no duty of affirmative action.

(Citations omitted.)

212 Spigelman CJ in *Presland* posited a relational or multi-factorial approach (at [9]-[10]):

[9] Where, as in the present proceedings, a novel issue arises with respect to the existence or scope of a duty of care, the contemporary Australian approach to determining both matters is to engage in a multifactorial or “salient features” analysis. (See the summary in the joint judgment in *Sullivan v Moody* (2001) 207 CLR 562 at 579 [50]-[51]. See also *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 198 [27]-[198], 254 [201], 302 [333] and 326 [406]; *Graham Barclay Oysters Pty Ltd* (at 597 [149], 624 [236]-[237]).)

[10] This approach, in the context of determining whether a duty of care arises with respect to the exercise of a statutory power, is exemplified in the joint judgment of Gummow J and Hayne J in *Graham Barclay Oysters Pty Ltd* (at 596 [146]-[149]):

[146] The existence or otherwise of a common law duty of care allegedly owed by statutory authority turns on a close examination of the terms, scope and purpose of the relevant statutory regime. The question is whether that regime erects or facilitates a relationship between the authority and a class of persons that, in all the circumstances, displays sufficient characteristics answering the criteria for intervention by the tort of negligence.

[147] Where the question posed above is answered in the affirmative, the common law imposes a duty in tort which operates alongside the rights, duties and liabilities created by statute.

...

[149] An evaluation of whether a relationship between a statutory authority and a class of persons imports a common law duty of care is necessarily a multifaceted inquiry. Each of the salient features of the relationship must be considered. The focus of analysis is the relevant legislation and the positions occupied by the parties on the facts as found at trial. It ordinarily will be necessary to consider the degree and nature of control exercised by the authority over the risk of harm that eventuated; the degree of vulnerability of those who depend on the proper exercise by the authority of its powers; and the consistency or otherwise of the asserted duty of care with the terms, scope and purpose of the relevant statute. ...

(footnotes omitted)

213 His Honour (at [11]) stated that four matters of significance came out of that passage:

- the purpose to be served by the exercise of the power;
- the control over the relevant risk by the depository of the power;
- the vulnerability of the persons put at risk; and

- coherence.

214 Importantly, however, what is emphasised in all of the above approaches is that there is no guiding principle or test to apply in determining whether a novel duty arises. Rather, it is appropriate and necessary to reason analogically from decided cases (*Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at [76] (McHugh J); *Brookfield* at [25] (French CJ)). For that reason, it is appropriate to discuss some of the more important cases in the area, including *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, *Pyrenees Shire Council v Day* (1998) 192 CLR 330, *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, and *Crimmins*. I will commence with *Heyman*.

215 The rationale for limiting liability in the case of negligence concerning the exercise or non-exercise of statutory powers or duties, or their exercise in a particular way, is that public authorities are bodies “entrusted by statute with functions to be performed in the public interest or for public purposes” (*Heyman* at 456 (Mason J)). Generally, only limited resources and limited credit will be available for the execution of these functions and they will often be insufficient to cover completely all statutory responsibilities, in which case policy choices have to be made: *Crimmins* at [79]-[80] (McHugh J); *City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641 at 655 (McIntyre J); see also RP Balkin and JLR Davis, *Law of Torts* (5th ed, 2013) at p 223 [7.31].

216 Accordingly, generally a public authority under no statutory obligation to exercise a power comes under no common law duty to exercise it (*Heyman* at 459-460 (Mason J)). But, in certain cases, set out in *Heyman* at 460-462 in particular, such a duty will arise. The principles were usefully collected by Ipp JA (with whom Mason P and McColl JA agreed) in *Amaca Pty Ltd v New South Wales* (2004) 132 LGERA 309 at [21]:

- (a) Generally, a public authority, which is under no statutory obligation to exercise a power, owes no common law duty of care to do so.
- (b) An authority may by its conduct, however, attract a duty of care that requires the exercise of the power.
- (c) Three categories are identified in which the duty of care may so be attracted.
 - (i) Where an authority, in the exercise of its functions, has created a danger.
 - (ii) Where the particular circumstances of an authority’s occupation of premises or its ownership or control of a structure attracts to it a duty of care. In these cases the statute facilitates the existence of a duty of care.
 - (iii) Where a public authority acts so that others rely on it to take care for their safety.

217 Ipp JA stated that (at [21]) that “[n]othing in *Pyrenees*, *Crimmins* and *Graham Barclay Oysters* is materially inconsistent with Mason J’s remarks”.

218 *Heyman* concerned whether a council was negligent in failing to inspect footings of a structure, the later subsidence of which caused structural defects. Mason J said, at 458, as follows:

It is now well settled that a public authority may be subject to a common law duty of care when it exercises a statutory power or performs a statutory duty. The principle that when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be

occasioned, by their exercise, damages for negligence may be recovered ... has been applied mainly to private Acts. However, it has been frequently applied in Australia to public authorities, notably public utilities, exercising powers under public statutes

(Citations omitted.)

Deane J, to like effect, reasoned (at 498) that the notion of “proximity”:

... may reflect an assumption by one party of a responsibility to take care to avoid or prevent injury, loss or damage to the person or property of another or reliance by one party upon such care being taken by the other in circumstances where the other party knew or ought to have known of that reliance.

219 In *Pyrenees*, a fire destroyed premises at 70 Neill St and damaged an adjoining shop at 72 Neill St. The fire was caused by a latent defect in the chimney of 70 Neill. The fire authority had two years earlier advised the then-tenants that the fireplace was unsafe to use and notified the shire council to that effect. A council building inspector inspected the premises and found a defect creating substantial risk of harm. The inspector wrote to the former tenants stating that it was imperative that the fireplace not be used unless fully repaired. The council took no further steps. It had powers to require compliance with its letter, but did not use them. The occupants of both 70 and 72 Neill were, in the High Court, successful.

220 At [25]-[37] of *Amaca*, Ipp JA identified and considered the “two differing strands of reasoning” that emerged from *Pyrenees*, noting (at [38]) that the differences were not of major significance. The first strand “emphasise[d] the sole and actual knowledge of the Council of the risk of serious harm to identifiable individuals, the power of the Council to intervene, and the prior (but inadequate) intervention by the Council to eliminate the risk” (*Amaca* at [30], emphasis added). It was typified (said Ipp JA) by these remarks of McHugh J at [115]:

Given the extensive powers of the Council, its entry into the field of inspection on this occasion, if not other occasions, its actual knowledge of the danger to the health and property of the occupiers of Neill Street and, at the least, its imputed knowledge that residents of the shire generally relied on it to protect them from the dangers arising from the use or condition of premises, the Council owed a duty of care to Mr and Mrs Day.

221 The second strand, said Ipp JA, was typified by the following statement of Gummow J at [168] of *Pyrenees*:

The Shire had statutory powers, exercisable from time to time, to pursue the prevention of fire at No 70. This statutory enablement of the Shire “facilitate[d] the existence of a common law duty of care”, but the touchstone of what I would hold to be its duty was the Shire’s *measure of control of the situation including its knowledge*, not shared by Mr and Mrs Stamatopoulos or by the Days, that, if the situation were not remedied, the possibility of fire was great and damage to the whole row of shops might ensue. The Shire had a duty of care “to safeguard others from a grave danger of serious harm”, in circumstances where it was “responsible for its continued existence and [was] aware of the likelihood of others coming into proximity of the danger and [had] the means of preventing it or of averting the danger or of bringing it to their knowledge”.

(Citations removed; emphasis added.)

222 Within that extract was a citation to the dissenting judgment of McHugh JA in *Parramatta City Council v Lutz* (1988) 12 NSWLR 293 at 328, where his Honour had said this:

In principle, there is much to be said for the view that a public authority should be under a duty to take affirmative action when the *control of conduct or activities has been ceded to it by common understanding* or when it receives some benefit from the conduct or activities. *If in addition to the right of control the authority knows or ought to know of conduct or activities which may foreseeably give rise to a risk of harm to an individual, the authority should be under a duty to prevent that harm.* Just as a teacher who has control of a classroom has a duty to prevent pupils from injuring others, so a public authority with legal or de facto control of a social situation should have a duty to take affirmative action to prevent harm to others. The touchstone of affirmative duty would be control and not the possession of any discretionary statutory powers. Failure to exercise such powers would go to breach of duty, but the common law duty would arise from actual or ceded control.

(Emphasis added.)

223 Gummow J's emphasis on control continued in *Crimmins*, wherein his Honour said at [166] that "the powers vested by statute in a public authority may give to it such a significant and special measure of control over the safety of the person or property of the plaintiff as to oblige it to exercise its powers to avert danger or to bring the danger to the knowledge of the plaintiff." In *Graham Barclay Oysters* at [151], Gummow and Hayne JJ, in describing the result in *Day*, referred to the "significant and special measure of control over the safety from fire of persons and property at the relevant premises. That degree of control was the touchstone of the Shire's duty to safeguard others from the risk of fire in circumstances where the Shire had entered upon the exercise of its statutory powers of fire prevention and it alone among the relevant parties knew of, and was responsible for, the continued existence of the risk of fire." And, in *Brodie v Singleton Shire Council* (2001) 206 CLR 512, Gaudron, McHugh and Gummow JJ again emphasised the importance of control, at [102]:

The decisions of this Court in *Sutherland Shire Council v Heyman*, *Pyrenees Shire Council v Day*, *Romeo v Conservation Commission (NT)* and *Crimmins v Stevedoring Industry Finance Committee* are important for this litigation. Whatever may be the general significance today in tort law of the distinction between misfeasance and non-feasance, it has become more clearly understood that, on occasions, the powers vested by statute in a public authority *may give it such a significant and special measure of control over the safety of the person or property of citizens as to impose upon the authority a duty of care.* This may oblige the particular authority to exercise those powers to avert a danger to safety or to bring the danger to the knowledge of citizens otherwise at hazard from the danger. In this regard, the factor of control is of fundamental importance.

(Citations omitted; emphasis added.)

224 In *Crimmins*, the plaintiff was a registered waterside worker employed by various stevedoring entities over a period of years. He contracted mesothelioma from exposure to asbestos. He contended that the Committee was under a continuous duty in the exercise of its statutory functions to take reasonable care to avoid foreseeable risks of injury to his health. By majority the High Court held that the Committee was under a duty to protect him from reasonably foreseeable risks of injury arising from his employment by registered stevedores. Early in his consideration of duty, at [62], McHugh J said this:

There is one settled category which I would have thought covered this case: it is the well-known category “that when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely (Later cases require ‘likely’ to mean that there is a reasonable possibility that the injury is likely to be occasioned) to be occasioned, by their exercise, damages for negligence may be recovered”.

(Citations removed.)

His Honour continued at [63]:

In directing the plaintiff and other waterside workers to places of work, the Authority was exercising its power to give directions in aid of its function of making “arrangements for allotting waterside workers to stevedoring operations” (s 17(1)(f)). That being so, I would have thought that the Authority owed a duty to the plaintiff as a person affected by the exercise of the power to exercise it with reasonable care for his safety.

225 At [93] his Honour set out a six-step approach for determination of whether, in a novel case, a statutory authority should be held to have owed a duty and to have breached it by failing to exercise a power:

1. Was it reasonably foreseeable that an act or omission of the defendant, including a failure to exercise its statutory powers, would result in injury to the plaintiff or his or her interests? If no, then there is no duty.
2. By reason of the defendant’s statutory or assumed obligations or control, did the defendant have the power to protect a specific class including the plaintiff (rather than the public at large) from a risk of harm? If no, then there is no duty.
3. Was the plaintiff or were the plaintiff’s interests vulnerable in the sense that the plaintiff could not reasonably be expected to adequately safeguard himself or herself or those interests from harm? If no, then there is no duty.
4. Did the defendant know, or ought the defendant to have known, of the risk of harm to the specific class including the plaintiff if it did not exercise its powers? If no, then there is no duty.
5. Would such a duty impose liability with respect to the defendant’s exercise of “core policy-making” or “quasi-legislative” functions? If yes, then there is no duty.
6. Are there any other supervening reasons in policy to deny the existence of a duty of care (eg, the imposition of a duty is inconsistent with the statutory scheme, or the case is concerned with pure economic loss and the application of principles in that field deny the existence of a duty)? If yes, then there is no duty.

His Honour said that if the first four questions are answered affirmatively and the last two negatively then ordinarily it would be correct in principle to impose a duty. While those principles are no doubt useful by way of guidance and identify the kinds of “salient features” that will often be of critical importance in a case — consistency with statutory scheme, control, etc — the contemporary approach is, as I have set out above, multi-factorial (cf *Presland* at [8] (Spigelman CJ)).

226 At [104] and [108] McHugh J concluded, on the issue of duty, thus:

To my mind, the factor that points compellingly to the Authority owing an affirmative duty of care is that the Authority directed the waterside workers where they had to work and that the failure to obey such a direction could lead to

disciplinary action and even deregistration as a waterside worker. That factor points so strongly to the existence of a duty of care that it should be negated only if to impose the duty was inconsistent with the scheme of the Act. It can seldom be the case that a person, who controls or directs another person, does not owe that person a duty to take reasonable care to avoid risks of harm from that direction or the effect of that control. ...

...
 ... The Authority knew that the workers were being directed to work on ships where there could be a significant risk of injury to the workers from the use of equipment and machinery, the stowage of cargo and the hazardous nature of the materials which the workers had to handle. It also knew that it was directing the waterside workers to participate in transient, casual employment on the waterfront — a factor recognised in s 25(b) of the Act. In this context, the power of the Authority to direct the waterside workers as to when and where they *must* work placed them in a very real position of vulnerability. The casual nature of the employment, employment sometimes lasting only for a few hours, was likely to mean that employers did not have the same incentives to protect their employees from harm as do employers who must utilise the same work force day after day. ...

(Emphasis in original.)

227 I should note that *Crimmins* has been regarded as a “very special” case (*Amaca* at [52], Ipp JA). It was a “control” case of a special kind because of the degree of control exercised by the Committee.

228 The final case that I will consider, and which Ipp JA considered in *Amaca*, is *Graham Barclay*. Here, it suffices to set out Ipp JA’s discussion from [56]-[59] of *Amaca*:

[56] McHugh J observed, generally (at [81]):

A public authority has no duty to take reasonable care to protect other persons merely because the legislature has invested it with a power whose exercise could prevent harm to those persons. Thus, in most cases, a public authority will not be in breach of a common law duty by failing to exercise a discretionary power that is vested in it for the benefit of the general public ... But if the authority has used its powers to intervene in a field of activity and increased the risk of harm to persons, it will ordinarily come under a duty of care ... So also, if it knows or ought to know that a member of the public relies on it to exercise its power to protect his or her interests, the common law may impose a duty of care on the authority (*Sutherland Shire Council v Heyman* (at 461), per Mason J).

[57] McHugh [J] also found that the powers of the State did not constitute control in the relevant sense (at [93]). Of significance to the present appeal is his Honour’s remark (at [95]): “Knowledge or imputed knowledge that harm may result from a failure to take affirmative action is not itself sufficient to create an affirmative duty of care”.

[58] Gummow and Hayne JJ regarded two factors as being of vital importance (see at [144]). First, the fact that the Council (like the Council in *Pyrenees*) was the only party with actual knowledge of the potential source of harm (namely, the progressive deterioration of the sewerage infrastructure which imperilled the purity of the waters of Wallis Lake). Secondly, the fact that the Council had extensive statutory powers to prevent or to redress that deterioration and to mitigate the effects of any pollution. Their Honours said (at [145]):

[T]he co-existence of knowledge of a risk of harm and power to avert or to minimise that harm does not, without more, give rise to a duty of care at common law. The totality of the relationship between the parties, not merely the foresight and capacity to act on the part of one of them, is the proper basis upon which a duty of care may be recognised. Were it otherwise, any recipient of statutory powers to licence, supervise or compel conduct in a given field, would, upon gaining foresight of some relevant risk, owe a duty of care to those ultimately threatened by that risk to act to prevent or minimise it.

...

[59] Their Honours emphasised the importance of the particular terms of the statutory regime applicable, saying (at [146]):

The existence or otherwise of a common law duty of care allegedly owed by a statutory authority turns on a close examination of the terms, scope and purpose of the relevant statutory regime. The question is whether that regime erects or facilitates a relationship between the authority and a class of persons that, in all the circumstances, displays sufficient characteristics answering the criteria for intervention by the tort of negligence.

229 I will attempt to state fairly concisely what I consider to be the correct approach to determination of whether a duty exists in this case. I note that the citations I have given below are illustrative and non-exhaustive. I also note that, as is necessary in this area of the law, the following list is non-exhaustive.

- (1) The approach to determining whether a duty of care exists is multi-factorial (*Stavar* at [102]-[103]; *Makawe* at [17], [92]-[94]; *Hoffmann* at [31], [127]-[130]; *Carey* at [310]-[317]; *Brookfield* at [24]).
- (2) The 17 factors listed by Allsop P in *Stavar* are a valuable checklist as to the kinds of matters that may be relevant in a multi-factorial analysis (*Hoffmann* at [31]; *Carey* at [316]). But they are not exhaustive, not all considerations will be relevant in each case, and the considerations that are relevant will be of various weights (*Carey* at [316]; *Stavar* at [104]).
- (3) The case where the defendant is a repository of statutory power or discretion is a special class of case, which raises its own problems (*Sullivan* at [50]; *Hunter* at [18]). However, the correct approach remains multi-factorial (*Presland* at [7], [9]-[10]; *Becker* at [19]; *Stuart* at [131]-[133]).
- (4) In such cases, however, particular of the factors listed in *Stavar* assume especial relevance. Coherence with the statutory scheme and policy considerations are of critical importance (*Stuart* at [133]; *Presland* at [11]; *Crimmins* at [93]; *Graham Barclay* at [145]-[146]). So, too, may be control, reliance, vulnerability, and the assumption of responsibility (see, variously, *Stuart* at [133]; *Graham Barclay* at [81], [149], [151]; *Presland* at [10], [11]; *Heyman* at 458, 486, 498; *Pyrenees* at [115], [168]; *Crimmins* at [93], [104], [108]).

230 I note, before moving on, that I think the approach I have set out above is consistent, in principle, with the submissions of both parties (though, of course, in the application of those principles the parties arrived at divergent results). In

particular, the applicant set out six factors (at [62] of its written submissions) which I accept are relevant but non-exhaustive. The respondents' approach was not, in my view, different in principle (see [50]-[53] of their submissions in particular). The six factors identified by the applicant are these:

- a) the power of a public authority to intervene to alleviate a risk of harm to an individual.;
- b) the authority's responsibility for, or control over, the existence or extent of a risk of harm;
- c) the public authority's knowledge, or constructive knowledge, of the danger or risk to an identifiable person;
- d) the degree of vulnerability of those who depend upon the proper exercise by the authority of its powers;
- e) the reliance by individuals on the public authority to take care for their safety, engendered by the nature of the authority's powers and its conduct; and
- f) the coherence of the asserted duty of care with the terms, scope and purpose of the relevant statute.

I should note that I conceive of vulnerability, control, reliance, and assumption of responsibility as being not entirely dissimilar, or at least overlapping.

231 Therefore it now is appropriate to direct attention to the salient features of this relationship. I devote particular attention to the features emphasised by the parties — coherence, policy, vulnerability, reliance, control, assumption of responsibility — commencing with the latter. I will commence by setting out some judicial consideration of that subject.

Assumption of responsibility

232 In the United Kingdom, there is longstanding authority for “assumption of responsibility” being centrally important in determining whether a duty of care exists. As Lord Browne-Wilkinson observed in *White v Jones* [1995] 2 AC 207 at 270, the concept has its genesis in *Nocton v Lord Ashburton* [1914] AC 932. Another important case is *Hedley Byrne & Company Ltd v Heller & Partners Ltd* [1964] AC 465.

233 After consideration of cases including *Nocton* and *Hedley Byrne*, Lord Browne-Wilkinson in *White* said as follows (at 273-274):

Just as in the case of fiduciary duties, the assumption of responsibility referred to is the defendants, [sic] assumption of responsibility for the task not the assumption of legal liability. Even in cases of ad hoc relationships, it is the undertaking to answer the question posed which creates the relationship. If the responsibility for the task is assumed by the defendant he thereby creates a special relationship between himself and the plaintiff in relation to which the law (not the defendant) attaches a duty to carry out carefully the task so assumed.

234 “Assumption of responsibility” has also been relevant at the final appellate level in this country in justifying the imposition of exceptional duties. In particular, assumption of responsibility has several times arisen in the context of the imposition of damages for pure economic loss. For example, the exception to the general rule that damages are not recoverable for negligent misstatement resulting in pure economic loss depends upon proof of an assumption of responsibility by the defendant and known reliance on the defendant by the plaintiff: *Brookfield* at [128] citing *Woolcock Street Investments Pty Ltd v CDG*

Pty Ltd (2004) 216 CLR 515 at [24], *Mutual Life & Citizens' Assurance Company Ltd v Evatt* (1968) 122 CLR 556, and *L Shaddock & Associates Pty Ltd v Parramatta City Council (No 1)* (1981) 150 CLR 225.

- 235 In *Watson v British Boxing Board of Control Ltd* [2001] QB 1134, the plaintiff was a professional boxer who sustained head injuries in a bout. He brought an action against the defendant claiming damages on the basis that the board was under a duty to see that all reasonable steps were taken to ensure that he received immediate and effective medical treatment should he sustain injury during a fight. He was successful at first instance. In the Court of Appeal, as the headnote records:

... since the board set out by its rules, directions and guidance to make comprehensive provision for the services to be provided to safeguard the health of professional boxers taking part in a sport the object of which was to inflict physical injury, and since all involved in a boxing contest were obliged to accept and comply with the board's requirements, there was sufficient proximity between the claimant and the board to give rise to a duty of care; ...

- 236 At [49], Lord Phillips of Worth Matravers MR said as follows:

It seems to me that the authorities support a principle that, where A places himself in a relationship to B in which B's physical safety becomes dependent upon the acts or omissions of A, A's conduct can suffice to impose on A a duty to exercise reasonable care for B's safety. In such circumstances A's conduct can accurately be described as the assumption of responsibility for B, whether "responsibility" is given its lay or legal meaning.

- 237 His Lordship noted the distinction between "general reliance" and "specific reliance." Thus, in *Alexandrou v Oxford* [1993] 4 All ER 328, it was held that the police were under no duty to respond to an emergency call or to exercise reasonable care to prevent a burglary. Or, in *Capital & Counties plc v Hampshire County Council* [1997] QB 1004 it was held that a fire brigade was under no common law duty to answer a call for help or, having done so, to exercise reasonable care to extinguish a fire. Conversely, in *Kent v Griffiths* [2001] QB 36 a doctor called for an ambulance. The request for an ambulance was accepted, but it was greatly delayed in its arrival, without reasonable explanation. Lord Woolf MR held that a duty existed. The following, from *Watson* at 1152-1153, is Lord Phillips's discussion of the outcome in *Kent*:

[54] ... In the subsequent action for personal injuries, this court held that the ambulance service had been in breach of a duty of care in failing to arrive promptly. Lord Woolf MR held that, on the facts, a duty of care had existed. He distinguished the fire and police "rescue" cases on the ground that, at p 44, para 14:

This was not a case of general reliance, but specific reliance. It was foreseeable that the claimant could suffer personal injuries if there was delay. The nature of the damage was important. There was a contrast with a fire or a crime, where an unlimited number of members of the public could be affected and the damage could be to property or only economic. In its statutory context the ambulance service is more properly described as part of the National Health Service than as a rescue service. As part of the health service it should owe the same duty to members of the public as other parts of the health service. The [London Ambulance Service] had not been responsible for the claimant's asthma but it had caused the

respiratory arrest and to this extent the [London Ambulance Service] was the author of additional damage.

[55] As I read the judgment the duty of care turned upon the acceptance by the ambulance service of the request to provide an ambulance and thus the acceptance of responsibility for the care of the particular patient. Thus Lord Woolf MR observed, at p 43, para 9:

once a call to an ambulance service has been accepted, the service is dealing with a named individual upon whom the duty becomes focused. Furthermore, if an ambulance service is called and agrees to attend the patient, those caring for the patient normally abandon any attempt to find an alternative means of transport to the hospital.

[56] He summarised his conclusion, at p 54, para 49:

The fact that it was a person who foreseeably would suffer further injuries by a delay in providing an ambulance, when there was no reason why it should not be provided, is important in establishing the necessary proximity and thus duty of care in this case. In other words, as there were no circumstances which made it unfair or unreasonable or unjust that liability should exist, there is no reason why there should not be liability if the arrival of the ambulance was delayed for no good reason. The acceptance of the call in this case established the duty of care. On the findings of the judge it was delay which caused the further injuries. If wrong information had not been given about the arrival of the ambulance, other means of transport could have been used.

[57] This concludes my consideration of cases dealing with the assumption of responsibility to exercise reasonable care to safeguard a victim from the consequences of an existing personal injury or illness. *They support the proposition that the act of undertaking to cater for the medical needs of a victim of illness or injury will generally carry with it the duty to exercise reasonable care in addressing those needs.* While this may not be true of the volunteer who offers assistance at the scene of an accident, it will be true of a body whose purpose is or includes the provision of such assistance.

(Emphasis added.)

238 More recently still, *Michael v Chief Constable of South Wales Police* [2015] AC 1732, Lord Toulson JSC (with whom Lord Neuberger of Abbotsbury PSC, Lord Mance, Lord Reed, and Lord Hodge JJSC agreed) considered whether a duty of care was owed to the maker of an emergency call to police. The victim had called the police and said at some point during the call that her former partner had threatened to kill her. However, the call handler did not hear that and heard the victim say only that the former partner intended to hit her. The call was given a priority level requiring response within 60 minutes rather than a higher priority requiring response within 5 minutes. Around 15 minutes later, and before police attended, the victim called again and was heard to scream. Police responded immediately but the victim had already been stabbed to death.

239 The majority noted that the law generally did not impose liability for pure omissions. At [100], it noted that an exception to that principle was the following:

The second general exception applies where D assumes a positive responsibility to safeguard C under the *Hedley Byrne* principle, as explained by Lord Goff in *Spring v Guardian Assurance plc* [1995] 2 AC 296. It is not a new principle. It

embraces the relationships in which a duty to take positive action typically arises: contract, fiduciary relationships, employer and employee, school and pupil, health professional and patient. The list is not exhaustive. ... There has sometimes been a tendency for courts to use the expression "assumption of responsibility" when in truth the responsibility has been imposed by the court rather than assumed by D. It should not be expanded artificially.

240 A few other examples might be mentioned: In *Perrett v Collins* [1998] 2 Lloyd's Rep 255 there was negligence in issuing a fitness to fly certificate in relation to an aircraft, without which the doomed aircraft would not have been permitted to fly. In *Vowles v Evans* [2003] 1 WLR 1607 it was held that a referee of a game of rugby football owes a duty of care to the players, Lord Phillips MR saying as follows at [25]:

Rugby football is an inherently dangerous sport. Some of the rules are specifically designed to minimise the inherent dangers. Players are dependant for their safety on the due enforcement of the rules. The role of the referee is to enforce the rules. Where a referee undertakes to perform that role, it seems to us manifestly fair, just and reasonable that the players should be entitled to rely upon the referee to exercise reasonable care in so doing. *Rarely if ever does the law absolve from any obligation of care a person whose acts or omissions are manifestly capable of causing physical harm to others in a structured relationship into which they have entered.* Mr Leighton Williams has failed to persuade us that there are good reasons for treating rugby football as an exceptional case.

241 In *Ministry of Defence v Radclyffe* [2009] EWCA Civ 635 the Court of Appeal dismissed an appeal from a judgment in which it the Ministry had been held liable for a soldier's injuries caused by jumping from a high bridge, because a senior officer had earlier "assumed responsibility to prevent [the junior soldiers] from taking undue risks of which he was or ought to have been aware".

242 While there are many other cases concerning assumption of risk, it is not necessary to discuss them further. I set out the foregoing cases really by way of illustration. I recognise that in the UK the assumption of responsibility doctrine has taken on especial significance. However, the important point that I draw from them is quite simple: the voluntary assumption of responsibility by a defendant, which assumption is relied upon by the plaintiff, is a potent consideration in favour of the imposition of a duty of care. It provides a clear basis for distinguishing the superimposition onto statutory powers of a duty to persons in an indeterminate class of persons, from such a superimposition in the particular case of a plaintiff that has received and acted upon an assumption of responsibility.

Application of legal principles to the facts

243 I hold that the Minister owes a duty of care to the applicant to exercise reasonable care in the discharge of the responsibility that he assumed to procure for the applicant a safe and lawful abortion. The reasoning that has driven me to that conclusion follows.

244 I commence by reference to the observations of Gummow and Hayne JJ in *Graham Barclay Oysters* at [146] in the passage set out at [212] above. A close examination of the statutory scheme is required when the existence of a duty of care reposed in a statutory authority is being considered. The question is, does the statutory regime erect or facilitate a relationship between the repository of

the statutory power, in this case the Commonwealth, and persons in the class of the applicant, sufficient in the circumstances to display characteristics answering the criteria for intervention by the tort of negligence.

245 Subdivision B of Div 8 of Pt 2 of the Act (“Subdiv B”) provides a scheme for “regional processing”: *M68* at [77] (Bell J). As is stated in s 198AA, Subdiv B was enacted because the Parliament considered that:

198 AA Reason for Subdivision

...

- (b) unauthorised maritime arrivals, including unauthorised maritime arrivals in respect of whom Australia has or may have protection obligations under the Refugees Convention as amended by the Refugees Protocol, should be able to be taken to any country designated to be a regional processing country;

246 There are other reasons specified for the enactment of Subdiv B in s 198AA. The other primary reason (specified in s 198AA(a)) is the avoidance of “people smuggling, and its undesirable consequences”. The avoidance of those consequences and the removal of unauthorised maritime arrivals (“UMAs”) from Australia for processing are linked. I need not be detained by the nature or coherence of that connection. It is sufficient to observe that s 198AA(b) as well as s 198AB(3) contemplate that UMAs who have or may have protection obligations under the Refugees Convention should have their claims to such protection assessed. Subdivision B is (at least in part) designed to foster the assessment of those claims. That is to be done in a “regional processing country” designated as such by the Minister pursuant to s 198AB. Subdivision B was enacted in contemplation of Australia providing assistance to a regional processing country so as to facilitate the objective that UMAs have their protection claims assessed. The purpose of s 198AHA is to authorise the Commonwealth to enter into arrangements which facilitate the regional processing functions undertaken in the regional processing country. As French CJ, Kiefel and Nettle JJ said in *M68* at [46]:

Section 198AHA is incidental to the implementation of regional processing functions for the purpose of determining claims by UMAs to refugee status under the Refugees Convention. The exercise of the powers conferred by that section must also therefore serve that purpose.

247 It is not in contest that the powers conferred by s 198AHA to facilitate regional processing functions extend to providing assistance to UMAs whose refugee status has been recognised and who are awaiting re-settlement in the regional processing country.

248 The characteristics of the Subdiv B regime which I have described, make it apparent that the regime “erects or facilitates a relationship” (cf *Graham Barclay* at [146]) between the Commonwealth and UMAs, in which the Commonwealth is empowered to provide assistance in relation to the processing in the regional processing country of protection claims of UMAs made under the Refugees Convention. The Commonwealth may or may not enter that relational field. It is not compelled to provide assistance, but it is empowered to do so.

249 The facts reveal that the Commonwealth has entered the field by providing very substantial assistance to the regional processing functions taken up by Nauru pursuant to the MOU. The nature and extent of that assistance is revealed

by the terms of the Administrative Arrangements and the contracts with Service Providers made by the Commonwealth, as well as the actual provision of services to UMAs which I have described at [36]-[69].

250 One important aspect of the assistance provided by the Commonwealth pursuant to s 198AHA is the contribution made by the Commonwealth to the conditions of existence of UMAs on Nauru. One of the persons in that class is the applicant. I have described at [36]-[49] the Commonwealth's involvement in the applicant's detention on Nauru. It is not necessary to determine whether a duty of care was owed by the Commonwealth to the applicant while she was detained on Nauru and prior to her status as a refugee being recognised. It is sufficient to observe, as I do, that the facts show that the applicant was dependent upon the assistance provided by the Commonwealth to sustain her very existence. In that respect, the Commonwealth provided or was directly responsible for the provision to her of food, water, housing, security and medical services to maintain her health and wellbeing.

251 The facts at [50]-[69] also demonstrate that the sustenance provided by the Commonwealth to the applicant continued after the applicant ceased to be detained on Nauru. The "settlement services" extended beyond basic necessities to the education and welfare services provided by Connect.

252 The facts are clear. The applicant had no means of survival independent of the services provided by the Commonwealth through its Service Providers. She was dependent upon the Commonwealth for her very existence. The same may be said of each of the persons in the class. Again, it is not necessary that I consider whether a general duty of care was owed by the Commonwealth to the applicant to maintain her basic needs whilst a refugee on Nauru. However, the applicant's dependence upon the Commonwealth for her very existence provides the contextual framework in which the specific duty of care claimed should be properly considered.

253 I turn next to the most-immediate facts. Having been raped and fallen pregnant, the applicant sought the assistance of the Commonwealth through its medical services provider, IHMS, to obtain an abortion. The facts demonstrate that the Commonwealth:

- procured medical professionals to assess the applicant's physical and psychological condition and determine what treatment was required including whether the applicant ought to undergo a termination of her pregnancy and for that purpose be transferred to another country;
- through its officials, including Dr Brayley and Mr Nockels, gave consideration to the medical needs of the applicant and whether she should undergo a termination of her pregnancy and for that purpose be transferred to another country;
- decided to facilitate the transfer from Nauru to Papua New Guinea of the applicant for the purpose of the termination of her pregnancy;
- procured the medical professionals and facilities of PIH to perform an abortion in order to terminate the applicant's pregnancy;
- provided medical records of the applicant to PIH for the purpose of the conduct of the abortion; and sought (and received) her consent to PIH providing to the Department of Immigration and Border Protection, amongst others, her "personal medical information";
- procured travel documents (without the applicant's involvement) sufficient to permit the applicant to travel to Papua New Guinea;

- procured a visa for the applicant (without her involvement) to enter Papua New Guinea and remain there for the purpose of having an abortion;
- made arrangements for the applicant to travel to Papua New Guinea, including by facilitating her passage through immigration and security and selecting and providing a flight to Papua New Guinea;
- made arrangements which facilitated the applicant's travel from the airport at Port Moresby to a hotel in Port Moresby;
- procured the applicant's accommodation in Port Moresby;
- procured security personnel to guard the applicant and provide her food in Port Moresby;
- procured the services of PIH to treat the applicant when she fell ill in Port Moresby;
- paid for all costs of and incidental to the applicant's travel to, and care and maintenance in, Papua New Guinea.

254 It is also necessary to recall that the Minister has admitted that “it would not be possible for the Applicant to obtain an abortion without the assistance of the Commonwealth”. Furthermore, it is not in contest that all of the activities of the Commonwealth just described were done in the exercise of the Commonwealth's power under s 198AHA for the purpose of the regional processing arrangements with Nauru, or its executive power.

255 The putative duty in question is the duty to provide the applicant with a safe and lawful abortion or, more exactly, a duty to exercise reasonable care in the discharge of the responsibility that the Minister assumed to procure for the applicant a safe and lawful abortion. I turn then to the “salient features” analysis, noting as I go that one of the three categories of conduct by a statutory repository of power in which a duty of care may be attracted is, as Ipp JA (with whom Mason P and McColl JA agreed) said in *Amaca* at 317:

Where a public authority acts so that others rely on it to take care for their safety.

256 I will analyse the facts most relevant to the existence of the putative duty by reference to those “salient features” identified by Allsop P in *Stavar* that are significant to the circumstances of this particular case. No additional factors were suggested by the parties.

257 The foreseeability of and the nature of the harm alleged are the first two features on the *Stavar* list. It is not in contest that in the absence of an abortion, the applicant will suffer harm. That the applicant will suffer harm in the absence of a safe and lawful abortion of the kind she alleges is required, is the subject of my later discussion dealing with breach of duty. I have found that it is foreseeable that the applicant may suffer grave harm (including the possibility of extreme harm), if the duty upon which she relies is breached. The foreseeability of harm and the nature of that harm strongly tend in favour of the existence of the duty of care asserted by the applicant.

258 I consider next the degree and nature of control able to be exercised by the Minister to avoid that harm being occasioned on the applicant. The facts show that the Minister controls whether the applicant can access an abortion and where that abortion takes place and, therefore, the legal and medical setting in which an abortion may be accessed by the applicant.

259 By its capacity to choose the legal setting, the Minister has control over whether or not, should an abortion occur, the applicant will be exposed to the

risk of being prosecuted or convicted in relation to any law which prohibits an abortion. By its capacity to choose the medical setting, the Commonwealth controls the medical resources available in that setting to alleviate the risks of an abortion faced by the applicant. Again, I spell out in more detail when I address breach how it is that the potential harm to the applicant is a product of the legal and medical setting in which an abortion is performed. It is, as I also detail later, harm which the Minister has the capacity to avoid there being no material impediment to the alleviation of the foreseeable harm.

260 It follows that the Minister is able to avoid the harm to the applicant and in that respect has control. The degree and nature of the Minister's control to avoid the harm is a strong factor in favour of the existence of the putative duty. It is, as I have said at [229], a factor of especial relevance.

261 The applicant is obviously in a position of vulnerability should the Minister fail to procure a safe and lawful abortion for her. The applicant has no capacity to protect herself from that potential for harm other than not to have the abortion. But, there is no issue that not having the abortion will also be harmful to the applicant, and the evidence, which I later address, shows the potential for harm to be grave. In those circumstances, no reasonable expectation can be imposed on the applicant to take steps to protect herself against the harm, nor could she. As the Minister admitted, she is entirely reliant upon the Commonwealth to procure the abortion. She is acutely vulnerable to the risk of harm in question and this factor strongly tends in favour of the existence of the putative duty.

262 The degree of reliance by the applicant on the Minister also tends in favour of the putative duty. As I have said, it is not in contest that the applicant cannot obtain an abortion without the assistance of the Minister and consequently cannot obtain a safe and lawful abortion without that assistance. In that respect, the applicant is entirely reliant on the Minister.

263 As to assumption of responsibility, the Minister was not required by the statutory regime to procure an abortion for the applicant. However, the Minister has entered into an exercise of his powers and in so doing has taken each of the steps outlined at [253] above, including facilitating the transfer of the applicant to a different country. The acts of the Minister in attending to the medical need of the applicant to have an abortion, carry with them a representation that her medical treatment will be safe and lawful, that is, that a safe and lawful abortion will be procured for her, and that reasonable care will be used in the discharge of that procurement. I say that because, unless the context suggests the contrary (and here it does not), it must be regarded as inherent in a representation made that any medical procedure will be procured, that it will be lawful and safe (in the sense that the risk of harm is minimised as far as is reasonably possible). The voluntary assumption of those tasks by the Minister in the context of the applicant's "specific reliance" (see [237] above) on the representation inherent therein, demonstrates an assumption of responsibility by the Minister to exercise reasonable care to procure a safe and lawful abortion for the applicant. I consider this to be a potent factor in favour of the exercise of the putative duty. It is of especial relevance.

264 Items (g) and (h) in the *Stavar* list can be considered together. It is only proximity as between the Minister and the applicant in the relational sense that I think is relevant. There are more proximate categories of relationships that come to mind, including parent and child, gaoler and prisoner, and guardian and

ward. However, given the general dependence of the applicant upon the Commonwealth and the nature of that dependence, there is, in my view, a dependency relationship between the Commonwealth and the applicant. The essentiality of it from the applicant's perspective, suggests that the relationship should be regarded as sufficiently near to strongly tend in favour of the existence of a duty of care.

265 Item (k) on the *Stavar* list, applied to the facts at hand, addresses the knowledge by the Minister of the harm that his impugned conduct will likely cause to the applicant. In *Lutz* at 326 (set out above at [222]), McHugh JA said “[i]f in addition to the right of control the authority knows or ought to know of conduct or activities which may foreseeably give rise to a risk of harm to an individual, the authority should be under a duty to prevent that harm.” I deal with knowledge of and foreseeability of the risks of harm to the applicant in addressing breach and find both to be established. What is more, the evidence in this case is of actual knowledge by the Minister of risks of harm, their having been brought to his attention including in the reports of expert witnesses. This factor also tends in favour of the existence of the putative duty of care.

266 The nature and consequences of any action that can be taken to avoid harm to the applicant are addressed by item (m). That is also broadly dealt with below, where I address the extent to which any difficulty would be imposed upon the Minister to avoid the risk of harm to the applicant. As I later find, there are no consequences of material significance which the Minister relied on as an impediment, if the harm apprehended by the applicant is to be avoided. I therefore regard this factor as relevantly neutral. Indeed in his submissions against the grant of injunctive relief the Minister accepted that the factor of “hardship” was not a significant factor.

267 There is, then, left to be considered items (o), (p) and (q) on the *Stavar* list of “salient features”. Relevantly, they address considerations of consistency with the statutory regime relevant to the existence of a duty, considerations of policy, and coherence in the law. The Minister's submissions were succinctly stated, as follows:

50. The imposition of a duty of care is inconsistent with the statutory and non-statutory powers in question. Those powers confer a wide discretion upon the Commonwealth, including in relation to setting up and maintaining regional processing arrangements. Neither s 198AHA (nor s 61) purports to confer a private right or even regulate the exercise of private rights. Instead, the provisions confer a range of powers exercisable in the public interest. Determination of whether and how the powers should be exercised involves considerations of a range of matters. Chief among those considerations is the *requirement* of the Act that unauthorised maritime arrivals be removed to an regional processing country: s 198AD(2). A duty of care which operates to require the Applicant to be brought to Australia is directly inconsistent with that obligation.
51. True it is that s 198B confers a power to bring a transitory person to Australia for a temporary purpose. This power, however, only serves to illustrate the inconsistency between the statutory scheme and the duty of care alleged by the Applicant. The power in s 198B is a broad discretion to be exercised having regard to a range of considerations that reflect the public interest. The duty of care proposed by the Applicant is inconsistent with this broad discretion because it effectively dictates the exercise of the discretion in particular cases. The proposed duty therefore promotes incoherence in the law because it would tend to upset the balance of

considerations that the relevant provisions permit by skewing those considerations in favour of the personal interest of the Applicant above all other considerations.

52. It must also be recognised that the exercise of power in this context (either under s 198AHA or s 61) is likely to involve sensitive policy questions and is not simply an operational or administrative decision. In particular, the exercise of power is likely to involve considerations of the Commonwealth's relations with other sovereign states. It is not appropriate for the Court to impose a duty of care that may interfere with this matters which are properly the preserve of the executive government.

(Footnotes omitted; emphasis in original.)

268 I agree that s 198AHA confers a wide discretion upon the Commonwealth. I agree also that no private rights are conferred and that s 198AHA is exercisable in the public interest involving potentially a wide range of considerations.

269 I do not agree that a duty of care which would operate to require a UMA to be brought to Australia is necessarily inconsistent with the requirement of s 198AD(2) for a UMA to be removed to a regional processing country. Section 198AD(2) must be construed in the light of s 198B and the power given to bring a "transitory person" to Australia for a temporary purpose. A duty of care that required that a "transitory person" be brought to Australia for a temporary purpose would not be inconsistent with s 198B, and not with s 198AD(2) when read in the light of s 198B.

270 In any event, there is nothing in the putative duty of care which necessarily requires the applicant to be brought to Australia. I may have given this factor much greater weight if it had been established that the only feasible way of discharging the putative duty of care was to bring the applicant to Australia. However, that was not the evidence, as my later discussion by reference to Mr Nockels's evidence demonstrates.

271 The Minister's submissions primarily relied upon *McKenna*. That was a case in which the recognition of the putative duty of care would have given rise to inconsistent obligations. It would have created a clash as between the duties and obligations imposed upon doctors by the *Mental Health Act 1990* (NSW) in relation to involuntary detention and the putative duty of care: see at [29]-[33]. There is no clash of duties between any duty or obligation required or imposed by Subdiv B and the putative duty of care here in question. Nor is there inconsistency between the putative duty of care and any policy manifested by the statutory scheme pursuant to which the discretion reposed in the Minister by s 198AHA is to be exercised. Unlike *MM Constructions (Aust) Pty Ltd v Port Stephens Council* (2012) 191 LGERA 292, which was relied upon by the Minister, Subdiv B does not "[lay] down the balance of interests to be assessed" in the exercise of the powers conferred by s 198AHA. There are two factors which point, although perhaps only faintly, to consistency rather than inconsistency. First, both the putative duty and s 198AHA are directed at providing assistance to a transitory person. Second, s 198AHA(3) suggests an intent that the powers and discretion conferred by s 198AHA(2) be exercised consistently with law.

272 Lastly, the Minister relies upon relations with other sovereign states as a matter of policy that forms a basis for incoherence or inconsistency with the putative duty. It is not clear how it is suggested that the imposition of the imputed duty would impact upon such relations. No evidence was led by the

Minister to demonstrate the possibility of any such impact. Nor was a submission made which explained the basis for any apprehended impact.

273 I would expect that the Commonwealth is subject to a duty of care in many situations which have the capacity to touch on relations with sovereign states. The most obvious category is the duty of care owed to employees of the Commonwealth working overseas, some of whose work, I suspect, may involve issues of sensitivity. There can be no general rule against the existence of a duty of care owed by the Commonwealth simply because the existence of the duty may give rise to a possibility of some impact on Australia's relations with other sovereign states. A far more concrete foundation needs to be established.

274 In the absence of that foundation, I am largely left to speculate. I accept that the imposition of the duty of care sought to be established may require the Commonwealth to interact with other sovereign states in relation to matters which may be sensitive. I can further accept that, hypothetically, it is possible that the interaction may be detrimental. Beyond that, I have nothing more to fasten upon so as to allocate weight to this consideration.

275 In the circumstances I give it some weight. I conclude that the issue of inconsistency and coherence tends against the existence of the putative duty of care in a material or not-insignificant way. I allocate due weight to that consideration. I recognise, however, that this consideration is of especial importance in the balancing process where statutory authorities are concerned (as here).

276 To my mind, that analysis shows that, on balance, there are sufficient characteristics displayed answering the criteria for intervention by the tort of negligence. Accordingly, the applicant has established a duty of care owed to her by the respondents that they will exercise reasonable care in the discharge of the responsibility that they assumed to procure for her a safe and lawful abortion.

277 I set out, before moving on to the question of apprehended breach, the following quote from Brennan J in *Heyman*, at 486:

I would not doubt that a public authority, which adopts a practice of so exercising its powers that it induces a plaintiff reasonably to expect that it will exercise them in the future, is liable to the plaintiff for a subsequent omission to exercise its powers, or a subsequent inadequate exercise of its powers, if the plaintiff has relied on the expectation induced by the authority and has thereby suffered damage provided that damage was reasonably foreseeable when the omission or inadequate exercise occurred and provided that any special element restricting a cause of action for negligence occasioning damage of that kind is satisfied.

278 That could have been written about this case.

Is apprehended breach established?

279 The next question is whether the evidence establishes a reasonable basis for an apprehension that the Minister's duty of care to the applicant will be breached. In that regard an assessment of the standard of care that is required of the Minister needs to be undertaken. The well-known test explaining how a tribunal of fact should decide whether there has been a breach of duty of care is stated by Mason J in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48:

In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for

the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.

280 Mason J further opined at 48 of *Shirt* that:

The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable

281 The continued applicability of the "*Shirt* formula" has been reaffirmed in *New South Wales v Fahy* (2007) 232 CLR 486 at [7], [78] and [129]. Its proper application requires "a contextual and balanced assessment of the reasonable response to a foreseeable risk": *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330 at [69] (Gummow J).

282 In applying the *Shirt* formula, I should first ask whether a reasonable person in the Minister's position would have foreseen, or in the context of an allegation of a continuing tort would foresee, that his conduct will involve the risk of injury to the applicant. I will then turn to address what a reasonable person the Minister's position would do by way of response to the risk. Involved in that is consideration of the magnitude and probability of any risk occurring. In that respect I observe that the seriousness of the foreseeable risk is a material factor in framing the requisite standard of care. As Dixon J said in *Mercer v Commissioner for Road Transport and Tramways (NSW)* (1936) 56 CLR 580 at 601:

In considering the extent and nature of the measures that due care demands, the first question must be the gravity, frequency and imminence of the danger to be provided against.

283 As I think the Minister's submissions correctly surmised, the complaint about the conduct of the Minister relates to his failure to offer the applicant "something better" than the care that the Minister has to date procured or been prepared to procure. That alleged failure has two dimensions. *First*, the failure to procure for the applicant an abortion in a legal setting where she is not exposed to the risk of prosecution and conviction for terminating her pregnancy. *Second*, the failure to procure for the applicant access to a safe abortion or, more particularly, an abortion conducted utilising those resources identified by the applicant's medical experts as necessary to adequately diminish the risk of physical and psychological injury to her.

Foreseeability, magnitude and probability of the risks

Legal setting

284 I will address, first, the issue of the legal setting and the risks posed by it to the applicant. It is inescapable that a reasonable person in the Minister's position would foresee that to procure an abortion for the applicant in a legal setting that exposed the applicant to the risk of prosecution or conviction, involves a risk of injury to the applicant. There can be no question that a criminal prosecution would be prejudicial and injurious and it goes without

saying that a conviction would be extremely injurious. The main basis for the apprehended breach based on legal setting is that the Minister has procured an abortion in Papua New Guinea. It is necessary, then, to focus on the legal setting provided in that country in order to consider the foreseeability and risk of injury to the applicant.

285 The *Criminal Code Act 1974* (PNG) (PNG Criminal Code) makes it an offence to procure an abortion, other than in limited circumstances. Sections 225 and 226 deal with procuring a miscarriage, whilst s 312 refers to the offence of killing an unborn child. The terms of those provisions are as follows:

225. Attempts to procure abortion.

- (1) A person who, with intent to procure the miscarriage of a woman, whether or not she is pregnant, unlawfully administers to her or causes her to take any poison or other noxious thing or uses force or any other means, is guilty of a crime.

Penalty: Imprisonment for a term not exceeding 14 years.

- (2) A woman who, with intent to procure her own miscarriage, whether or not she is pregnant —

- (a) unlawfully administers to herself any poison or other noxious thing, or uses force or any other means or
 (b) permits any such thing or means to be administered or used to her, is guilty of a crime.

Penalty: Imprisonment for a term not exceeding seven years.

226. Supplying drugs for instruments to procure abortion.

A person who unlawfully supplies to or procures for any person any thing, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether or not she is pregnant, is guilty of a misdemeanour.

Penalty: Imprisonment for a term not exceeding three years.

312. Killing unborn child.

A person who, when a woman is about to be delivered of a child, prevents the child from being born alive by any act or omission of such a nature that, if the child had been born alive and had then died, he would be deemed to have unlawfully killed the child, is guilty of a crime.

Penalty: Subject to Section 19, imprisonment for life.

286 Section 280 of the PNG Criminal Code is also relevant in that it arguably provides, in limited circumstances, protection from criminal responsibility in relation to a surgical operation on an unborn child for the preservation of the mother's life. That provision provides:

280. Surgical operations.

A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation on —

- (a) any person for his benefit; or
 (b) an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.

287 I do not accept that the risk to the applicant of being prosecuted and/or convicted of a breach of either s 225 or s 312 of the PNG Criminal Code is far-fetched or fanciful. I consider it real and to have been foreseeable. Why I have arrived at the conclusion that the risk is real will become apparent from the

discussion which follows, and in particular, my consideration of the probability of the risk occurring. The facts show that the Minister was aware at the time an abortion in Papua New Guinea was procured, and remains aware, that the legality of an abortion performed in Papua New Guinea is not free from doubt. It is sufficient in that regard to refer to the terms of the First RMM and to the evidence of Mr Nockels that he knew “that there was a serious issue about legality”. With that knowledge and in the circumstances of procuring an abortion in Papua New Guinea for the applicant, a reasonable person in the Minister’s position would have foreseen a risk that the applicant may be exposed to prosecution and conviction by reason of her participation in an abortion in Papua New Guinea.

288 Having answered “yes” to the first part of the *Shirt* formula, it becomes necessary to consider “the magnitude of the risk and the degree of the probability of its occurrence”.

289 As to the magnitude of the risk, there can be no other answer than that the prejudicial consequences of the risk are high to extreme. The risk is a risk to the applicant’s liberty. It is a risk of imprisonment for a period not exceeding seven years if s 225 is contravened or imprisonment for life if s 312 is contravened. Whilst I have identified the maximum sentences which may be imposed, I regard any risk of imprisonment as of great magnitude. I would include in that respect the risk that the applicant’s liberty may be lost if charged and not granted bail. Further, I would regard a prosecution for a contravention of either s 225 or s 312 as itself involving substantial injurious consequences for the applicant.

290 As to the degree of probability of the applicant being prosecuted and convicted, it is necessary first to consider the question of prosecutorial attitude. The evidence does not demonstrate that the provisions of the PNG Criminal Code dealing with abortion are there regarded as a “dead letter”.

291 The judgments of the National Court of Justice of Papua New Guinea in *State v Devana* (unreported, Bona J, 1 October 2015), *State v Manwau* (unreported, National Court of Justice, PNG, Cannings J, No 1452 of 2006, N3797, 4 December 2009) and *State v Maika* (unreported, National Court of Justice, PNG, Cannings J, No 903 of 2004, N2605, 16 August 2004), demonstrate the contrary.

292 *Devana* involved a prosecution brought under s 312 of the PNG Criminal Code. The accused was a 24 year old woman who used “Cytotec” tablets to induce an abortion. After she sought medical assistance, a report was made to police and both the accused and her husband were arrested and charged. The accused pleaded guilty and was sentenced to a head sentence of four years imprisonment, with three years of the sentence suspended on compliance with certain conditions. It is notable that Bona J observed at [25] that “a custodial sentence is warranted due to the community’s condemnation of the offence”. It is also notable that Bona J imposed a custodial sentence despite having accepted that the accused had been under pressure to kill the baby because of her genuine belief that her life was in danger. Bona J referred to the case of *State v Lamete* (unreported, National Court of Justice, PNG, Cannings J, No 870 of 2007, N4495, 26 October 2007) in which, in similar circumstances, the offender received a head sentence of six years.

293 *Manwau* involved a doctor charged with killing an unborn child in contravention of s 312. It was alleged that the doctor had induced an abortion

for a pregnant 14 year old girl. The reasons of Cannings J observed that the aunt and uncle of the girl in question had also been committed for trial on various charges for resolving to arrange the abortion. The doctor was acquitted.

294 In *Maika*, Cannings J dealt with an indictment presented under s 225(2) of the PNG Criminal Code. A complaint was made to police that the accused had deliberately procured a miscarriage by consuming “some raw egg and lemon grass”. A police investigation followed leading to the laying of the indictment. A provisional plea of guilty was entered but Cannings J indicated that he intended to consider whether he should exercise his discretion to enter a not guilty plea. A not guilty plea was subsequently entered on the application of the accused and the State offered no evidence. The accused was acquitted. Cannings J made the following observation at p 5:

Section 225(2) of the *Criminal Code* is one of a number of so-called morality crimes whose place in today’s statute book should perhaps be questioned by the legislature. I could find no record of any woman in Papua New Guinea ever having been convicted of such an offence.

Cannings J went on to suggest that the procurement by women of their own miscarriages ought be dealt with by guidance, counselling and caring rather than criminal sanctions. Those remarks were made in 2004. The cases to which I have referred and the continued applicability of ss 225 and 312 do not suggest that his Honour’s comments have had their desired effect.

295 In arriving at my view about the degree of probability of the risk of prosecution, I have taken into account the Minister’s submission that s 280 should be construed as providing a complete defence to any charge brought against the applicant pursuant to either s 225 or s 312. The difficulty for the Minister is that I am not persuaded that a contrary construction is not at least arguable. Nor can it be said, accepting the Minister’s construction to be correct, that s 280 will necessarily provide a complete defence because of the conditional nature of the exculpation provided.

296 It is to be observed that, by its terms, s 280 directly applies only to a person performing a surgical operation and not to the person (the woman) the subject of the surgery. Second, the excusing of the surgeon from criminal responsibility is conditional upon:

- (i) the operation being performed in good faith and with reasonable care and skill; and
- (ii) the operation on the unborn child being necessary for the preservation of the mother’s life; and
- (iii) the performance of the operation being reasonable, having regard to the patient’s state at the time and to all the circumstances of the case.

297 It is then necessary to consider what application s 280 was intended to have to conduct caught by ss 225 and 312. I think the better view is that it has application at least to s 225. But that view is not free from material doubt. For one thing, there is an oddity involved in the idea that s 280 excuses surgical intervention but not other medical intervention to procure a miscarriage. That tends to suggest that ss 225 and 312 were not in contemplation when s 280 was enacted.

298 Further still, it is necessary to consider how s 280 can have application to the criminal responsibility imposed upon the woman by ss 225 and 312. In that respect the Minister contended that both ss 225 and 312 made it an offence only

if the things done to the woman or permitted to be done by the woman were “unlawful”. As a surgical procedure conducted pursuant to the conditions required by s 280 would not be unlawful, the Minister contended that the things permitted to be done to her by the woman would also not be unlawful. The argument has some attraction. I agree with the Minister’s submission that the PNG Criminal Code would operate somewhat perversely if the surgeon was excused but the woman was not. A court is likely to construe the provisions favourably to the woman in those circumstances. But again, the submission is not without its difficulties. It may be, contrary to the Minister’s construction, that the word “unlawfully” in s 225(2)(a) was intended to describe the legal consequence of the conduct once s 225 was applied to it rather than the conduct which enlivened the application of s 225. If that were not so, abortions (which seem to be the mischief which the provision seeks to avoid) could be easily procured without ramification. For instance, on the Minister’s construction, the use of force by a woman upon herself to induce a miscarriage would not be caught by the provision. The same may be said in relation to a miscarriage induced by the woman ingesting a substance not unlawful to ingest. The use of force upon oneself is not inherently unlawful. It would not be unlawful unless made so by s 225 or some other provision. Furthermore, the Minister’s construction would lead to odd results. The criminal responsibility of the woman would depend upon matters outside of her control. For instance, the failure of the surgeon to use “reasonable care and skill” to perform the operation would result in criminal liability for the woman.

299 All of those difficulties also attend the Minister’s construction in the application of ss 280 to 312. There is an added problem that, when used in s 312, the word “unlawfully” is arguably not modifying the word “prevents”, a matter crucial to the construction relied upon by the Minister.

300 To all of those uncertainties, the prospect that one or more of the conditions required by s 280 would not be fulfilled, has to be added.

301 Having said all that, I also take into account Dr Sapuri’s evidence of his experience of performing abortions regularly without legal consequence. Dr Sapuri expressed confidence that there would be no prosecution in relation to an abortion conducted at PIH so long as two obstetricians agreed that the termination was necessary to preserve the applicant’s life. That provides some evidence of the likelihood of prosecution in the setting of a private hospital. It is possible, although not stated by Dr Sapuri, that his confidence is in part based on a memorandum circulated in 1982 by the Acting Secretary of Health containing a legal opinion which suggested that s 280 would have application to s 225 (the memorandum did not consider s 312).

302 Perhaps for an abortion out of the public eye, Dr Sapuri’s confidence is well founded. But the applicant’s situation has been well publicised by this proceeding. That may have some consequence. I say that in particular in the light of the evidence before me of the following departmental advice given to the Minister in January of this year:

Following advice received from the Department’s Acting Chief Migration Officer at the Australian High Commission in PNG, no discussions have been held with the PNG Government, including ICSA [a PNG authority], about the provision of termination services at PIH. All medical transfer cases to PNG, including the one termination case to date, are reported to ICSA as being for “medical treatment” and the detail of the medical procedures to be conducted are not provided.

303 Why the Department considers that it is necessary to procure abortions “under the radar” of the Papua New Guinea government is not clear but nevertheless troubling, particularly given that the context in which that advice was given included the statement that the Department relies on PIH to ensure that any terminations it provides are in accordance with Papua New Guinea law.

304 On the evidence before me, I am not satisfied that there is no prosecutorial appetite in Papua New Guinea for the criminal prosecution of a woman involved in procuring a termination of her pregnancy. Nor am I satisfied that, in the circumstances in which an abortion has been proposed for the applicant at PIH, there is no real risk of a prosecution. Whilst the probability of a prosecution alone or a prosecution and consequent conviction of the applicant is, to my mind, very low, the risk cannot be excluded as far-fetched, or fanciful. Whilst very low, the risk is real.

The medical setting

305 I turn next to consider the medical risk, if any, posed by the Minister having procured an abortion for the applicant in Papua New Guinea and any risk arising from any apprehended failure of the Minister to procure a safe abortion for the applicant.

306 The applicant’s evidence was directed to establishing that particular medical services and expertise was required in order that any termination of her pregnancy would meet appropriate clinical standards for safety. The evidence essentially went to five subcategories:

- (1) the requirement for neurological expertise and diagnostic equipment, the risk were it to be unavailable, and its availability or otherwise in Papua New Guinea;
- (2) the applicant’s requirement for mental health care both pre- and post-termination, including by persons with experience in trans-cultural issues and the other issues experienced by the applicant, the risk were it to be unavailable, and its availability or otherwise in Papua New Guinea;
- (3) the applicant’s requirement for gynaecological expertise and a surgical team with experience in conducting termination surgery on a woman with [redacted], the risk should it be unavailable, and its availability or otherwise in Papua New Guinea;
- (4) the applicant’s anaesthetic requirements, the risks should those requirements not be met, and the ability or otherwise for those requirements to be met in Papua New Guinea; and
- (5) the need for an interdisciplinary approach involving consultation between all of the various professionals required.

307 As well as being relevant to the declaration sought by the applicant that the proposed abortion in Papua New Guinea did not discharge the Minister’s duty of care, that evidence is also relevant to an apprehended breach. It identifies risks, if any, to the applicant if the Minister procured an abortion outside of Papua New Guinea but in the same or similar medical setting to that available at PIH. There is other evidence also relevant for the question of an apprehended breach. It is necessary to set out the consequences for the applicant should no safe abortion be procured by the Minister and she continued to carry her pregnancy to full-term. The risk of harm in that circumstance is to some extent admitted. It is admitted that the applicant will suffer further mental harm if she

is unable to obtain an abortion, and that if the applicant obtains an abortion it may lessen or alleviate some risk of harm to her. There is evidence to which I will shortly refer that elaborates on the nature of that risk.

308 The applicant advanced the evidence of five expert witnesses. Associate Professor Ernest Somerville is a consultant neurologist, specialising in epilepsy. His evidence went to the probable diagnosis for the applicant's seizures, required treatment, risks to the applicant's health posed in performance of a surgical termination, neurological services required in order that any abortion be safe, risks that would arise should an abortion be performed absent those services, and whether they were available in Papua New Guinea. His report was dated 19 April 2016. Associate Professor Somerville also provided a supplementary report dated 27 April 2016.

309 Dr Miriam O'Connor is specialist obstetrician and gynaecologist. Her evidence went to the kind of termination most appropriate in the applicant's circumstances, where any termination should occur, and the circumstances of the pregnancy and the effect of any termination. Her report was dated 20 April 2016. Dr O'Connor also provided a supplementary report dated 27 April 2016. Dr O'Connor undertook a medical assessment of the applicant in Port Moresby on 19 April 2016.

310 Professor Caroline de Costa AM is a specialist obstetrician and gynaecologist. Her evidence went to matters including the kind of termination most appropriate in the applicant's circumstances, where any termination should occur, and the circumstances of the pregnancy and the effect of any termination. Her report was dated 19 April 2016. Professor de Costa also provided a supplementary report dated 27 April 2016.

311 Professor Louise Newman is a Fellow of the Royal Australian and New Zealand College of Psychiatrists. She has expertise in women's mental health and trauma-related conditions. Her evidence went to the applicant's psychological condition, mental health issues in connection with termination of pregnancy, and the availability of treatment in Papua New Guinea. Professor Newman's report was dated 18 April 2016. Professor Newman had a telephone consultation with the applicant.

312 Dr Gregory Purcell is a specialist anaesthetist. His evidence went to the anaesthetic requirements for a termination, risks of termination, facilities and services required for a safe termination, and the availability of those facilities and services in Papua New Guinea. Dr Purcell's report was dated 20 April 2016.

313 The respondents relied upon the evidence of Dr Mathias Sapuri. Dr Sapuri is a Senior Specialist Consultant Obstetrician Gynaecologist, at PIH. He has held various positions on boards and medical societies in Papua New Guinea and has over 30 years' experience in surgical terminations of pregnancy.

314 I will address the evidence by reference to the five subcategories identified above.

Neurological expertise

315 It was admitted that the applicant suffers from epilepsy or a psychogenic disorder and has regular seizures. This raises neurological issues.

Associate Professor Somerville

316 In his report of 19 April 2016, Associate Professor Somerville opined that the

applicant probably has epilepsy but that she requires at least a consultation with a neurologist to confirm the diagnosis. That may, in his view, be sufficient to make a diagnosis but confirmation with EEG would be routine.

317 If the neurologist thought it necessary to exclude psychogenic non-epileptic events, the applicant would be referred to a neurologist specialising in epilepsy who would see the patient in consultation and perform video-EEG monitoring as an inpatient. In Australia, that procedure would only be available in a teaching hospital with an epilepsy unit.

318 In the event that the diagnosis was epilepsy (with or without psychogenic non-epileptic events), Associate Professor Somerville stated that the applicant would continuously require anti-epileptic medication. She would require monitoring, preferably by a neurologist, and may require blood tests. Psychogenic non-epileptic events require consultation with a neuropsychiatrist or at least a psychiatrist familiar with the disorder.

319 While uncontrolled epilepsy poses risks to health, those risks are not significantly increased by the performance of a termination of pregnancy, provided the termination is performed at a hospital where emergency treatment of seizures can be satisfactorily performed, no doses of anti-epileptic medication are omitted, and seizure-provoking drugs are not used. However, a seizure may complicate a termination if it occurred during the termination.

320 Epilepsy does, in Associate Professor Somerville's opinion, pose a number of risks in pregnancy and additional risks if uncontrolled. Uncontrolled epilepsy in a pregnant woman has the same risks as uncontrolled epilepsy at large, namely, injuries from falls and burns, drowning, choking on vomit, status epilepticus, and sudden death. It causes significant psychosocial impact. In Associate Professor Somerville's opinion, a neurologist should be available to supervise the treatment of any seizures that might occur. He noted that access to an intensive care unit with facilities to ventilate a patient should be available to treat status epilepticus, should it occur. The risks of inadequately-treated status epilepticus include brain damage, pneumonia, and death.

321 Associate Professor Somerville was not aware of the availability of neurologists in Papua New Guinea. He was sure there were no neurologists specialising in epilepsy. He doubted that there was a neuropsychiatrist in Papua New Guinea.

322 In reply to Dr Sapuri's evidence, outlined below at [328], Associate Professor Somerville opined that, in Australia, assessment by an internal medicine specialist would not be considered adequate. Rather, the applicant would at least be assessed by a neurologist and probably referred to a neurologist specialising in epilepsy. He continued:

She would then be admitted to an epilepsy unit for video-EEG monitoring to capture an episode. The reasons are firstly, to confirm the diagnosis (of epilepsy and/or psychogenic non-epileptic events) and secondly, if epilepsy were confirmed, to optimise therapy.

His opinions, as conveyed in his 19 April report, were unchanged by Dr Sapuri's evidence.

Dr Purcell

323 Dr Purcell opined that due to the refractory, drug-resistant nature of the applicant's epilepsy, it would be preferable to have it investigated and expertly managed before termination. If pregnancy aggravated the refractory epilepsy,

the applicant might need MRI imaging to ensure that she does not have intracranial pathology or increased intracranial pressure. In order to tolerate the MRI, and avoid fitting in the machine, the applicant might require expert anaesthesia in a “complex isolated difficult environment.” Dr Purcell doubted that Papua New Guinea had the specialised equipment for anaesthesia in an MRI suite.

324 Dr Purcell opined that the applicant should, for proper pre-operative assessment, see an experienced neurologist, have possible MRI assessment, and have proper neurosurgical management. Risks that might arise following anaesthesia and procedure could include unmanageable fitting (status epilepticus), due to physiological and pharmacological perturbations during the procedures. Other complications might include bleeding, uterine rupture, peritonitis, sepsis, and perineal injury. In Dr Purcell’s opinion, experienced surgeons and intensivists would need to be readily available.

Dr O’Connor

325 Dr O’Connor’s opinion was that a surgical abortion was required. That was not in contest. Dr O’Connor was asked how risks associated with termination of pregnancy should be managed and what precautions ought to be taken. Preliminarily Dr O’Connor identified that a gynaecologist would ordinarily consult with other specialists including a neurologist. Also relevantly to neurological issues, Dr O’Connor said as follows:

The safety of anaesthesia and post-op care may be significantly influenced by her seizures which create an increased airway risk during anaesthesia and the perioperative period. *We would require adequate assessment by an experienced neurologist (and possibly psychiatrist) in relation to diagnosis, immediate management around the time of termination, post-procedure and long-term care and treatment. This neurologist would then discuss with the anaesthetist and gynaecologist regarding the best approach to take in relation to methods of anaesthesia, agents to be used or avoided, a post-operative pain management and medication plan, as well as the longer term management of her seizures.*

(Emphasis added.)

326 Dr O’Connor stated that there were no consultant neurologists in Papua New Guinea. She re-iterated that in her oral evidence, and said further that there was no EEG or ambulatory EEG service available in Papua New Guinea. She opined, noting that she was not a neurologist, that most neurologists would require an EEG and would probably recommend an ambulatory EEG. She said that many Papua New Guinean medical practitioners would not have much experience with adult epilepsy causing grand mal seizures because Papua New Guineans who are prone to such seizures often do not advance in their adult years.

327 Dr O’Connor’s opinion was unchanged by Dr Sapuri’s evidence (discussed at [328]).

Dr Sapuri

328 Dr Sapuri’s evidence was that anaesthetists at PIH were experienced in administering anaesthesia to patients with epilepsy. He also stated that Dr Paul Mondia, a senior internal medicine specialist at PIH, had treated epileptics. He gave evidence as to Dr Mondia’s ability to complete a physician assessment but, after objection, that was received only as evidence of Dr Sapuri’s opinion and not as to the facts.

Professor Newman

329 Professor Newman did not address neurological issues in her report of 19 April 2016. However, in reply to the report of Dr Sapuri, Professor Newman said that on review of email correspondence in the matter she saw it stated that there was “no capacity to examine [the applicant] in the offshore location for epilepsy using EEG.” That meant, she said, that it was not possible to exclude a diagnosis of epilepsy even in the event of some seizure activity being stress related. She remained of the opinion that investigation of the seizure disorder was “indicated” and that investigation of that disorder “[could] only occur in a suitable facility on the mainland.”

Professor de Costa

330 Professor de Costa’s opinion was that the applicant should have a surgical abortion rather than a medical abortion. That was uncontroversial. Professor de Costa said as follows in regard to risk-management for a surgical abortion:

[T]he treating doctors should be concerned about [the applicant’s] history of apparent grand mal seizures and should not proceed with a surgical abortion until there is a much clearer history of these than I have so far been provided with. I have been informed that a diagnosis of epilepsy was made when [the applicant] was aged 16 but I do not know who made this diagnosis; nor the facts the diagnosis was based on, whether any investigations were undertaken, or whether any treatment has been proposed for her; nor whether if medication has been provided this has been accepted and taken regularly. It would be essential before embarking on the abortion process to have as much information as possible as a surgical procedure would be complicated if [the applicant] were to have a grand mal seizure during the process, and there may be a risk of status epilepticus. I do not believe that any Australian specialist anaesthetist would be prepared to give an anaesthetic without being well-informed on these points.

331 Professor de Costa continued that “[the applicant] should be seen by a specialist neurologist with a view to more specific diagnosis and control of the epilepsy, with the reassurance from that practitioner about the safety of proceeding with the abortion.” The opinion of a neurologist was, in Professor de Costa’s view, essential.

332 Professor de Costa stated that she was reliably informed that there was no specialist neurologist in Papua New Guinea and that many of the diagnostic aids to neurological diagnoses were not available. “Therefore if [the applicant] were to undergo surgical abortion in PNG and have medical assessment prior to the surgery and anaesthesia, this would not be at the standard required in an Australian teaching hospital.”

333 In her reply report, Professor de Costa noted the opinion of Dr Rudolph that the applicant should be seen by a neurologist and have an EEG and possibly other neurological investigations performed. She agreed. Professor de Costa said further that in an Australian setting an anaesthetist would want a review, investigations, and diagnosis by a neurologist before agreeing to give general, inhalational, or total intravenous anaesthesia electively. Therefore, she said, a surgical termination at PIH prior to neurological assessment would not provide the same level of safety for the plaintiff as if it were performed in Australia.

Other evidence

334 I have noted elsewhere (see [89], [94], [139]) that email correspondence passing between IHMS and employees of the Australian Border Force goes to

the availability of neurological expertise and equipment in Papua New Guinea. In particular, Dr Rudolph's 9 March 2016 email to Dr Brayley said that there were no EEG services at PIH. In his 17 March 2016 email Dr Rudolph said that if the applicant were in Australia she would have an EEG and would probably be admitted to a neurology ward for observation if the EEG was inconclusive.

335 Dr Rudolph said in the same email that there was no EEG or neurology capability at PIH, and that he suspected that IHMS would be requesting transfer to Australia for an EEG and admission to a neurology ward.

336 In her 13 April 2016 email to Mr Willis of the Australian Border Force, Ms Wishart of IHMS said that specialist neurology services are not currently available at PIH, and that EEGs are not able to be performed at PIH.

Mental health care

337 Again, it was not in dispute that the applicant suffered mental harm and continues to suffer mental harm as a result of being raped. It was also admitted that she will suffer further mental harm so long as she continues to be pregnant.

338 Professor Newman opined that the applicant's presentation was "consistent ... with a diagnosis of acute stress response given the severe nature of the trauma that she has experienced." She said that it is "likely to become an emergent chronic post-traumatic stress situation." Professor Newman said that emotional responses to the applicant's pregnancy are likely to be complex and that it is important that the applicant be offered supporting counselling.

339 Professor Newman's opinion was that "[the applicant] should have experienced and expert psychiatric opinion regarding her current mental state, capacity to understand the procedure and the ability to tolerate the proposed procedure before a plan for intervention is finalised."

340 Specifically in relation to the applicant's [redacted], Professor Newman said that women who had experienced such [redacted]. Thus, general anaesthesia or psychotropic medication may be necessary or appropriate. In Professor Newman's opinion, it is standard practice in a tertiary women's hospital to have culturally-sensitive and informed workers familiar with these procedures in the cultural context to engage with and counsel the woman. A patient may, in a tertiary women's hospital, also be provided "high-level expert psychiatric opinion" and support during assessment for the procedure and recovery. She described the availability of those facilities and expertise as "important" for women with risk factors like the applicant's.

341 Professor Newman's opinion as to the nature of service that was appropriate in the applicant's case was as follows:

In summary, [the applicant] has many risk factors for negative responses and reactions to the proposed procedure and is at risk of both short term and ongoing complications. Given these risk factors, it would be appropriate to arrange appropriate level treatment for her with relevant specialist expertise including psychiatric expertise in women's mental health including termination of pregnancy and sexual trauma, sexual health specialists, and the capacity to provide ongoing mental health treatment if required. A tertiary level women's hospital with these services on site and the ability for hospitalisation on mental health grounds would be, in my opinion, the most appropriate and in the interests of [the applicant's] psychological welfare.

342 Risks of failing to provide such a co-ordinated system of care included negative psychological response extending to ideas of self-harm and even

suicide. Professor Newman said that it was possible that women in such circumstances could develop extreme psychiatric symptoms including dissociation, panic and high-level anxiety, and in extreme cases psychotic symptoms, requiring admission to a psychiatric facility.

343 Professor Newman gave evidence that, to her knowledge, “there are limited mental health clinicians available in Papua New Guinea.” She was unaware of tertiary-level specialist treatments in the area of sexual assault and trauma-related symptoms. That made it “extremely difficult to have any confidence in the capacity of local health providers to avoid or minimise the risks of mental deterioration discussed above.” That evidence was objected to on 28 April. On 28 April, when Professor Newman gave oral evidence, she attested as to her basis for the statement. I think a basis has been established and I would admit the evidence. Tertiary women’s hospitals in Australia have high-level mental health services including sexual assault services and ongoing care for victims of trauma. In particular:

This level of service also includes the availability of interpreters and cross-cultural workers. The Royal Women’s Hospital in Melbourne offers specialist counselling and care for women who are victims of [redacted] which would be necessary in the management of [the applicant].

344 In reply to Dr Sapuri’s affidavit, Professor Newman said that she remained of the opinion that “comprehensive care of a woman in this situation also requires experienced mental health assessment and treatment facilities,” more so in the case of a patient with pre-existing mental health issues. To Professor Newman’s knowledge, the required level of mental health support and staff was not available in Papua New Guinea, which would put the applicant at increased risk were she to have a termination of pregnancy at PIH. (Again, that evidence was objected to, but a basis was established in oral evidence and I would admit it).

345 Professor de Costa also opined that the applicant required psychiatric/psychological care. In reply to Dr Sapuri’s affidavit, Professor de Costa said that “[the applicant] requires mental health assessment and care, and rape crisis counselling, over and above what is being provided to her on Nauru and in PNG.”

346 Dr O’Connor also considered that the applicant required psychological care, and said further that “a transcultural psychiatric team would be considered fundamental in most Pregnancy Advisory Services in Australia given [the applicant’s] particular circumstances.” Dr O’Connor said that “Pregnancy termination, even after rape, requires the woman to have psycho-sexual and cultural (and sometimes religious) support in order to minimise the sequelae. This woman already has major issues in relation to GBV [gender-based violence] and pregnancy. She would provide a challenge for any service, so experienced transcultural workers are required.” Further, up to 20% of women suffer serious, prolonged mental health problems following abortion.

347 Dr O’Connor said that on Papua New Guinea, “there are very few psychiatrists and almost none with transcultural experience,” which was a “significant gap” in relation to the applicant’s needs. Further, there was no “Pregnancy Advisory Service trained support workers e.g. psychologists, social workers,” which was also a “significant gap” in relation to the applicant’s needs. In Dr O’Connor’s opinion, there were “inadequate services in PNG to

cover the complexity and minimise the risks involved given [the applicant's] physical and mental health needs." Dr O'Connor's opinion was not altered upon reading Dr Sapuri's affidavit.

348 Dr O'Connor also gave oral evidence. She said that "there are few [psychiatrists in PNG], and most of them will not be involved in any way in relation to assessing patients prior to termination of pregnancy." Beyond that, "[the applicant] has trans-cultural issues that would normally be assessed by a pregnancy advisory team, skilled and staffed to address ... her mental health issues, but also in relation to the [redacted], and those things are not available in PNG."

349 Dr Sapuri's affidavit contained little on the subject: he said that "[t]ransferees and refugees from Manus Island and Nauru are regularly treated at PIH and staff at the hospital are familiar with the use of interpreters and cross-cultural treatment." He also indicated that "where the risk to a [woman's] life which necessitates a termination has a psychiatric element, we also obtain a report from a psychiatrist about the patient's mental state." In this case, Dr Priscilla Nad had prepared a report dated 9 April 2016 which was annexed to Dr Sapuri's report.

350 Again, emails between IHMS and the Australian Border Force largely corroborated the evidence of the applicant's witnesses concerning facilities and services available in Papua New Guinea. Ms Wishart said in a 13 April 2016 email to Mr Willis that "PIH does not currently offer psychological counselling services," but that "[m]ental health support will be provided by IHMS clinicians in [Port Moresby]".

Gynaecological expertise

351 Professor de Costa and Dr O'Connor were the applicant's primary witnesses on this issue. The focus of their evidence, in the end, was not upon the gynaecological expertise necessary to carry out a standard surgical abortion, but instead upon necessity that the surgical team specifically have expertise in cases of women with [redacted].

352 Professor de Costa, for example, accepted in her supplementary report that "purely from the point of view of Dr Sapuri's qualifications and the surgical equipment available at PIH, Dr Sapuri is qualified to perform the procedure of surgical TOP for [the applicant]." However, in her original report she said this:

[The applicant] has undergone a form of [redacted] when she was a child; ... I do not know the extent of the [redacted] procedure originally performed for her nor whether any vaginal or vulval damage was suffered by her as a consequence of the rape. In Australia now women with [redacted] are referred to specialist centres in larger city hospitals for management of the condition during and following pregnancy and childbirth. I would recommend that [the applicant] have access to the care provided by such a centre

353 Professor de Costa said that if the termination was not conducted in a safe manner, there was risk of haemorrhage, infection, damage to the uterus or adjacent organs such as bladder, subsequent infertility, and a risk of death. In the case of abortion carried out in an Australian hospital after adequate consultation with a neurologist, anaesthetist, and mental health experts, she said, the risk of all complications is negligible and the risk of death less than one in 100,000.

354 Dr Sapuri said as follows in relation to termination of pregnancy procedures at PIH:

10. All 4 operating theatres at PIH are fully equipped for a safe surgical abortion, including with suction cutterage equipment and both myself and the other OBGYN at the hospital, Dr Onne Rageau, are experienced in performing the procedure.
 11. I perform around 2 surgical terminations of pregnancy each month at PIH, including in cases where the pregnancy is the result of rape.
 12. I have also read and am familiar with the clinical practice guidelines for terminations of pregnancy in PNG which have been published by the PNG Department of Health.
 13. PIH can perform a surgical termination of pregnancy up to 20 weeks' of pregnancy.
 14. There are also 3 full-time anaesthetists at PIH who provide anaesthetist assessments and anaesthetists services for surgeries, including surgical terminations of pregnancy. Monitored total intravenous anaesthesia and new volatile inhalation anaesthetic desflurane are both available at PIH.
- ...
19. I have also come to know that the Applicant has [redacted]. In my experience [redacted] does not complicate a surgical abortion. I have performed surgical abortions on women with [redacted] in the past including when I worked at the Royal Women's Hospital in Melbourne and recently at PIH on a patient with extensive [redacted] who was transferred from the regional processing detention centre in Nauru.

355 Dr Sapuri's conclusion on this issue was at [20], as follows:

I would not perform a surgical abortion on the Applicant if I did not consider it was safe to do so. Based on the information currently available to me, and subject to ongoing assessment of the Applicant's condition, I believe it is safe to perform a surgical abortion on the Applicant at PIH. Of course, no surgical procedure is entirely safe in the sense that there is no risk of harm to the patient. In saying that, in my view, it would be safe for the Applicant to undergo a surgical abortion, I am expressing the view that the procedures can be considered safe because the risks associated with the procedure are within acceptable clinical tolerances.

356 All but the first sentence was received into evidence only on the limited basis that it is the belief of the witness together with an opinion, but confined to an opinion by a gynaecologist about the safety of a procedure identified from a gynaecological point of view.

357 Dr Sapuri also gave evidence as to this issue in cross-examination. He said around five or six weeks prior he had performed a surgical abortion on a woman with [redacted]. He said that [redacted] was not required in that case. It was put to him that, in that case, it was unlikely that the woman had [redacted]. He could not recall and did not have his clinical notes available to him while giving his evidence.

358 Dr O'Connor's report in reply to Dr Sapuri's addressed the issue of expertise in dealing with [redacted]. As I have stated earlier, Dr O'Connor's examination of the applicant revealed a [redacted]. She said, "I do not believe the issues around [redacted] in [the applicant's] circumstance can be appropriately, reliably and perhaps safely managed in PNG." She doubted that Dr Sapuri's experience in Papua New Guinea would have given him much exposure in relation to women with [redacted]. Dr O'Connor said as follows specifically in relation to standard practice in relation to [redacted]:

It would be standard practice to offer such a woman appropriate counselling and encouragement to have a [redacted] procedure carried out at the same time as the TOP, with a plan NOT to [redacted], if she would agree. A decision regarding the latter is often quite a challenge for a woman without the appropriate, knowledgeable counselling from a practitioner with relevant cross-cultural and practical experience as well as support from community members experienced in counselling peers who have also had [redacted] procedures (such as is available in major teaching hospitals in many Australian centres).

359 Dr O'Connor identified the risks associated with unsafe termination as including haemorrhage, infection, uterine perforation, damage to another organ, and any treatment to correct these including hysterectomy and blood transfusion, and exacerbation of any mental health issues.

Anaesthesia

360 As I outlined above, Dr Purcell opined that, if pregnancy aggravated refractory epilepsy, anaesthesia in an MRI may be required. He doubted that the specialised equipment for anaesthesia in an MRI suite was available in Papua New Guinea. Dr Sapuri's evidence concerning anaesthesia equipment at PIH is set out above. He did not say anything concerning whether anaesthesia in an MRI suite was possible at PIH.

361 Touching in part on this subject, Dr O'Connor said as follows:

The safety of anaesthesia and post-op care may be significantly influenced by her seizures which create an increased airway risk during anaesthesia and the perioperative period. We would require adequate assessment by an experienced neurologist (and possibly psychiatrist) in relation to diagnosis, immediate management around the time of termination, post-procedure and long-term care and treatment. This neurologist would then discuss with the anaesthetist and gynaecologist regarding the best approach to take in relation to methods of anaesthesia, agents to be used or avoided, a post-operative pain management and medication plan, as well as the longer term management of her seizures.

362 Dr Purcell indicated that complications that may arise included the following:

[S]evere unmanageable fitting (status epilepticus), due to physiological and pharmacological perturbations during the procedures. Other complications include bleeding, uterine rupture, peritonitis, sepsis, perineal injury and all require expert and individual assessment and management.

363 Dr Purcell thought that risks would be reduced in Australia: "A different professional culture and experience in terminations of high risk medical patients is available throughout Australia. Experience with newer, safer anaesthetic drugs and anaesthetic techniques, familiarity with anaesthesia in a MRI facility (highly magnetised), and experienced intensivists and neurosurgeons are all available in Australia and of satisfactory standard."

An interdisciplinary approach

364 There was an emphasis in much of the applicant's expert evidence on an interdisciplinary approach, involving consultation as between various professionals, and the risks associated with another approach. That was typified by the oral evidence of Professor Newman.

365 Professor Newman said that the applicant had "quite a complex medical and psychiatric presentation." She referred to the applicant's "pre-existing seizure disorder" and that "we're still unsure of what the nature of that actually is." The

applicant is in the position now of reporting sexual assault and unwanted pregnancy and has described, on Professor Newman's assessment, features relating to the stress of that such that Professor Newman's view is that "she constitutes quite a high risk of having complicated or negative outcomes," even with the requested termination.

366 Professor Newman's assessment was based on the standard that would be applied on the mainland for women of similar complexity: ie, pre-existing psychiatric or neurological problems, acute stress such as sexual assault, and being in a high-risk setting in terms of her understanding of her circumstances and fear of being unsupported, and being in a location with limited access to services. Professor Newman continued thus:

... [L]ooking at those factors in a holistic way, I come — my conclusion and my recommendation would be that she actually requires quite a — a comprehensive and coordinated treatment approach, and that a very important part of this treatment approach is, I mean, obviously, the importance of good medical or surgical care, but she also needs culturally appropriate and informed mental health specialist treatment, and the sort of treatment that I would be meaning there would be a mental health service with high-level expertise in women's mental health, with experts used to working with sexual assault and some of the issues that arise after that, and also where that care can be better coordinated with relationships with the surgeons and obstetricians involved in her care.

367 Professor Newman was asked what she meant by "culturally-informed services," and she replied that the applicant required clinical services with available expertise working with different cultural groups with religious and other sensitivities, and gender-related issues particular concerning sexual assault and termination. Ideally, Professor Newman said, there would be bilingual workers of the same cultural group which, to her knowledge, was available only in tertiary-level women's hospitals on the mainland.

The harm if no abortion was procured

368 As I have stated, it was admitted that the applicant's continued pregnancy would cause her to suffer further mental harm. It was also admitted that the performance of an abortion may lessen or alleviate some risk of harm to the applicant. Those matters are relevant.

369 Professor Newman's opinion was that if the termination was not undertaken in a timely fashion the applicant was likely to experience ongoing mental distress with associated agitation, anxiety and the potential risk of self-harming behaviours and emergent suicidal ideation. Professor Newman said that delay in decision-making and the undertaking of a termination procedure would be significant. There are cultural and religious issues which are important to the applicant in that, within her belief, termination must occur prior to 16 weeks to be socially and culturally acceptable. Psychologically, the applicant is likely to deteriorate in her mental state if there is not a timely resolution. Further, Professor Newman said that, because of her current living situation and issues related to her epilepsy, the applicant is in a state of agitation and vulnerability such that is very unlikely that her symptoms of anxiety will resolve.

370 Professor de Costa's opinion was that carrying the pregnancy to term placed the applicant at risk of further seizures leading to hypoxia, and increasing mental distress of an unwanted pregnancy resulting from rape. There were also risks to the foetus including from hypoxia and the risk of birth defects caused by anti-epileptic medicine.

- 371 Associate Professor Somerville also noted that anti-epileptic medicine may result in birth defects and reduced intellect in children. He further noted that seizures may be harmful to a foetus and result in miscarriage or premature labour. Sleep deprivation in late pregnancy, during labour, and when breastfeeding, may provoke seizures. The risks of seizures, as mentioned elsewhere, include injuries from falls and burns, drowning, choking on vomit, status epilepticus (with the potential to cause brain damage, a number of secondary medical problems including pneumonia, or death), and psychosocial impact.
- 372 Dr O'Connor stated that, in her experience, continuing with unwanted pregnancy, particularly in the case of rape, leads to poor outcomes for woman and child. The applicant's feelings of a lack of control over her life, and her social and cultural isolation in her community, are likely to increase. Dr O'Connor opined that continuing pregnancy would likely exacerbate her already-challenged mental health issues, and in particular that a failure to terminate prior to 16 weeks would cause significant cultural and religious issues and risk her not being able to access a termination at all. She identified that there were risks associated with correct management of her [redacted] at the time of delivery.
- 373 There is other evidence going to risk of harm to the applicant should a termination not be performed. In the First RMM, dated 1 April 2016 and authorised by Dr Rudolph, it was said that "[s]hould there be delays in performing the termination of pregnancy at an early stage, there are increased risks of mental health issues as well as intraoperative and post-operative complications such as bleeding and infection. [The applicant] is also at risk of significant mental health issues prenatally and postnatal which includes potential risks of post-natal depression and disengagement from the baby, should the termination not proceed." That RMM provided through Australian Border Force channels was ultimately authorised by Mr Nockels. In the email of 5 April 2016 from Ms Crivici of the Australian Border Force to Dr Sapuri, Ms Crivici relayed to Dr Sapuri the IHMS clinical advice.
- 374 Dr Sapuri asked for a self-harm report in his reply of 5 April 2016, which he said was "necessary to comply with [the] Laws in PNG." That self-harm report was provided. It is worth noting that the report detailed an attempt by the applicant to drown herself and this statement by her: "be aware, I'm going to kill myself tonight."
- 375 On that basis, Dr Sapuri agreed to accept the case. He stated that a Dr Ragaue had reviewed the applicant and had agreed that termination was necessary to preserve her life. He said, at [15], that at PIH "we require 2 obstetricians to agree that a termination is necessary to preserve a woman's life before we perform the procedure." He also said that where the risk has a psychiatric element a psychiatrist's report is procured. That was done in this case in the form of the report from Dr Nad.
- 376 Another contextual element is that the Minister's case concerning legality of the procedure in Papua New Guinea seems to me to have been predicated precisely upon an abortion being necessary to preserve the applicant's life.
- 377 The Minister's case and oral submissions proceeded on the basis that the s 280 defence would apply to the applicant's case. That involves an acceptance that unless an abortion is performed the applicant's life is endangered.

Discussion

378 The overwhelming majority of the applicant's expert evidence was unchallenged. Associate Professor Somerville, Dr Purcell, and Professor de Costa were not called or cross-examined. Professor Newman and Dr O'Connor were called but not cross-examined. Dr Sapuri was a gynaecologist and did not purport to give evidence on matters neurological (so as to contradict Associate Professor Somerville), anaesthetic (so as to contradict Dr Purcell), or psychiatric (so as to contradict Professor Newman).

379 Dr Sapuri's evidence was not entirely on all fours with that of his gynaecologist colleagues — Professor de Costa and Dr O'Connor — but equally it was not markedly contradictory. That is, the main criticism advanced by the applicant as to the services available at PIH was that it did not have adequate experience dealing with [redacted]. Dr Sapuri's evidence disclosed that he had some such experience, but not much, and possibly none at all dealing with [redacted].

380 I accept the evidence of the experts called by the applicant. The evidence establishes that if the applicant had the abortion at PIH which the Minister has procured for her, she would be exposed to the risk of suffering the kinds of physical and psychological injuries that the medical experts have identified as risks which could be alleviated if, broadly speaking, the following resources had also been procured:

- (i) the neurological expertise and neurological facilities referred to in the expert medical report of Associate Professor Ernest Somerville dated 19 April 2016, together with his expert medical report dated 27 April 2016; and
- (ii) the psychiatric expertise, and other resources including cross-cultural expertise, referred to in the expert medical report of Professor Louise Newman dated 18 April 2016, together with her email dated 27 April 2016; and
- (iii) the anaesthetic expertise and anaesthetic facilities referred to the expert medical report of Dr Gregory Purcell dated 20 April 2016; and
- (iv) the gynaecological expertise and experience, and the gynaecological facilities, referred to in the expert medical report of Professor Caroline de Costa dated 19 April 2016, together with her expert medical report dated 27 April 2016, and the expertise, experience and facilities referred to in the expert medical report of Dr Miriam O'Connor dated 20 April 2016, together with her expert medical report dated 27 April 2016.

381 I find that the evidence establishes that these resources are not available at PIH and have not been procured by the Minister.

382 I accept that, in the absence of those resources, there is a heightened risk of very serious physical and/or psychological harm to the applicant of the kind specified by the medical evidence called by her. There can be no doubt that a reasonable person in the Minister's position at the time an abortion was procured by the Minister would have foreseen that the applicant would be exposed to a risk of harm additional to the extent of risk that she would have been exposed to in a better-resourced medical setting such as Australia. Those additional risks are real and are not far-fetched. I also find that the same risk is foreseeable should the Minister procure an abortion for the applicant in a

medical setting analogous to that available in Papua New Guinea. What is more, in light of the applicant's medical evidence it is clear that any reasonable person in the Minister's position could not now fail to appreciate the risks.

383 Turning then to the possibility of risk to the applicant should the Minister not procure a safe abortion and the applicant carries her pregnancy to full-term, it is clear that that risk is also foreseeable.

384 Having given an affirmative answer to the first question raised by the *Shirt* formula in relation to each category of medical risk, I turn to consider the magnitude and degree of probability of the medical risks to which the applicant has been or may be exposed too. I deal first with the exposure to risk arising from an abortion at PIH together with the potential exposure to risk if an abortion was procured for the applicant in an equivalent medical setting to that provided in Papua New Guinea.

385 The magnitude of the neurological risks is high to extreme. One possibility envisaged by the medical evidence is status epilepticus leading to brain damage, pneumonia or death. The mental health risks are also high to extreme. One possibility envisaged by the evidence is that the applicant would take her own life. In relation to inadequate gynaecological experience with [redacted], Professor de Costa identified a range of consequences in what I would characterise as the high to extreme range, including infertility and death. The anaesthetic risks identified by Dr Purcell included complications with obviously severe consequences. Overall, the evidence justifies the finding that the magnitude of the medical risks is high to extreme.

386 The degree of probability of those risks occurring is a more difficult question on which the expert evidence does not provide me much assistance. However, the evidence is clear that each of the applicant's experts, whose evidence I have accepted, considers the risks to be sufficiently weighty that he or she would take measures to alleviate them. From that it may be safely inferred, that the probability of the occurrence of those risks is neither trivial nor insignificant. In other words, the risks are material.

387 As to the magnitude of the risks of harm to the applicant should she carry her pregnancy beyond 16 weeks and then to full term, I find those risks to be high to extreme in magnitude. They include the possibility of the applicant's death. Whilst the degree of probability of the occurrence of a risk of an extreme magnitude such as that may be low, the degree of probability of the occurrence of psychological injury of a high magnitude is, on the evidence I have accepted, very significant.

388 The final question in the *Shirt* formula, is a consideration of "the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have". As Mason J went on to say it is only when these matters are "balanced out" that "the standard or response to be ascribed to the reasonable man placed in the defendant's position" can be confidently asserted. As Gleeson CJ said in *Fahy* at [6], the factors identified by Mason J are "factors which are likely to enter into such a consideration" as factors which need to be "balanced out". The exercise (in totality) "involve[s] a judgment about reasonableness, and reasonableness is not amenable to exact calculation".

389 The Minister made no submission that the expense, difficulty or inconvenience of taking alleviating action provided a basis for not having taken or not now taking alleviating action. Nor was any evidence lead which would

have supported such a submission, beyond one very minor matter which I will shortly address. Indeed, as I have said, the Minister conceded in his submissions on relief, that hardship imposed on the Minister by an injunction would not be a “significant factor”.

390 The evidence of Mr Nockels positively established the absence of difficulty. In cross-examination, Mr Nockels was given several opportunities to identify “logistical” difficulties in procuring for the applicant an abortion in a country with medical settings like those of Australia. He did not raise inconvenience, but a fair reading of his evidence suggests that inconvenience arising from the need to identify an alternative country in which an abortion could be procured for the applicant in a medical setting comparable to that provided in Australia, may have existed. Beyond that factor, the prominence of which was not given particular significance by Mr Nockels, the evidence of Mr Nockels suggested that factors such as expense, logistics or inconvenience were not a problem faced by the Commonwealth, as the following evidence illustrates:

So what they were offering there — we know Australia has these standards, but there may be a third country — say, Singapore or New Zealand — that could be expected to have similar standards. You understand that?---Yes.

And there would be no legal or safety problem in those two locations?---Yes.

So you had the opportunity when you read this — you could have decided to agree to a transfer to Australia, as recommended. Yes?---Yes.

And that was just one flight from Port Moresby, which is done regularly by many, many people?---Yes.

So there’s no logistical difficulty involved in that?---No.

And you know that the suggestion is that, for this patient, it should be at an Australian teaching hospital. The Commonwealth has no problem in getting access to an Australian teaching hospital for medical services that this applicant would require?---Not that I’m aware of.

No. But you also had the opportunity — if, for a policy reason, you didn’t want to send her to Australia, you could have solved this problem by arranging for an abortion in New Zealand or Singapore. That’s correct?---That’s correct, although I would have relied on the advice from IHMS on which country could have been the option.

...

And you had the resources of the Federal Government available to you, throughout the world, to find a hospital in this region that could give a safe and lawful abortion. Can you think of one logistical difficulty in you making an inquiry and finding that out?---I had asked IHMS to provide us, because they are our service provider on health issues, to suggest to us what other--

391 The tenor of Mr Nockels’s evidence was not directed to identifying any difficulty in alleviating the risks which I have identified the applicant faces. Before going directly to that evidence, it is necessary to recall that the applicant’s medical evidence largely identified the risks to the applicant by reference to Australian standards of medical care. The resources that were lacking at PIH, which raised the risks identified, were all resources that the expert evidence established were available and would be supplied in an Australian medical setting.

392 Mr Nockels had no difficulty with the proposition that the applicant should be provided with the standard of medical care available in Australia. His evidence was that, in the context of the applicant’s circumstances (which required assistance to be procured outside of Nauru), Australian standards are regarded

as the “base line” and were the expected “starting point” to have been used by IHMS in recommending a suitable medical setting for the applicant’s abortion. This was the evidence of Mr Nockels on that issue:

Was it your opinion on 26 April that in assessing the medical needs of the applicant, Australian medical standards should be used as the baseline?---No. Not at that stage. No.

At 26 April?---Yes. In terms of — in my mind, in terms of when I was making that decision on the 26th.

Yes. Please — did you believe that Australian standards should be used as a baseline prior to the 26th?---Yes.

Okay. Could you tell me — let’s start with that. At what stage did you believe Australian standards should be used as a baseline by IHMS for assessing refugees and asylum seekers in Nauru and Papua New Guinea?---So — so IHMS should — should, obviously, use that baseline as a starting point, yes.

Starting point? Do we go up and improve on it, or do we finish below it? What do you mean, “as a starting point”?---That’s their — that’s the baseline.

You know a baseline in this context — just so we’re not at odds?---Yes.

---is the standard that they’re entitled to expect?---Yes.

Now, do you have any quarrel with refugees and asylum seekers in Nauru and Papua New Guinea being offered Australian standards in their healthcare, to the---?---No.

Thank you. Now, on 26 April, you hadn’t changed your opinion about that, had you?---About using Australian standards?

As the baseline for this---?---No.

---applicant’s treatment?---No.

So if Australian standards could not be obtained at the PIH, then you would have no difficulty in saying she should be transferred to a place where Australian standards could be obtained for her abortion?---That would be one option. Yes.

Well, can you tell me any other option?---That we could get the standard to her where she is.

Sorry?---That we could take that standard to her, ie, if---

No. I’m not talking about location now. Location we will come to. I promise I will give you plenty of opportunity to talk about location. I’m talking about the health standards to which she’s entitled, not the place where she’s to get it. So on 26 April, you were of the view she was entitled to have Australian standards---?---Yes.

---in respect of her abortion; is that correct?---Yes.

393 The extent to which Mr Nockels did not regard expense, difficulty or inconvenience as inhibiting factors is revealed by his acceptance that the Commonwealth may be prepared to take the actions identified in the following question:

So is what you’re saying to me, is to maintain the policy in Australia of not sending anyone to Australia in Plaintiff S99/2016’s position because she’s not an exceptional case, you would fly over an EEG unit, an expert neurologist, if you can find one, a psychiatrist, an anaesthetist and someone who has had prior experience on [redacted], as well as the necessary counselling required before and after the operation and before and after the [redacted]. You would fly that whole team over to PNG because this is not an exceptional case? Is that what you’re saying?---It could be an option. I’m not saying I would take that option.

394 The Minister’s position, as put through the evidence of Mr Nockels and also in submissions, was not that there are difficulties to be faced in alleviating the

risks facing the applicant, but that there are no risks which need to be alleviated. That addresses a different issue to the issue currently under consideration. It is, in any event, a proposition which I have already rejected.

395 The point raised does, however, re-surface as I will explain. Mr Nockels gave evidence that his decisions to procure the applicant an abortion in Papua New Guinea and not elsewhere were based upon a departmental policy which he initially described as “ensuring that IMAs [Irregular Maritime Arrivals] are treated in a third country outside of Australia for medical support”. Later in his evidence, Mr Nockels confirmed that the policy allowed for “exceptional circumstances”.

396 The Minister did not make a submission that the policy just described (“Policy”) justified not alleviating the risk faced by the applicant. Nor did Mr Nockels expressly do that through his evidence. But his evidence was that the Policy was the primary consideration in the decisions he made not to procure an abortion for the applicant other than in Papua New Guinea. In that respect he rejected that the applicant’s circumstances fell into the category of “exceptional circumstances”.

397 Despite it not being put by the Minister, I would accept that a governmental policy can be an alleviating factor to be taken into account in the application of the *Shirt* formula. The reference by Mason J to “any other conflicting responsibilities which the defendant may have” is wide enough to encompass governmental policy as a factor. But the extent to which governmental policy may justify the non-alleviation of a risk will depend upon at least two considerations. *First*, whether the policy relevantly stands in the way of alleviation and to what extent, and, *second*, like all alleviating factors, the weight to be given to it in the “balancing out” process.

398 I only need to consider the first consideration. The second only arises if the Policy materially stood in the way of the alleviation of the risks faced by the applicant, and I find that it does not. The Policy only stands in the way of the prospect of alleviation, if bringing the applicant to Australia was the only feasible option for alleviating the risk. Even if that were the fact, the Policy only has application if the applicant’s circumstances do not fall within the “exceptional circumstances” exclusion.

399 As to the first consideration, no case has been made that there is no feasible option other than Australia, for alleviating the risks faced by the applicant. As the extract at [390] shows, Mr Nockels accepted that it could be expected that Singapore or New Zealand would provide medical services equivalent to those in Australia. He saw no legal or safety problem in those two locations and if, for a policy reason, Australia was not an option, Mr Nockels accepted, subject to getting the advice of IHMS, that he could have “solved this problem by arranging an abortion in New Zealand or Singapore”. I note further, that in the Third RMM, IHMS suggested that the applicant could be referred for care to a “third country” which when read in context, meant a country other than Papua New Guinea or Australia.

400 Again, the import of the evidence of Mr Nockels was not directed at demonstrating a difficulty in finding an alternative to Papua New Guinea. His evidence was directed to the absence of relevant risk in that location. That was essentially the basis for Mr Nockels’s contention that the applicant’s circumstances were not “exceptional” so as to allow for Australian-based care as an option.

401 It is not necessary for me to enter that debate as I am not persuaded that
feasible options outside of Australia are unavailable. However, a brief recount
of the reasoning advanced by Mr Nockels demonstrates the implausibility of his
position that the applicant's circumstances are not exceptional.

402 Mr Nockels's position was that the applicant's circumstances were not
exceptional to a degree sufficient so that she might be brought to Australia,
because Dr Sapuri had advised that he could perform the abortion in Papua New
Guinea. Mr Nockels came to or continued to hold that view despite:

- having accepted that he had no expertise and was reliant on IHMS to
advise him on the appropriate needs for the conduct of a surgical
abortion;
- IHMS having advised him that a surgical abortion should take place in
Australia;
- his knowledge that PIH did not have neurological services of the kind
IHMS had advised were required;
- having read the neurological, psychiatric and anaesthetic evidence
called by the applicant in this proceeding as well as the evidence of the
risks occasioned by [redacted] and having no reason to doubt that
evidence;
- having not discussed that evidence with Dr Sapuri (who, in any event,
would not have had the relevant expertise to contradict most if not all
of the applicant's experts); and
- having accepted that the baseline care appropriate was the Australian
standard of care but not knowing whether Dr Sapuri's advice was based
on the application of PNG standards or Australian standards.

403 Furthermore, as to whether the legality of the abortion procured in Papua
New Guinea provided a basis for saying that the circumstances were
exceptional, Mr Nockels said he had assumed that Dr Sapuri would have an
understanding of the "legal framework". In that context, and without seeking
legal advice, he relied and continues to rely on Dr Sapuri's understanding,
despite recognising that there is a serious issue raised about the legality of an
abortion for the applicant in Papua New Guinea.

404 There are, in my view, no material considerations established on the evidence
which weigh against or reasonably excuse the need for the Minister to have
alleviated the risks to the applicant which I have found exist. I make that finding
as to the medical risks, as to the legal risks and as to the combination of those
risks. I do so with particular regard to the findings I have made as to the
magnitude of the risks involved which, in each case, lead me to the conclusion
that the risks are grave. I consider that a reasonable person in the Minister's
position would have alleviated and should alleviate those risks.

405 I find that by procuring (in the sense of obtaining or making available) an
abortion for the applicant in Papua New Guinea, the Minister failed to exercise
reasonable care in the discharge of the responsibility that he assumed to procure
for the applicant a safe and lawful abortion. Accordingly, there was no discharge
of the duty effected. Having not already procured for the applicant a safe and
lawful abortion in the circumstances detailed by the evidence which I have
accepted, and having indicated no intention to do so, I further find that the
applicant has established a reasonable apprehension that the Minister will not do
so. I also find that damage is likely to be caused to the applicant should the
Minister not procure for her a safe and lawful abortion. In each case, by "safe

and lawful abortion” I mean an abortion that that addresses the risks identified by the applicant’s medical experts and that is free of the risk of the applicant being charged or convicted of unlawful conduct.

406 In arriving at those conclusions, I have considered the Minister’s contention that there is no breach or no apprehended breach, as the standard of care must be assessed by reference to the medical services reasonably available in Papua New Guinea. In part, the Minister based that submission on the proper law being Papua New Guinean law and that the standard of care must therefore be assessed by reference to the medical services reasonably available in that country. I reject that submission for two reasons. *First*, I have found that the proper law is Australia. *Second*, I have earlier held that in the absence of evidence as to the tort law of Papua New Guinea, I must presume that the law is the same as the law of Australia. That means that whether the proper law is Australia or Papua New Guinea, the *Shirt* formula is to be applied. I fail to see a basis, and none was suggested, as to how the application of the *Shirt* formula would lead to a different result in this case, on the basis that the law of Papua New Guinea is the proper law. Again, it must be recognised that the breach alleged relates to the procurement, done in Canberra, of a service, and not the delivery of a service in Papua New Guinea. If the delivery of a medical service in Papua New Guinea by, for instance, a Papua New Guinean doctor was the alleged wrongful act, there may be a basis for that wrong to be assessed by reference to the standards of medical practice in Papua New Guinea. But that is not this case. The defendant here is a wealthy and advanced sovereign state. The reasonableness of its act of procurement, in Australia, of particular services is to be assessed by reference to what a reasonable defendant in that position would have done. I do not consider that, in those circumstances, the application of the *Shirt* formula would lead to a different result, whichever of the two competing contentions as to the proper law is accepted.

407 *Second*, the Minister submitted that if the proper law was Australia, the standard of care required should be informed by the medical care available in the country in which the applicant is found. That is reasoning directed at the factual position of the applicant rather than to the focus of the *Shirt* formula, which is the position of a reasonable person in the defendant’s position. It is a submission which ignores the significance of where the wrongful act of the defendant took place.

408 On the Minister’s approach, despite the wrongful act having occurred in Australia, the standard of medical care in the country where a plaintiff happens to be taken for medical treatment, would determine the applicable standard. That would be so irrespective of the options available to the defendant for procuring the medical assistance. To illustrate by reference to facts not relevantly dissimilar to those at hand: if an employee of the Commonwealth was very seriously burnt on Nauru and, by reason of a procurement of medical assistance done in Canberra, was taken to Papua New Guinea for treatment, rather than to the highly-specialised burns unit at the Royal Brisbane Hospital, on the Minister’s contention, the standard of care would be “attenuated” to the Papua New Guinean standards of medical care. The result would be that the procurement of medical assistance in Papua New Guinea rather than Brisbane would not provide a foundation for the employee to recover for injuries sustained by reason of the absence of a sophisticated burns unit in Papua New Guinea. That could not be the law. It would result in the wrongful act (the

careless act of procuring) escaping an assessment as to its reasonableness. The applicant's circumstances are not relevantly different. It was not suggested by the Minister that they were different because of the applicant's status. If it matters (which I doubt), and insofar as the Minister relied on the applicant's consent to travel to Papua New Guinea, I have found that her informed consent was not given.

Relief

Section 474 of the Act

409 The Minister raised, in answer to the applicant's prayer for injunctive relief, s 474 of the Act. That section, and also the headings of its Part and Division, are as follows:

Part 8 — Judicial review

Division 1 — Privative clause

474 Decisions under Act are final

- (1) A privative clause decision:
 - (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.
- (2) In this section:

privative clause decision means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5).
- (3) A reference in this section to a decision includes a reference to the following:
 - (a) granting, making, varying, suspending, cancelling, revoking or refusing to make an order or determination;
 - (b) granting, giving, suspending, cancelling, revoking or refusing to give a certificate, direction, approval, consent or permission (including a visa);
 - (c) granting, issuing, suspending, cancelling, revoking or refusing to issue an authority or other instrument;
 - (d) imposing, or refusing to remove, a condition or restriction;
 - (e) making or revoking, or refusing to make or revoke, a declaration, demand or requirement;
 - (f) retaining, or refusing to deliver up, an article;
 - (g) doing or refusing to do any other act or thing;
 - (h) conduct preparatory to the making of a decision, including the taking of evidence or the holding of an inquiry or investigation;
 - (i) a decision on review of a decision, irrespective of whether the decision on review is taken under this Act or a regulation or other instrument under this Act, or under another Act;
 - (j) a failure or refusal to make a decision.
- (4) For the purposes of subsection (2), a decision under a provision, or under a regulation or other instrument made under a provision, set out in the following table is not a privative clause decision:

...

410 The Minister's argument was that mandatory injunctions could not issue because their effect would be to "require the Commonwealth to take actions authorised by s 198B, or s 198AHA, of the Act." He continued, "[s]uch actions, and the failure or refusal to take such actions, are 'privative clause decisions' in the light of s 474(2) and (3)(g) and therefore, under s 474(1)(c), are not subject to injunction 'in any court on any account'."

411 There can be no doubt that a decision by the Minister to exercise powers under s 198AHA or s 198B, or to exercise them in a particular way, or to refuse to exercise those powers, would be a "decision" within the meaning of s 474(3). Any such decision that the Minister "made", or "proposed to make," would be a "privative clause decision" within the meaning of s 474(2). That has the consequence that any such decision is "final and conclusive", that it "must not be challenged, appealed against, reviewed, quashed or called in question", and "is not subject to ... injunction ... on any account." It was this final limitation upon which the Minister principally relied.

412 The question, then, is this: would issuing an injunction in this case requiring the taking of action by the Minister or the Commonwealth, or prohibiting it being taken which action may be performed using statutory powers including s 198AHA, constitute the "subject[ing of]" a "privative clause decision" to injunction? I have concluded that it would not.

Cases concerning ss 476A and 486A

413 The Minister took me to one case only in relation to the effect of s 474 of the Act, being *Beyazkilinc v Manager, Baxter Immigration Reception and Processing Centre* (2006) 155 FCR 465. But, as I will now set out, there are quite a few judgments, including from the High Court and Full Courts of this Court, that bear upon the proper interpretation of the section.

414 The meaning of the phrase "in relation to a migration decision", as used in ss 476A and 486A, has been considered in a number of cases. I will start with *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, which concerned s 486A of the Act. At the time, that section provided, relevantly, as follows:

486A Time limit on applications to the High Court for judicial review

(1) An application to the High Court for a remedy to be granted in exercise of the court's original jurisdiction in relation to a migration decision must be made to the court within 28 days of the actual (as opposed to deemed) notification of the decision.

(1A) The High Court may, by order, extend that 28 day period by up to 56 days if:

- (a) an application for that order is made within 84 days of the actual (as opposed to deemed) notification of the decision; and
- (b) the High Court is satisfied that it is in the interests of the administration of justice to do so.

415 In *Bodruddaza*, the Minister's delegate refused an application for a residency visa on the basis that Bodruddaza had not obtained the requisite number of points prescribed by the regulations (because he had failed to achieve the requisite language skills scores). Bodruddaza applied to the Migration Review Tribunal, out of time, for review of that decision. The Tribunal determined it had no power to extend time and thus that it had no jurisdiction to review. Bodruddaza applied to the High Court for certiorari, prohibition and mandamus

asserting jurisdictional error on the part of the delegate. That application was made outside the 84 days prescribed by s 486A for a “remedy ... in relation to a migration decision.” “Migration decision” was defined in s 5(1) to include a privative clause decision — which is in issue in this case — a purported privative clause decision, or a non-privative clause decision.

416 A relevant question concerned the meaning of the phrase “a remedy ... in relation to a migration decision.” At [21]-[25], the Court (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ) resolved the competing submissions on the issue in the following way:

[21] The Solicitor-General of the Commonwealth submitted that the phrase in s 486A(1) “a remedy ... in relation to a migration decision” was sufficiently broad to encompass more than applications for judicial review. *He submitted that, for example, unless the plaintiff complied with s 486A, an action in tort would not lie in the original jurisdiction of this Court against the Commonwealth for false imprisonment where an officer had detained the plaintiff as an unlawful non-citizen without the knowledge or reasonable suspicion stipulated by s 189 of the Act.*

[22] *Counsel for the plaintiff advanced cogent reasons why the phrase “a remedy ... in relation to a migration decision” should not be given a reading which would take s 486A beyond public law remedies and into the area of what might be called collateral attack upon migration decisions.*

[23] First, the plaintiff emphasised the extensive scope of the definition of “migration decision” in s 5(1), and in particular the inclusion of proposed decisions in the definition of “purported privative clause decision” found in s 5E. *The tortious conduct completing a cause of action might well take place after the end of the eighty-four day period stipulated in s 486A by reference to actual notification of a migration decision. Such a draconian, if not irrational, legislative scheme should not be attributed to the Parliament in the absence of clear words.*

[24] Secondly, the perceived mischief to which the 2005 Act was directed concerned the challenge by judicial review processes to migration decisions. The application to this Court identified in s 486A(1) is “for a remedy” by way of judicial review, specifically in a s 75(v) matter. The Explanatory Memorandum on the Bill for the 2005 Act circulated by the authority of the Attorney-General to the House of Representatives is instructive in this respect. Section 486A was one of several provisions included in the 2005 Act amendments with the avowed objective “to impose uniform time limits for applications for judicial review of migration decisions in the [Federal Magistrates Court], the Federal Court (in the limited circumstances that migration cases will be commenced in that Court) and the High Court”.

[25] *Accordingly, the submission now made by the Solicitor-General which would give broader reach to s 486A should not be accepted.*

(Emphasis added; citations omitted.)

417 In other words, the Court construed the words “a remedy ... in relation to a migration decision” as applying only to judicial review applications, that is, in relation to *public law* remedies sought in relation to a migration decision. The words “a remedy ... in relation to a migration decision” did not capture, for example, an action in tort for false imprisonment relating to detention purportedly under s 189 of the Act (as the Solicitor-General had submitted that it did). A plaintiff would not be precluded by s 486A(1) from bringing an action in false imprisonment after the 84-day period prescribed by the section.

418 In *Fernando v Minister for Immigration and Citizenship* (2007) 165 FCR 471, Siopis J was called upon to consider s 476A. That section provided, at the time, as follows:

- (1) Despite any other law, including section 39B of the *Judiciary Act 1903* and section 8 of the *Administrative Decisions (Judicial Review) Act 1977*, the Federal Court has original jurisdiction in relation to a migration decision if, and only if:
 - (a) the Federal Magistrates Court transfers a proceeding pending in that court in relation to the decision to the Federal Court under section 39 of the *Federal Magistrates Act 1999*; or
 - (b) the decision is a privative clause decision, or a purported privative clause decision, of the Administrative Appeals Tribunal on review under section 500; or
 - (c) the decision is a privative clause decision, or purported privative clause decision, made personally by the Minister under section 501, 501A, 501B or 501C; or
 - (d) the Federal Court has jurisdiction in relation to the decision under subsection 44(3) or 45(2) of the *Administrative Appeals Tribunal Act 1975*.
- (2) Where the Federal Court has jurisdiction in relation to a migration decision under paragraph (1)(a), (b) or (c), that jurisdiction is the same as the jurisdiction of the High Court under paragraph 75(v) of the *Constitution*.

419 The applicant had sought damages for false imprisonment after being held in detention. The question, again, was whether the action was “in relation to a migration decision.” Siopis J held that it was not, and that the Court had jurisdiction to consider the claim.

420 The respondent had argued that the detention of the applicant was a “privative clause decision,” and thus within the meaning of a “migration decision,” because the detention of the applicant was the “doing of an act” and fell within s 474(3)(g). The respondent submitted that the claim for damages for false imprisonment amounted to a “collateral attack” on a migration decision and that the Court had no jurisdiction to consider the claim (see [16]). His Honour assumed for the sake of the argument that the detention of the applicant was a “privative clause decision” (at [17]). At [19], Siopis J identified the question as being whether, by enacting s 476A, the Parliament intended to deprive the court of original jurisdiction “to hear and determine a claim for damages for false imprisonment arising from actions that were taken under the Act, because such a claim could comprise a collateral attack on the lawfulness of a migration decision.”

421 Siopis J set out, at [21], paragraphs [21]-[25] of *Bodruddaza*, which I have quoted above. At [22], his Honour concluded as follows:

In my view, the observations of the High Court in relation to the legislative intention of the 2005 Act apply *mutatis mutandis* to the amendments made to the Act by the insertion of s 476A. Accordingly, the limitations imposed by that section on the original jurisdiction of the Federal Court were intended to apply only to the “challenge by the judicial review processes to migration decisions”. It follows that the original jurisdiction of the Federal Court under s 39B(1A)(c) of the *Judiciary Act*, to hear and determine a claim for common law damages for false imprisonment arising from detention under the Act, is not affected by

s 476A. In other words, s 476A(1) of the Act is to be read as if the words “an application for judicial review of”, were inserted between the words “in relation to” and “a migration decision”

422 In *Tang v Minister for Immigration and Citizenship* (2013) 217 FCR 55, Rares, Perram and Wigney JJ were also called upon to consider s 476A. In that case, the applicant applied too late for judicial review of a decision by the Migration Review Tribunal in relation to his student visa. The Federal Circuit Court refused to grant an extension of time. The applicant commenced proceedings in the High Court seeking constitutional writs against the Federal Circuit Court, and the application was remitted to the Federal Court. The primary judge dismissed it. On appeal to a Full Court, a preliminary question was whether the Federal Court had jurisdiction to hear the application in light of s 476A.

423 The Full Court observed that Tribunal’s decision was a “migration decision” but that the decision of the Federal Circuit Court was not (at [3]). Their Honours stated that, in light of s 476A(1), the Federal Court only had jurisdiction if the proceeding was not “in relation to” a “migration decision.” Evidently without being taken to *Fernando*, the Full Court reached the same conclusion as Siopis J. At [6]-[9], their Honours said this:

[6] In this case the statutory context requires that the phrase be given a circumscribed meaning. Section 476A of the Act appears in Div 2 of Pt 8 of the Act which is entitled, and governs, “Judicial Review” of migration decisions. Whether valid or invalid, a decision of a tribunal dealing with issues of migration is defined to be a “privative clause decision” (s 474) and all such decisions are defined to be “migration decisions” (s 5). ...

[7] The expression “in relation to a migration decision” appears throughout Div 2 of Pt 8. In particular, ss 477 and 477A require proceedings “in relation to a migration decision” in the original jurisdiction of the Federal Circuit Court and in this Court’s circumscribed original jurisdiction to be commenced within 35 days of the migration decision. These time limits make little sense if proceedings “in relation to a migration decision” were to include collateral challenges to the underlying migration decision such as might occur in a case alleging false imprisonment. It is established, therefore, that such a challenge is not caught by s 486A of the Act: *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651. That decision does not directly govern this case because Mr Tang’s proceeding does not involve a collateral challenge to the decision not to reinstate his visa and because s 486A (which placed time limits on when an application to the High Court “in relation to a migration” had to be made) is contained in Pt 8A and not Div 2 of Pt 8. There is no relevant difference, however, between Pt 8A and Div 2 of Pt 8 in relation to the issue of construction which arises and the presence of s 486A in Pt 8A may be put aside.

[8] *Bodruddaza* does nevertheless establish, that “in relation to” has a narrower operation in the present context than its ordinary meaning might otherwise suggest. In *Bodruddaza* the High Court held that the expression “a remedy ... in relation to a migration decision” in s 486A “should not be given a reading which would take s 486A beyond public law remedies and into the area of what might be called collateral attack upon migration decisions” (at [22]; see also: [25] and [79]). This does not directly control the outcome of this matter either because Mr Tang’s application is properly characterised as one which seeks a public law remedy, namely, writs of mandamus and certiorari against an officer of the Commonwealth.

On the other hand, one of the reasons the High Court accepted the limitation on s 486A (at [24]) was that given in the Explanatory Memorandum for the *Migration Litigation Reform Bill 2005* (Cth) which accompanied its introduction. That showed that the legislation was introduced with the avowed objective “to impose uniform time limits for applications for judicial review of migration decisions in the [Federal Magistrates Court], the Federal Court (in the limited circumstances that migration cases will be commenced in that Court) and the High Court”.

[9] That objective would not be served by extending the concept of proceedings “in relation to a migration decision” to include cases where judicial review is sought of orders made by the Federal Circuit Court in respect of an underlying migration decision. Although it is also true that the broader interpretation would not hinder the achievement of that objective we do not consider that it is the interpretation which would “best achieve the purpose or object of the Act”: cf *Acts Interpretation Act 1901* (Cth), s 15AA. *Consequently, we conclude that Div 2 of Pt 8 of the Act is confined by the use of the expression “in relation to a migration decision” to applications for direct judicial review of migration decisions and does not extend to ancillary judicial review proceedings in respect of orders made in proceedings of that kind.*

(Emphasis added.)

424 I was taken in submissions to two cases in which judges of this Court considered making injunctions in relation to a breach of a duty of care: *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 217 (Finn J) and *MZYR v Secretary, Department of Immigration and Citizenship* (2012) 292 ALR 659 (Gordon J). At [263] of *S*, Finn J said that he would have been prepared to grant injunctive relief against the Commonwealth exposing the applicants to likelihood of harm, but as they had already been transferred to a mental health facility an injunction was unnecessary.

425 At [55] of *MZYR*, Gordon J said that she was not yet persuaded that the Court lacked power to restrain a continuing tort. That was in response to a submission by the respondents recorded at [49], that “the court has no power to order the minister to make a determination under s 197AB of the Act and no power to compel the minister to approve a specific new place of ‘immigration detention’.” That seemed to be based upon the associated submission at [50] that “it was not possible to craft an order which was certain in its terms and, at the same time, would satisfy the statutory regime.” I do not think that submission was based on s 474 or a submission that the Court did not have the power to issue an injunction: at [20], Gordon J records that it was not in dispute that:

The court has power, in an appropriate case, to restrain the Minister for Immigration and Citizenship’s agents from causing a person’s immigration detention to continue at a place or in a form that constitutes a *continuing* tort: *Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Mastipour* (2004) 207 ALR 83; [2004] FCAFC 93 at [127]-[129] and [137], see also [1]-[4] and [14]; *S* at [218] and [232]. ...

(Emphasis in original.)

426 In *Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Mastipour* (2004) 207 ALR 83, the applicant (a detainee in the Baxter detention centre) sought damages for breach of duty associated with his treatment while in detention, and he sought injunctive orders that he be removed

from the Baxter facility. The primary judge made interlocutory order requiring the Secretary to move the applicant to either the Villawood or the Maribyrnong detention centre. An appeal was made against that order. On appeal, Lander J (with whom Finn and Selway JJ agreed) allowed the appeal but only for the purpose of substituting a different injunctive order, namely this:

Until the trial of this action or until further order, whichever first occurs, an injunction is hereby granted restraining the first respondent (the secretary) from:

- (1) Detaining the applicant (Mr Mastipour) at the Baxter Reception and Processing Centre in Port Augusta, South Australia; or
- (2) Removing the applicant (Mr Mastipour) to the Port Hedland Reception and Processing Centre in Western Australia.

427 In *SBEG v Secretary, Department of Immigration and Citizenship (No 2)* (2012) 292 ALR 29, the applicant commenced proceedings against the Commonwealth seeking a permanent injunction with respect to his mental health needs and the circumstances and place of his detention, and also damages. The applicant failed, but not because the relief he sought was unavailable: Besanko J held that the scope of the Commonwealth's duty of care did not extend to devising a form of detention for the applicant under a particular paragraph of the definition of "immigration detention" (at [117]).

Extrinsic materials

428 It was important in the reasoning of *Bodruddaza*, *Fernando*, and *Tang* that the sections there under consideration were directed at "judicial review processes" (see *Bodruddaza* at [24], *Fernando* at [22]) or at "direct judicial review" (*Tang* at [9]). Section 486A was added by the *Migration Legislation Amendment Act (No 1) 2001* (Cth) ("Legislation Amendment Act"). The Explanatory Memorandum for the Bill for that Act provided, at [2] of the "overview" and [7] of the explanatory material for Sch 1, as follows:

2 Schedule 1 to the Bill makes a number of amendments relating to the judicial review scheme set out at Part 8 of the Act and introduces a new Part 8A into the Act. *These amendments flow from the Government's policy intention of restricting access to judicial review in visa related matters in all but exceptional circumstances. ...*

7 New subsection 486A(1) provides that an application to the High Court in its original jurisdiction under the Constitution for judicial review of a decision covered by subsection 475(1), (2) or (3) must be made within 28 days of the notification of the decision. ...

(Emphasis added.)

429 As noted at [24] of *Bodruddaza*, the purpose of the *Migration Litigation Reform Act 2005* (Cth), which amended s 486A, was similarly targeted. Point (iii) of the "General Outline" states, "[t]he Bill includes amendments to impose uniform time limits for applications for judicial review of migration decisions in the FMC, the Federal Court (in the limited circumstances that migration cases will be commenced in that Court) and the High Court" (emphasis added).

430 It is evident from the explanatory material to the Bill that amended s 474 into its now-familiar form that its target was the same. On 27 September 2001, the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) ("Judicial Review Act") was assented to. The Explanatory Memorandum to the *Migration*

Legislation Amendment (Judicial Review) Bill 1998 (Cth) (later the *Migration Legislation Amendment (Judicial Review) Bill 2001* (Cth)) (“Judicial Review Bill”), said, *inter alia*, as follows:

- 3 The amendments to the *Migration Act 1958* and the *Administrative Decisions (Judicial Review) Act 1977*, in relation to **judicial review of immigration decision-making**:
- introduce a **new judicial review scheme**, in particular a privative clause, to cover decisions made under the *Migration Act 1958* relating to the ability of non-citizens to enter and remain in Australia;
 - apply the **new judicial review scheme** to both the Federal Court and the High Court; and

...

FINANCIAL IMPACT STATEMENT

- 4 The amendments to the *Migration Act 1958* **in relation to judicial review of immigration decision-making** will, if they operate as predicted by reducing the issues to be addressed and allowing cases to be resolved more quickly, deliver substantial savings. It will take some time before the scheme is fully effective given a backlog of cases to which it will not apply and for any initial court challenges to it to be resolved.

...

Item 3 Subsection 5(1)

- 8 A new definition — “privative clause decision” — is inserted **in relation to the new judicial review provisions** for those decisions covered by new subsection 474(1) and made under the Migration Act (or regulations or other instruments made under that Act).

...

474 Decisions under Act are final

- 14 New subsection 474(1) introduces a privative clause for decisions made under the Migration Act, regulations made under that Act or other instruments under that Act except for decisions made under the provisions set out in new subsection 474(4) or as prescribed under new subsection 474(5). **A privative clause affects the extent of judicial review by both the Federal Court and the High Court of decisions covered by the clause.**
- 15 **A privative clause is a provision which, although on its face purports to oust all judicial review, in operation, by altering the substantive law, limits review by the courts to certain grounds.** Such a clause has been interpreted by the High Court, in a line of authority stemming from the judgment of Dixon J in *R v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598, to mean that a court can still review matters but the available grounds are confined to exceeding constitutional limits, narrow jurisdictional error or *mala fides*.
- 16 The intention of the provision is to provide decision-makers with wider lawful operation for their decisions such that, provided the decision-maker is acting in good faith, has been given the authority to make the decision concerned (for example, by delegation of the power from the Minister or by virtue of holding a particular office) and does not exceed constitutional limits, the decision will be lawful

(Bold emphasis added.)

431 The Minister's Second Reading Speech was equally as clear (Commonwealth, *Parliamentary Debates*, House of Representatives, 26 September 2001, 31559 (Philip Ruddock)) at 31559:

The bill gives legislative effect to the government's longstanding commitment to introduce *legislation that in migration matters will restrict access to judicial review in all but exceptional circumstances*. This commitment was made in light of the extensive merits review rights in the migration legislation and concerns about the growing cost and incidence of migration litigation and the associated delays in removal of non-citizens with no right to remain in Australia.

It is worth noting that the language in the italicised passage in the foregoing — “restrict access to judicial review is all but exceptional circumstances” — is nearly identical to the purpose mentioned of the insertion of provisions including s 486A, quoted above at [428] — “restricting access to judicial review in visa related matters in all but exceptional circumstances”. The Minister continued:

The bill introduces a new judicial review scheme ...

The privative clause does not mean that access to the courts is denied, nor that only the High Court can hear migration matters. *Both the Federal Court and the High Court can hear migration matters, but the grounds of judicial review before either court have been limited.*

...

Faced with the problem I have outlined, I asked the Department of Immigration and Multicultural Affairs in early 1996 to explore options for best achieving the government's policy objective of restricting access to judicial review. This was done in conjunction with the Attorney-General's Department, the Department of the Prime Minister and Cabinet and eminent legal counsel.

The advice received from legal counsel was that the only workable option was a privative clause.

...

It has been suggested that the introduction of a leave requirement would achieve the government's policy objective of restricting judicial review to “exceptional circumstances”. In the government's view, that is not a viable option. While it is possible to impose a leave requirement on the Federal Court, it is not constitutionally possible to do so with the High Court in its original constitutional jurisdiction. That would leave that court exposed to applicants going straight to the High Court in order to avoid any leave requirement imposed on the Federal Court. In any event, the imposition of a leave requirement could increase the complexity of the litigation and cause consequential delay and cost, and may in practice even double the number of hearings before the Federal Court. That would exacerbate those problems which the government is aiming to rectify.

...

The government has other legislative reforms of judicial review either in the parliament or about to be introduced to the parliament. Those reforms, such as the bar on class or other representative actions in visa related matters, and the codification of the natural justice or procedural fairness “hearing rule”, are complementary to this bill.

432 It is overwhelming clear that the Minister's concern was with judicial review. I also refer to the italicised passage in the last paragraph. That is likely a reference to the *Migration Legislation Amendment Bill (No 1) 2001* (Cth) (“Legislation Amendment Bill”). The Legislation Amendment Bill became the Legislation Amendment Act. It was assented to on the same day as the Judicial Review Act, and inserted s 486A

433 It is abundantly clear that the purpose of s 474 was to restrict judicial review of migration decisions. The act that inserted s 474 was assented to on the same day and as part of the same package of “legislative reforms of judicial review” that inserted s 486A. A unanimous High Court held that s 486A was confined to judicial review processes and was not intended to preclude, for example, an action in tort against the Commonwealth for false imprisonment. The same consideration led Siopis J to conclude that the phrase “in relation to a migration decision” should be read “in relation to an application for judicial review of a migration decision”. It seems to me that precisely the same course is open here, and for the same reasons. In essence, I would read the words “in an application for judicial review” between the words “is not” and “subject to prohibition”, and a corresponding phrase into s 474(1)(b) so that the section read thus:

- (1) A privative clause decision:
 - (a) is final and conclusive; and
 - (b) must not, *in an application for judicial review*, be challenged ...; and
 - (c) is not, *in an application for judicial review*, subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

Other cases

434 For completeness I must mention *Beyazkilinc* and *SGS v Minister for Immigration and Border Protection* (2015) 34 NTLR 224. In *Beyazkilinc* the applicant sought an injunction restraining his continued detention in any form of immigration detention that would inhibit his admission to and treatment at a mental health facility (“detention injunction”). He also sought an injunction restraining the respondent from removing him from Australia other than on certain conditions (“removal injunction”). Besanko J identified (at [16]) that the applicant made two claims: one in tort for breach of duty of care, and one that his proposed removal from Australia would be *ultra vires*. It was alleged (see [18]) that removal of the applicant from Australia would breach the duty of care.

435 At [29], Besanko J turned to consider whether the proposed removal of the applicant from Australia was a privative clause decision. His Honour held that it was (at [39]). His Honour then considered, at [40]-[45], whether there was an arguable case that the “privative clause decision” could be set aside for jurisdictional error. His Honour held that there was not. At [45] his Honour said that it followed from the terms of s 474 that the removal of the applicant from Australia was not to be the subject of an injunction, whether the claim was based on the allegation that removal was beyond power or whether on a breach of a duty of care.

436 His Honour was not, it seems, taken to *Bodruddaza, Fernando, Tang, S, MZYYR*, or any of the explanatory material concerning s 474. There is no discussion in his Honour’s judgment of whether s 474 was limited in its application to judicial review applications. Indeed, the point does not seem to have been argued before his Honour. With respect to his Honour, so far as *Beyazkilinc* holds that an injunction may not issue in respect of a claim against the Minister in tort, whether arising out of the exercise (or non-exercise) of statutory duties or not, I am of the opinion that it was plainly wrong. I would decline to follow it.

437 I am aware that the “plainly wrong” test is a high bar. But, as Greenwood J (with whom Sundberg J agreed) said in *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2007) 162 FCR 234 at [83], an instance of an error is “plainly wrong” is where there is a “failure to apply ... an authority of the High Court expressing a clear persuasive emphasis of opinion in favour of a particular conclusion (particularly concerning legislation of the Commonwealth Parliament).” In my opinion, the High Court’s judgment in *Bodruddaza* contains a relevant such “clear persuasive emphasis of opinion”.

438 *SGS* was a proceeding by a five-year-old girl who sued for damages for negligence suffered while in detention on Nauru, and for an injunction restraining her return to that centre. It was argued that the Northern Territory Supreme Court did not have jurisdiction in relation to *SGS*’s claims, because of s 484 of the Act. That provision provided as follows:

484. Exclusive jurisdiction of High Court, Federal Court and Federal Circuit Court

- (1) Only the High Court, the Federal Court and the Federal Circuit Court have jurisdiction in relation to migration decisions.
- (2) To avoid doubt, subsection (1) is not intended to confer jurisdiction on the High Court, the Federal Court or the Federal Circuit Court, but to exclude other courts from jurisdiction in relation to migration decisions.
- (3) To avoid doubt, despite section 67C of the *Judiciary Act 1903* (Cth), the Supreme Court of the Northern Territory does not have jurisdiction in relation to migration decisions.
- (4) To avoid doubt, jurisdiction in relation to migration decisions is not conferred on any court under the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth).

The question was whether the effect of that section was that the Supreme Court of the Northern Territory lacked jurisdiction to grant the injunctive relief sought.

439 His Honour noted (at [17]) that the defendants did not challenge the Court’s ability to hear the plaintiff’s claims in tort and grant the “normal remedy of damages.” The same concession was made in this case.

440 The plaintiff relied upon the principle of legality. Importantly, his Honour noted (at [21]) that “[e]ven if this court does not have jurisdiction to grant [injunctive] relief, it can be sought elsewhere, in the High Court and possibly the Federal Court and the Federal Circuit Court.”

441 The defendant relied upon s 474(3)(g) and (j). He submitted that the plaintiff’s claim for injunctive relief rested upon failures by the Minister to exercise certain statutory powers and a failure to provide an undertaking not to remove the plaintiff and her family to Nauru (at [31]). The defendants “contended that each of the alleged failures is inimically [sic; scilicet ‘intimately’?] related to the exercise of power by the Minister under the *Migration Act* and are ‘migration decisions’ as defined by the *Migration Act*.” The plaintiff rejoined that her claim was a civil suit for negligence seeking appropriate remedies and that it was “simply not the case” that her claim involved failures relating to powers under the Act.

442 Hiley J held, at [34]-[35], as follows:

- [34] ... The plaintiff’s request for injunctive relief is very much based upon the failures or refusals of the defendants to make the kind of migration decisions referred to in her statement of claim.

[35] Moreover, the granting of injunctive relief of the kind sought would have the effect of preventing the second defendant from performing its statutory obligations, for example, under s 198AD(2), and the minister from freely exercising or refusing to exercise certain powers and discretions, for example, under s 198AE(1), and would have the same effect as a migration decision. Counsel for the plaintiff accepted this. Further, the plaintiff would remain in detention until and unless the minister exercised some other power such as the power to grant a visa under s 65 or to make a residence determination under s 197AB.

443 His Honour then turned to the authorities. He considered *Bodruddaza* and said that both ss 486A and 484 were introduced by the same Act. His Honour continued, at [42], thus:

Accordingly the defendants did not contend that s 484 deprives this court of jurisdiction to hear the plaintiff's claims in tort against the Commonwealth notwithstanding that they might involve a "collateral attack upon migration decisions". The Federal Court would also have such jurisdiction: see *Fernando v Minister for Immigration and Citizenship*.

444 Respectfully, I would not have declined to follow *Bodruddaza* on that basis. The holding of *Bodruddaza* was that the words "a remedy ... in relation to a migration decision" was not, *contra* the submissions of the Solicitor-General, "sufficiently broad to encompass more than applications for judicial review". Instead, s 486A applies to remedies *sought in applications for judicial review* in relation to migration decisions. Section 484 of the Act, introduced by the same Act, denies to courts other than those identified in s 484(1) "jurisdiction in relation to a migration decision." By reasoning analogous to *Bodruddaza*, the section denies jurisdiction in judicial review applications in relation to migration decisions. Jurisdiction in non-judicial review applications obtains. Further, if (as the defendants in *SGS* allowed), the Supreme Court had jurisdiction to hear a tort claim against the Commonwealth, I cannot see a basis for saying that s 484 (which denies that court *jurisdiction* in certain cases) would permit the remedy of damages but not the remedy of an injunction.

445 His Honour turned to *Tang*. After setting out some of the passages I have quoted above, his Honour recorded (at [52]) the plaintiff's reliance upon "the conclusion expressed in the last sentence at [9] of *Tang* (Full Court) and [contention] that the expression 'jurisdiction in relation to a migration decision' in s 484 is confined to applications for 'direct judicial review' of a migration decision." His Honour disposed of the submission at [53], on the basis that the final sentence — "Div 2 of Pt 8 of the Act is confined ... to applications for direct judicial review of migration decisions" — did not form "an essential part of the ratio decidendi of *Tang*" (at [53]). Respectfully, I disagree. It was precisely the conclusion expressed in that sentence, being a conclusion as to the issue of statutory interpretation then before the Court, that allowed the Court to hold that it had jurisdiction. And, even if Hiley J was right in saying that the Court's conclusion at [9] of *Tang* was not part of the *ratio* of the case, their Honours' reasoning is persuasive and, respectfully, I would have followed it in any event.

446 Hiley J identified the purpose of Pt 8, Div 2 as being "to circumscribe the jurisdiction of all courts ... to entertain applications which challenge migration decisions." Consistently with *Bodruddaza* and *Tang*, I would have instead said that its purpose was to circumscribe the jurisdiction of courts to entertain

judicial review applications in relation to migration decisions. Thus, respectfully, I would differ from Hiley J’s conclusion at [56]-[57] that s 484 precluded the issue of an injunction that would “effectively force the minister to make [a] migration decision,” even if sought by way of a remedy in a common law action in negligence (though inconsistency with the statutory scheme may well have gone to scope of duty). It seems to me from the rejection in *Bodruddaza* of the Solicitor-General’s submission that s 486A applies to tort claims that the use of the same words in s 484 means that courts retain their jurisdiction in such claims. Once it is accepted that the court has jurisdiction, I see no basis in s 484 — which deals with jurisdiction and not remedies — for denying the availability of injunctive relief. I would decline to adopt the reasoning in *SGS*.

447 In any event, significant in his Honour’s reasoning (it seems to me) is that his Honour was under the apprehension (recorded at [21]) that even if the NT Supreme Court could not grant injunctive relief, some other court could. Of course, the import of the Minister’s submission in this case is that no other court could. The principle of legality is thus important in this case, and less so in *SGS*.

General principles of interpretation

448 For two other reasons I consider that the Minister’s interpretation is incorrect. The first is the principle of legality. The second and related reason is that the Minister’s interpretation would yield draconian and absurd results and that an intent to effect such results would not readily be ascribed to the legislature.

449 As to the content of the former, it suffices to quote two passages from *X7 v Australian Crime Commission* (2013) 248 CLR 92. At [86]-[87], Hayne and Bell J said this:

[86] The question of statutory construction which arises in this case requires the consideration and application of a well-established rule. That rule, often since applied, was stated by O’Connor J in *Potter v Minahan* by quoting *Maxwell’s On the Interpretation of Statutes*:

It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.

(Emphasis added.)

[87] This rule of construction has found most frequent application in this Court with respect to legislation which may affect rights. In that context, it has come to be referred to as a “principle of legality”. But the rule is not confined to legislation which may affect rights. It is engaged in the present case because of the effects which the asserted construction of the ACC Act provisions authorising compulsory examination would have not only on the rights, privileges and immunities of a person charged with an indictable Commonwealth offence, but also on a defining characteristic of the criminal justice system. ...

(Emphasis in original.)

450 And, at [158], Kiefel J said this:

The requirement of the principle of legality is that a statutory intention to abrogate or restrict a fundamental freedom or principle or to depart from the general system

of law must be expressed with irresistible clearness. That is not a low standard. It will usually require that it be manifest from the statute in question that the legislature has directed its attention to the question whether to so abrogate or restrict and has determined to do so.

451 Very recently, Kiefel J's statement of principle was approved in *R v Independent Broad-Based Anti-Corruption Commissioner* (2016) 256 CLR 459 at [40] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

452 And it is useful to re-iterate the fundamental principles of statutory construction, as recently set out in *Federal Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 250 CLR 523 at [47]:

As French CJ, Hayne, Crennan, Bell and Gageler JJ said in *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd*: "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text". Context and purpose are also important. In *Certain Lloyd's Underwriters v Cross* French CJ and Hayne J said:

The context and purpose of a provision are important to its proper construction because, as the plurality said in *Project Blue Sky Inc v Australian Broadcasting Authority*, "[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of *all* the provisions of the statute" ... That is, statutory construction requires deciding what is the legal meaning of the relevant provision "by reference to the language of the instrument viewed as a whole", and "the context, the general purpose and policy of a provision and its consistency with fairness are surer guides to its meaning than the logic with which it is constructed".

(Citations omitted; emphasis in original.)

453 The final passage concerning context, general purpose, policy, and fairness is a quotation from Dixon CJ in *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397, which passage was also cited by the Court (comprising French CJ, Gummow, Hayne, Kiefel and Bell JJ) in *AB v Western Australia* (2011) 244 CLR 390 at [10]. Their Honours continued:

The modern approach to statutory interpretation uses "context" in its widest sense, to include the existing state of the law and the mischief to which the legislation is addressed. Judicial decisions which preceded the Act may be relevant in this sense, but the task remains one of the construction of the Act.

(Citations omitted.)

454 The Minister's submission was that if there was a breach of a duty of care and the applicant suffered damage, "she gets damages". It was put that s 474 did not preclude that outcome because "that's not calling into question the decision or its legal effectiveness; that's putting propositions about the consequence of it being carried out, which have private law results". In other words, the Minister's submission was that if he engaged in tortious conduct, damages were available (having not been mentioned in s 474), but injunctive relief was not. And injunctive relief would not be unavailable just in this Court: as counsel for the applicant noted, the Minister's interpretation of s 474 would cover every court in the country.

455 That, in my opinion, is a very large submission. It goes well beyond the tort of negligence. It extends to any tort committed or apprehended to be committed by the Minister, the Commonwealth, or an officer of the Commonwealth, using powers under the Act, but which is not, or is not yet, a jurisdictional error.

456 Suppose an applicant was being falsely imprisoned. Could it really be that the legislature intended that the falsely-imprisoned applicant could seek damages from the court from time to time during the course of his or her imprisonment, or after that imprisonment ended, but could never have the benefit of injunctive relief prohibiting his or her continued unlawful detention? Suppose it was clear that the Minister's gross negligence would very shortly cause the death of hundreds of detainees. Could it really be that the legislature intended that no injunction could issue preventing the negligence and that the detainees' descendants would have to wait for the detainees' death and then seek damages?

457 Suppose the Minister purported unlawfully to expropriate all detainees' property. Would an injunction to restrain a conversion not issue? Suppose the Minister indicated he intended unlawfully to introduce corporal punishment in processing centres. Would an injunction restraining a common law battery not issue? Or, take the present case: suppose that the Minister's duty to the applicant extends to procuring for her a safe and lawful abortion and suppose that the Minister told the applicant he had no intention of so procuring. Could it really be that the Parliament intended that the applicant's choices were to take the risk of an unsafe or unlawful abortion, or to take the risk associated with having no abortion at all, and if she suffered damage in either case she would *then* have an entitlement to a remedy against the Minister?

458 All of those outcomes are, in my judgment, irrational and draconian. They are inconsistent with the "general purpose and policy of [the] provision", which (as I have identified above) is concerned with judicial review. They are inconsistent with fairness. They markedly depart from the general system of the common law so far as it pertains to apprehended or continuing torts. In my view they would overthrow several fundamental principles of the law, such as that there is no wrong without a remedy: *ubi jus ibi remedium* (see, eg, *Western Counties Manure Company v Lawes Chemical Manure Company* (1874) LR 9 Ex 218 at 222 (Pollock B)). Or, relatedly, the principle that equity suffers not a right without a remedy: *Annuity and Rent-Charge* (1744) 1 Eq Ca Abr 31; 21 ER 851. Or, and most appositely, the following principle, from the speech of Lord Hanworth MR in *Graigola Merthyr Company Ltd v Mayor of Swansea* [1928] Ch 235 at 241-242:

When the Court has before it evidence sufficient to establish that an injury will be done if there is no intervention by the Court — it will act at once, and protect the rights of the party who is in fear, and thus supply the need of what has been termed protective justice. It is a very old principle. Sir E. Coke, 2nd Institute, p. 299, says 242 that "preventing justice excelleth punishing justice," and quotes Bracton's advice:

Et hoc faciat tempestive, ne per negligentiam damnum incurrat, quia melius est in tempore occurrere quam post causam vulneratam remedium quaerere.

The Latin translates roughly to "it is better to restrain in time than to seek a remedy after the injury has been inflicted."

459 Consistently with the principle of legality, "irresistibly clear words" would be required before I would construe s 474 as precluding the issue of injunctive relief in the case of a tortious wrong. I do not think the words are sufficiently clear. They bear also the less-offensive interpretation, consistent with authority, that injunctions *in relation to judicial review applications* are precluded.

Declaratory relief

460 I have determined that the abortion procured by the Minister for the applicant in Papua New Guinea did not discharge the duty of care which is owed. The applicant has sought a declaration to that effect (paragraph B of the relief claimed). A further declaration is sought (paragraph A) to the effect that the procurement of an abortion in an Australian teaching hospital would satisfactorily discharge the duty of care owed.

461 The making of a declaration and the terms in which it should be framed are in the Court's discretion, but any declaration made by the Court should reflect the final outcome of the case with certainty and precision: *Stuart v Construction, Forestry, Mining and Energy Union* (2010) 185 FCR 308 at [89] (Besanko and Gordon JJ with whom Moore J agreed at [35]). In *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582, Mason CJ, Dawson, Toohey and Gaudron JJ said:

It is now accepted that superior courts have inherent power to grant declaratory relief. It is a discretionary power which "[i]t is neither possible nor desirable to fetter ... by laying down rules as to the manner of its exercise." However, it is confined by the considerations which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions. The person seeking relief must have "a real interest" and relief will not be granted if the question "is purely hypothetical", if relief is "claimed in relation to circumstances that [have] not occurred and might never happen" or if "the Court's declaration will produce no foreseeable consequences for the parties".

(Citations omitted.)

See further, *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [102]-[103] (the Court).

462 The reference in the last sentence of the passage quoted from *Ainsworth* to a circumstance that "might never happen" is to what Gibbs J said in *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 10. In the passage in which the quoted words appear, Gibbs J went on to say that a declaration may be an appropriate remedy where it is established that the defendant intends to take action that will amount to an infringement.

463 I would not make the declaration claimed at paragraph A of the claim for relief. A declaration of that kind would address circumstances that "[have] not occurred" in the absence of it having been established that the Minister intends to procure an abortion at an Australian teaching hospital. It would fall foul of the observation made in *Ainsworth*.

464 However, I would make a declaration in relation to the procurement of an abortion in Papua New Guinea. That act of the Minister has occurred and is complete. A declaration in relation to that act will assist in the determination of the legal controversy and has utility. I would declare that the abortion that has been procured by the respondents to be performed in Papua New Guinea is not a safe and lawful abortion, and that its procuring did not discharge the respondents' duty to exercise reasonable care to discharge the responsibility that they assumed to procure for the applicant a safe and lawful abortion.

465 Furthermore, whilst the Minister's intent to procure an abortion in Australia has not been established, the evidence does establish that the Minister intends to procure an abortion for the applicant. It has also been established that, unless that was done in a particular legal and medical setting, there would be a breach

of the duty of care owed. There would be utility in making a declaration which reflected the apprehended wrong which the Court has found. That would be relief directed to the determination of the legal controversy.

466 Accordingly, I would make a declaration in the following terms:

It would be a breach of the respondents' duty of care to exercise reasonable care to discharge the responsibility that they assumed to procure for the applicant a safe and lawful abortion where:

- (a) the abortion is procured so that it takes place in any location where a person who participates in an abortion is exposed to criminal liability; or
- (b) the abortion is procured so that it takes place in a hospital or other medical facility that does not have, or that cannot make available to the treating doctor or doctors who perform the abortion:
 - (i) the neurological expertise and neurological facilities referred to in the expert medical report of Associate Professor Ernest Somerville dated 19 April 2016, together with his expert medical report dated 27 April 2016; and
 - (ii) the psychiatric expertise, and other resources including cross-cultural expertise, referred to in the expert medical report of Professor Louise Newman dated 18 April 2016, together with her email dated 27 April 2016; and
 - (iii) the anaesthetic expertise and anaesthetic facilities referred to in the expert medical report of Dr Gregory Purcell dated 20 April 2016; and
 - (iv) the gynaecological expertise and experience, and the gynaecological facilities, referred to in the expert medical report of Professor Caroline de Costa dated 19 April 2016, together with her expert medical report dated 27 April 2016, and the expertise, experience and facilities referred to in the expert medical report of Dr Miriam O'Connor dated 20 April 2016, together with her expert medical report dated 27 April 2016.

Should an injunction be granted?

467 The applicant asserts a reasonable apprehension that the Minister will fail to discharge his duty of care. There is a basis for that apprehension because the Minister has already procured an abortion for the applicant which, as I have found, failed to discharge the duty of care owed and has indicated an unwillingness to procure any other kind of abortion. But, in the absence of a claim of breach and as damage has not been established, the applicant's cause of action is not yet complete. In that case, if the applicant is to obtain injunctive relief, a *quia timet* injunction would be required. A court may issue a *quia timet* injunction to prevent or restrain an apprehended or threatened wrong which would result in substantial damage if committed: *Hurst v Queensland (No 2)* [2006] FCAFC 151 at [20] (Ryan, Finn and Weinberg JJ).

468 Before turning to consider the factors relevant to the grant of *quia timet* relief, I observe, as the tenor of the Minister's submissions did, that injunctions restraining the commission of the tort of negligence are rare. That, however, is not indicative of a doctrinal limitation.

469 As JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th ed, 2015) at [21-105] say:

It has sometimes been thought that an injunction to restrain the commission of the tort of negligence could not lie, whether the defendant is threatening to do an act for the first time, or to continue or repeat an act. The reasoning is that damage is

one of the ingredients of the plaintiff's cause of action and since one can never tell in advance whether the defendant's activity will cause damage, no occasion to seek the injunction can, as a matter of logic, arise. That reasoning is faulty. If it were accepted, one could never obtain an injunction to restrain a nuisance, a tort in which damage is equally an ingredient. ...

470 There is a reason why cases to restrain the commission of the tort of negligence are rare. Usually, damage is suffered before a claim is brought. It is obvious why that is so: in many cases risk of harm is not perceived by the plaintiff and so it cannot be avoided; in cases where a plaintiff perceives danger, especially physical danger, he or she will often take steps to avoid it; in some cases, he or she will take the risk of harm and, if it eventuates, commence proceedings (subject to claims of contributory negligence); finally, in some cases harm is perceived but is unavoidable.

471 In that light, there is limited opportunity for plaintiffs to approach a court to restrain a tort. It might occur in these rare circumstances:

- (1) the plaintiff has perceived the risk;
- (2) the plaintiff is not prepared to take the risk;
- (3) the risk is, in theory, avoidable or reducible;
- (4) but, the risk is not in the power of the plaintiff to avoid or reduce;
- (5) and, the risk is in the power of the defendant to avoid or reduce; and
- (6) the plaintiff has enough time to go to court before the risk eventuates.

472 This is such a case. The applicant is biologically unable to avoid the risks that attend continued pregnancy. The Minister has admitted that the applicant would be unable to procure an abortion without his assistance, but has indicated an unwillingness to make available any abortion other than the Papua New Guinea abortion. The applicant's options are to take the risk associated with abortion in Papua New Guinea, take the risk associated with continued pregnancy, or commence proceedings. It will be only exceptional cases in which an applicant has so few options.

473 Accordingly, I do not consider the novelty of the remedy as constituting a bar to its award, should the claim deserve it. And, unless the remedy was doctrinally sound, it is difficult to imagine why the learned authors of *Meagher, Gummow and Lehane* would devote text to explaining why it is, in principle, available.

474 Finally, while my researches were unable to reveal a claim in which an injunction was issued in respect of negligence on a final basis, injunctions have been issued on an interlocutory basis, which engenders that the same relief must be available finally: *Toomelah Boggabilla Local Aboriginal Land Council v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 69 FCR 306 at 309 (Foster J), relying on *Minister for Immigration, Local Government and Ethnic Affairs v Msilanga* (1992) 34 FCR 169 at 179 (Beaumont J). In *Mastipour v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* [2003] FCA 952, the applicant claimed that the respondent "owed to him a duty to take care to avoid exposing him to circumstances which are or were likely to cause him emotional shock and psychiatric injury, that the duty of care has been breached, and that as a consequence he has suffered severe emotional shock and psychiatric injury." Mansfield J made this Order:

The first respondent do transfer the applicant as soon as reasonably practicable to either the Villawood Immigration Reception Processing Centre or to the Maribyrnong Immigration Reception Processing Centre as the first respondent may determine.

475 An appeal was allowed, but only because of the form of the order: *Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Mastipour* 207 ALR 83. As Lander J explained:

[139] However, in my opinion, a mandatory injunction of the type made was inappropriate.

[140] The terms of the order are such that the order is already spent. The order required the secretary to transfer Mr Mastipour and no more. It was put to counsel, during argument, that the order in its literal terms would not prevent the secretary returning Mr Mastipour to Baxter.

[141] *Both counsel, however, accepted that the spirit of the order was that Mr Mastipour be removed to one of those places and kept there.* If that is the way in which the order should be read, it would mean that the secretary could not move Mr Mastipour to a hospital or to some other detention centre. Again, if the order was understood in the way that counsel accepted, it might mean that the secretary was not able to remove Mr Mastipour from Australia if the occasion arose for a power to be exercised under s 198 of the Act. The order sought was an interlocutory order. The terms of the order made were more akin to a final order. For those reasons, the terms of the order were inappropriate.

(Emphasis added.)

476 The basis of the order, as Lander J explained, was the following:

[132] The primary judge, in my opinion, properly recognised that the application for an injunction was dependent upon Mr Mastipour establishing that there was a duty of care. Once he established that there was a duty of care which, as I say, is admitted, the question for the trial judge was whether there was a serious question to be tried in relation to the breach of that duty.

[133] There can be no doubt that if there was a serious question to be tried in relation to the continuing breach of duty by the secretary, the balance of convenience favoured Mr Mastipour, notwithstanding Mr Wallis' protestations that it would not be viable to move Mr Mastipour to another detention centre.

[134] There was a further question being whether or not injunctive relief would go to restrain the continuing breach of a duty of care. That matter does not arise on this appeal because it was not argued that if there was a serious question to be tried and, if the balance of convenience favoured Mr Mastipour, an order in the nature of injunction could not be made.

[135] The only real question before the primary judge, and it was a matter of fact, was whether there was a serious question to be tried in relation to a continuing breach of duty.

[136] In my opinion, the evidence overwhelmingly supported the decision arrived at by the primary judge. There can be no doubt, in my opinion, that the evidence adduced, most of which was uncontradicted, supported the finding that there was a serious question to be tried.

[137] In those circumstances, the primary judge was right to conclude that an injunction should issue.

477 The orders substituted were as follows:

Until the trial of this action or until further order, whichever first occurs, an injunction is hereby granted restraining the first respondent (the secretary) from:

- (1) Detaining the applicant (Mr Mastipour) at the Baxter Reception and Processing Centre in Port Augusta, South Australia; or

(2) Removing the applicant (Mr Mastipour) to the Port Hedland Reception and Processing Centre in Western Australia.

478 I am of the opinion that there is no doctrinal barrier to my issuing an injunction. Dunford J came to the same conclusion in *Prisoners A to XX Inclusive v New South Wales* (1994) 75 A Crim R 205 at 213 and see *Patsalis v New South Wales* [2012] NSWSC 267 at [54] (Beech-Jones J).

479 A survey of the general principles for the grant of a *quia timet* injunction is usefully provided by Bennett J in *Apotex Pty Ltd v Les Laboratoires Servier (No 2)* (2012) 293 ALR 272 at [46]:

[46] The following principles generally apply to the grant of a *quia timet* injunction:

- A *quia timet* injunction is granted to prevent a threatened infringement of the rights of the applicant. The applicant must show that what the respondent is threatening and intending to do will cause imminent and substantial damage to the applicant: *Royal Insurance Co Ltd v Midland Insurance Co Ltd* (1908) 26 RPC 95 at 97; followed in *Bendigo and Country Districts Trustees and Executors Co Ltd v Sandhurst and Northern District Agency Co Ltd* (1909) 9 CLR 474 at 478; [1909] HCA 63 (*Bendigo*).
- The word “imminent” means that the injunction must not be granted prematurely. The degree of probability of future injury is not an absolute standard. What is to be aimed at is justice between the parties, having regard to all the relevant circumstances: *Hooper v Rogers* [1975] Ch 43 at 50; [1974] 3 All ER 417 at 421. However, this is not to be taken as conveying that future injury need not be shown to be likely at all: *Magic Menu Systems* at FCR 270; ALR 208.
- *Quia timet* injunctions are not to be granted unless the imminence of the act to be prohibited is sufficiently clearly established to justify the court’s intervention. (I C F Spry *The Principle of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages*, 8th ed, Law Book Co, NSW, 2010 (*Spry*), referred to and adopted by Weinberg J in *Glaxosmithkline* at [94].)
- In deciding whether to grant a *quia timet* injunction, the court will have regard to the degree of probability of the apprehended injury, the degree of seriousness of the injury and the requirements of justice between the parties: *Hurst v Queensland (No 2)* [2006] FCAFC 151 at [21].

480 I note that in the last dot point, Bennett J referred to *Hurst*. In *Hurst*, the appellant sought an injunction against the State of Queensland. A finding was made that the State of Queensland had contravened the *Disability Discrimination Act 1992* (Cth) in relation to the provision of education services to Hurst. Hurst sought an injunction restraining the State of Queensland from continuing to deny her the services of an Auslan interpreter. Having noted that a *quia timet* injunction was being sought, Ryan, Finn and Weinberg JJ set out their formulation of the test, to which Bennett J referred in her survey. At [21] their Honours said:

In *quia timet* proceedings, the court will have regard to the degree of probability of apprehended injury, the degree of the seriousness of the injury, and the requirements of justice between the parties

481 Their Honours continued by referring to the following two sources. They said at [21]-[22]:

[21] ... In *R v Macfarlane; Ex parte O'Flanagan and Ex parte O'Kelly* (1923) 32 CLR 518 Isaacs J observed (at 539):

The Court is not entitled to apply the obstacle of injunction to the contemplated action of a co-ordinate branch of the Government unless not only a case of clear illegality, proved to be calculated to result in a clear injury, is established, but also it is shown that by no other means can injury be averted or sufficiently compensated for.

[22] Dr I C F Spry, in *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (2001, 6th ed), comments (at 378) that *quia timet* injunctions are not granted unless the imminence of the act to be prohibited is sufficiently clearly established to justify the court's intervention. The fact that there is no breach presently occurring may make it more difficult, as a matter of evidence, to establish that there is a sufficient risk of a future injury to justify the immediate grant of an injunction. If, in all the circumstances, the likelihood that an injury will take place is not sufficiently high, *quia timet* relief will be refused. The applicant will be left either to avail himself or herself of such other remedies as may be open, or else to renew his or her application should the likelihood of an injury subsequently increase sufficiently to render equitable intervention appropriate.

482 The reference to the observations made by Isaacs J in *R v Macfarlane; Ex parte O'Flanagan* (1923) 32 CLR 518 has caused me to consider whether there is a stricter test for an injunction, or at least a *quia timet* injunction, when that relief is sought against "a co-ordinate branch of the Government".

483 *Macfarlane* was a case in which an interlocutory injunction was sought against members of a statutory board appointed to inquire as to whether Macfarlane (and others) should be deported. The claim for an injunction was based on the alleged invalidity of the Commonwealth enactment pursuant to which the inquiry was being conducted. Knox CJ held that there was no substance to the challenge to the enactment and dismissed the application for the injunction (at 528-533). Higgins J held that the injunction ought be refused even if the enactment was invalid on the basis that, in the circumstances, the plaintiffs were not entitled to an injunction (at 577). Rich J agreed with Isaacs J (at 578). Starke J held that the enactment was within power (at 583) and did not decide whether an injunction would be an appropriate remedy (at 584-585).

484 It is only in the judgment of Isaacs J (with whom Rich J agreed) that the governmental character of the defendant was raised as a basis for the test for the grant of an injunction.

485 The observation made by Isaacs J has not often been adopted. Although referred to in *Hurst*, the formulation of the test at [22] of *Hurst* does not reflect the formulation adopted by Isaacs J. That was so in circumstances where the Court was dealing with an injunction sought against the State of Queensland. Nor does the Full Court's application of the test (at [23]-[25]) suggests that the formulation of Isaacs J was applied. Instead, the Full Court applied its own test.

486 Weinberg J, a member of the Full Court in *Hurst*, was also a member (with Black CJ and Sundberg J) of the Full Court in *Minister for Immigration and Multicultural and Indigenous Affairs v VFAD* (2002) 125 FCR 249. As the headnote to that case states, the central issue on the appeal was whether the

power conferred by s 23 of the Federal Court Act to make interlocutory orders could be exercised to order the release, on a temporary basis, of persons in immigration detention. The question was whether s 196(3) of the Act abrogated the s 23 power in relation to persons kept in immigration detention. The Full Court rejected the proposition that it did (at [104]).

487 At [103], Black CJ, Sundberg and Weinberg JJ referred to the judgment of Isaacs J in *Macfarlane* but only for the proposition that in a suitable case a *quia timet* injunction might be “possible as preventive”. There is no reference made to the observation of Isaacs J set out in *Hurst*. Nor is there any suggestion in the following discussion about the power conferred upon this Court by s 23, that a different test for the grant of an injunction (or a *quia timet* injunction), applies in relation to an injunction sought against the executive. At [98]-[101], the Full Court said:

[98] In general terms, therefore, the High Court has held that the power conferred upon this Court by s 23 may be exercised in any proceeding in which this Court has jurisdiction. That power is subject only to the limits specifically identified by the High Court, particularly the limits to which reference was made in *Patrick*, as set out above. It is at least implicit in what was said in that case that the section should be construed as conferring power on this Court to ensure that it can exercise effectively the jurisdiction which it otherwise possesses. That conclusion is generally consistent with the broad ambit of the power conferred upon this Court in its original jurisdiction by ss 19 and 21.

[99] It should be noted that the wide interpretation accorded to s 23 by the High Court is, in general terms, consistent with the approach traditionally taken to the power of superior courts of record to grant interlocutory injunctions. Such injunctions may be granted to protect equitable rights and, in what is sometimes described as the “auxiliary jurisdiction”, to restrain the threatened infringement of some legal right (that is, some breach of contract, tort or invasion of statutory right).

[100] Historically, injunctive relief would only be granted to protect a right that was proprietary in nature, in circumstances where damages would not be an adequate remedy. It is now no longer necessary to demonstrate that the legal right which is threatened is proprietary: *Bateman’s Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 258 [27]; *Egan v Willis* (1998) 195 CLR 424 at 438 [5] and *Cardile* at 395 [30], citing *Bradley v Commonwealth* (1973) 128 CLR 557.

[101] In modern times, there is nothing peculiar about the notion that an interlocutory injunction can be granted by the courts to restrain what is said to be an unlawful detention. In *M Aronson* and *B Dyer*, *Judicial Review of Administrative Action* (2nd ed, 2000), the learned authors observe (p 670): “There is no reason in principle against the possibility of terminating an imprisonment by means of a mandatory injunction, but no decision expressly so holds.”

(Emphasis added.)

488 The challenge to the following order made by the primary judge was dismissed:

Until the hearing and determination of the proceeding or until further order the respondent, whether by his servants, agents or howsoever otherwise, be restrained from continuing to detain the applicant in immigration detention under the *Migration Act 1958* (Cth).

489 Since *Al-Kateb v Godwin* (2004) 219 CLR 562, some of the reasoning in *VFAD* is no longer good law. But the observations made on s 23 of the Federal Court Act and the power to grant injunctions, are unaffected. I do not consider that the principles for the grant of *quia timet* injunctions collected by Bennett J in *Apotex*, cease to be the applicable principles where an injunction is sought against the Commonwealth. I will apply those principles.

490 The imminence of harm is a factor that needs to be considered. “Imminent”, in this context means that the injunction must not be issued prematurely. Whilst that question is directed to the prospect of harm, I should say something first about the prospect of breach. No submissions were made (and perhaps the urgency with which this matter came on provides a justification) as to when (assuming the existence of the duty of care), the Minister is obliged to discharge his duty to procure an abortion for the applicant. It will only be at that time, assuming no effective discharge of the duty beforehand, that a breach of the duty will have occurred.

491 The evidence was not expressly directed to that issue. However, it is a fair inference that the duty, being a duty to take reasonable care in relation to a matter concerning the applicant’s health, entails the obligation to procure an abortion as soon as is reasonably possible. I say that including because it is admitted by the Minister that whilst the applicant continues to carry her pregnancy she is suffering mental harm. There was also uncontested evidence that by reason of cultural and religious practice applicable to the applicant, no abortion may be performed if the pregnancy is carried beyond 16 weeks. The best evidence I have as to the date of the rape is that it occurred on 31 January 2016. If that is accurate, then 22 May 2016 is the last day on which an abortion may be performed. It seems to me therefore that even if a generous view is taken as to what is a reasonable time for the Minister to procure a safe and lawful abortion and, allowing for a grace period of, say, a week, a safe and lawful abortion must be procured on or before 15 May 2016 in order for the Minister to avoid breaching his duty of care. I so find.

492 I proceed on that assumption to consider the imminence of harm. The answer is fairly obvious. I do not regard it as premature to grant an injunction now, in relation to the risk of harm that has probably already manifested to some extent but which will be manifest within one or two weeks.

493 Whilst the degree of probability of harm is not an absolute standard, the aim being “justice between the parties, having regard to all the relevant circumstances”, the probability should nevertheless be evaluated and considered. As the Full Court said in *Hurst*, the degree of seriousness of the injury must also be considered.

494 I have already given consideration to both the probability and the magnitude of the apprehended injury in applying the *Shirt* formula. That assessment was performed through a frame not inappropriate for adoption here. Consistently with my earlier findings at [307]-[372] and [274] and [289], I consider that the magnitude of the medical risks are high to extreme whilst the probability of occurrence is material to very significant. As for the risks of prosecution or conviction, the magnitude is high to extreme whilst the probability of occurrence is very low.

495 All in all, that provides a strong foundation for the grant of a *quia timet* injunction. An additional factor in support of an injunction is the concession made by the Minister that the nature of any hardship that may be imposed on

the Minister by the grant of an injunction is not a significant factor against an injunction being granted in this case. It is also admitted by the Minister that damages would not provide a sufficient remedy to the applicant. That is a potent consideration in favour of an injunction. The advice of Lord Hanworth MR in *Graigola Merthyr* (see [458]) that it is better to restrain in time than to seek a remedy after the injury has been inflicted, is wiser still where the infliction of injury will be irremediable.

496 The Minister submitted that he had not behaved wantonly or unreasonably. That consideration is sourced from *Redland Bricks Ltd v Morris* [1970] AC 652 at 665-666. It relates specifically to the grant of a mandatory injunction. I do not propose to grant a mandatory injunction but note that, in this country, *Redland Bricks* is not without its critics: *Meagher, Gummow and Lehane* (5th ed, 2015) at [21.440] and [21.465]; ICF Spry, *The Principles of Equitable Remedies* (6th ed, 2001) at p 547.

497 Further, I have at [402] made observations about the implausibility of the position taken by Mr Nockels. Those observations do not support the proposition that there has been no unreasonable conduct. Save for the form of any injunction to be issued, which I will shortly address, there are no other considerations which were relied upon by the Minister.

498 To my mind, the totality of those considerations, examined through the frame of doing justice between the parties, favour the grant of a prohibitive injunction. If it had been necessary to apply what I consider to be the stricter approach propounded by Isaacs J in *Macfarlane*, I would have nevertheless arrived at the same conclusion. To my mind this is a clear case of apprehended breach and the risks of harm are sufficiently grave for me to conclude that the prospect of injury is clear should the duty of care not be discharged.

499 The terms of an injunction should clearly identify what is required of the person subject to it. The formulation of an effective and clearly-worded restraint is not without difficulty in the context of this case. I am presently resistant to the form of prohibitory injunction that the applicant seeks as follows:

G. Alternatively to F, an injunction restraining the Commonwealth from failing to procure for the Applicant a surgical abortion both at a place other than in Papua New Guinea and in a hospital certified as appropriate for that abortion by:

- (a) a specialist gynaecologist, who is a fellow of the Royal Australian and New Zealand College of Obstetricians and Gynaecologists;
- (b) a specialist neurologist, who is a fellow of the Royal Australasian College of Physicians;
- (c) a specialist psychiatrist, who is a fellow of the Royal Australian and New Zealand College of Psychiatrists; and
- (d) a specialist anaesthetist, who is a fellow of the Australian and New Zealand College of Anaesthetists.

500 I prefer the following formulation:

- (1) On or before _____, the Respondents cease to fail to discharge the responsibility that they assumed to procure for the Applicant a safe and lawful abortion.
- (2) Upon the Respondents discharging their duty of care to exercise reasonable care to procure for the Applicant a safe and lawful abortion:
 - (a) the abortion not be procured so that it takes place in Papua New Guinea; and

- (b) the abortion not be procured so that it takes place in any location where a person who participates in an abortion is exposed to criminal liability; and
- (c) the abortion not be procured so that it takes place in a hospital or other medical facility that does not have, or that cannot make available to the treating doctor or doctors who perform the abortion:
 - (i) the neurological expertise and neurological facilities referred to in the expert medical report of Associate Professor Ernest Somerville dated 19 April 2016, together with his expert medical report dated 27 April 2016; and
 - (ii) the psychiatric expertise, and other resources including cross-cultural expertise, referred to in the expert medical report of Professor Louise Newman dated 18 April 2016, together with her email dated 27 April 2016; and
 - (iii) the anaesthetic expertise and anaesthetic facilities referred to in the expert medical report of Dr Gregory Purcell dated 20 April 2016; and
 - (iv) the gynaecological expertise and experience, and the gynaecological facilities, referred to in the expert medical report of Professor Caroline de Costa dated 19 April 2016, together with her expert medical report dated 27 April 2016, and the expertise, experience and facilities referred to in the expert medical report of Dr Miriam O'Connor dated 20 April 2016, together with her expert medical report dated 27 April 2016.

501 Injunctions in that form, are grounded in the declaration I propose to make which, in turn, is referable to the findings I have made and in particular those at [380] which are based on the expert medical evidence which I have accepted. The expert reports provide a clear understanding of the expertise and other resources which the treating doctors performing a safe abortion may need to access. I propose, however, to provide the parties with an opportunity to speak to the orders before finally determining the form in which they are to be made. I will also hear the parties further as to an appropriate date by which the Minister's duty must be discharged.

502 Finally the applicant also sought an injunction restraining the Minister from returning her to Nauru prior to procuring for her a safe and lawful abortion. I do not propose to make an order to that effect. In the light of the orders to be made, I do not consider it necessary even if it were the case that the making of such an order was appropriate.

Miscellaneous issues

503 A number of issues do not arise for determination.

The fiduciary duty argument

504 The applicant alleged in her pleadings that the Minister owes her a fiduciary duty. It may be inferred from [20]-[22] of the statement of claim that the duties for which she contends are:

- (1) a duty not to act otherwise than in her best interests ([20(a)]);
- (2) a duty to act in her best interests ([20(b)]); and
- (3) a duty to procure for her a safe and lawful abortion ([22]).

However, in my judgment, the applicant really only seeks to establish the first

two duties with a view to establishing the third and its negative: that the Minister not procure any abortion that is not safe and lawful. There is no call to consider any wider manifestation of those putative duties.

505 I asked Senior Counsel for the applicant in opening whether this claim was advanced. I was told they were not withdrawn, but that ultimately the applicant “see[s] this as a duty of care case,” so that if the facts necessary to establish a duty of care case were not established, that may mean that neither would be the other claims. Nothing was said on the issue in closing submissions by either party. There is a fair basis for thinking that the claim was not pressed. But if it was pressed, I would have held that no fiduciary duty existed, for reasons that follow.

506 I was not taken to authority recognising the existence of a fiduciary duty as between people in the circumstances of the parties to this proceeding. However, the classes of fiduciary relationships are not closed (*Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 68 (Gibbs CJ)), and it is of course open to the applicant to seek to establish the existence of a duty in this case notwithstanding its novelty.

507 For the most part the recognised categories of relationship have a commercial flavour (eg, lawyer and client, company director and company, partner and partner, agent and principal). But, not always: it is recognised, for example, that the relationship of guardian and ward is fiduciary: *Clay v Clay* (2001) 202 CLR 410 at 428-430; *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-421 (Dixon J); *Tusyn v Tasmania* (2004) 13 Tas R 51 at [10] (Blow J). There may well be a fair argument that the facts of the present case establish a relationship sufficiently analogous to that existing between guardian and ward that the relationship between the applicant and the Minister should also be seen as fiduciary in nature.

508 But that would not suffice for the applicant. As the guardian/ward cases disclose, not every duty arising as between parties to a fiduciary relationship is a fiduciary duty. In *Paramasivam v Flynn* (1998) 90 FCR 489, the appellant alleged that he had been sexually assaulted by the respondent some years prior, and that those sexual assaults constituted breach of a fiduciary duty owed by the respondent to the appellant. A single judge of the Supreme Court of the Australian Capital Territory had entered judgment against the appellant on the basis that the claim was commenced outside of relevant limitation periods and on the basis that it had not been shown that it was just and reasonable to extend the limitation period. On appeal, Miles, Lehane and Weinberg JJ were called upon to assess whether the primary judge had erred in considering the strength of the equitable claim for breach of fiduciary duty.

509 Their Honours recognised that the guardian/ward relationship may give rise to duties typically characterised as fiduciary — not to allow duty and interest to conflict and not to make an unauthorised profit (at 504). However, the Court continued by noting that the interests that fiduciary doctrines “have hitherto protected are economic interests” (at 504). The appellant’s claim was novel, which did not condemn it but did require that any advance in the law such as to cover the appellant’s claim must be “justifiable in principle.” Their Honours held that the advance put before them was not easily justifiable (at 505):

Here, the conduct complained of is within the purview of the law of tort, which has worked out and elaborated principles according to which various kinds of loss and damage, resulting from intentional or negligent wrongful conduct, are to be

compensated. That is not a field on which there is any obvious need for equity to enter and there is no obvious advantage to be gained from equity's entry upon it. And such an extension would, in our view, involve a leap not easily to be justified in terms of conventional legal reasoning.

- 510 Their Honours doubted that a parent/child relationship was rightly described as “fiduciary” (*contra M (K) v M (H)* [1992] 3 SCR 6). They discussed the judgment of the High Court in *Breen v Williams* (1996) 186 CLR 71, which considered whether a doctor owed fiduciary duties to a patient to disclose medical records to that plaintiff. In holding that a doctor did not owe such duties, Dawson and Toohey JJ said this (at 93-94):

... it is the law of negligence and contract which governs the duty of a doctor towards a patient. This leaves no need, or even room, for the imposition of fiduciary obligations. Of course, fiduciary duties may be superimposed upon contractual obligations and it is conceivable that a doctor may place himself in a position with potential for a conflict of interest — if, for example, the doctor has a financial interest in a hospital or a pathology laboratory — so as to give rise to fiduciary obligations ... But that is not this case.

Gaudron and McHugh JJ said this (at 110):

In our view, there is no basis upon which this Court can hold that Dr Williams owed Ms Breen a fiduciary duty to give her access to the medical records. She seeks to impose fiduciary obligations on a class of relationship which has not traditionally been recognised as fiduciary in nature and which would significantly alter the already existing complex of legal doctrines governing the doctor-patient relationship, particularly in the areas of contract and tort. As Sopinka J remarked in *Norberg v Wynrib* [[1992] 2 SCR 226 at 312; (1992) 92 DLR (4th) 449 at 481]: “Fiduciary duties should not be super imposed on these common law duties simply to improve the nature or extent of the remedy.”

- 511 Those passages, with others from *Breen* and other cases, were relied upon by the Court in *Paramasivam* in order to conclude, at 507-508 thus:

... [A] fiduciary claim, such as that made by the plaintiff in this case, is most unlikely to be upheld in Australian courts. Equity, through the principles it has developed about fiduciary duty, protects particular interests which differ from those protected by the law of contract and tort, and protects those interests from a standpoint which is peculiar to those principles.

- 512 In *Cubillo v Commonwealth* (2001) 112 FCR 455, one of the issues was whether the Director of Native Affairs or the Commonwealth owed fiduciary obligations to Aboriginal children removed from their families. As in *Paramasivam*, a finding that fiduciary duties were owed to the appellant was not enough for success. As the Court held at [462], “the fact that one person is in a fiduciary relationship with another does not mean that all aspects of their relationship are necessarily governed by equitable principles”. The Court continued thus (at [463]):

On the appellants' case, the fiduciary duties owed by the Commonwealth and the Directors were largely co-extensive with the scope of the Commonwealth's duty of care to the appellants. So, too, the alleged breaches of fiduciary duty were largely co-extensive with the alleged breaches of the Commonwealth's duty of care. ... As the reasoning in *Pilmer v Duke Group* suggests, Australian law has set its face firmly against the notion that fiduciary duties can be imposed on relationships in a manner that conflicts with established tortious and contractual principles.

513 And, their Honours continued as follows at [465]-[466]:

Insofar as the appellants' case on fiduciary duties is co-extensive with their case on breach of duty of care, it faces two insurmountable obstacles. ... The second obstacle is that, in any event, the appellants' claims are, to use the language of *Paramasivam v Flynn*, within the purview of the law of torts. As the High Court has held, there is no room for the superimposition of fiduciary duties on common law duties simply to improve the nature and extent of the remedies available to an aggrieved party. If it had been the case that the removal and detention of the appellants were not authorised by the Ordinances (or otherwise justified by law), those who caused the removal or detention would be guilty of tortious conduct and liable at common law. There would be no occasion to invoke fiduciary principles.

514 Similar statements were made by a Full Court of the Supreme Court of South Australia (Doyle CJ, Duggan and White JJ) in *South Australia v Lampard-Trevorrow* (2010) 106 SASR 331. The appellant sought damages for loss arising from being placed into foster care without the consent of his parents. The Court discussed (at [327]-[330]) *Cubillo* and *Paramasivam*. Their Honours quoted (at [332]) passages from *Breen* and at [331] the following extract from *Tusyn* at [11]:

However, when the fiduciary relationship of guardian and ward exists, it does not necessarily follow that the guardian owes the ward a fiduciary duty to take reasonable care for the ward's physical safety. One needs to distinguish between moral duties, non-fiduciary duties imposed by law, and fiduciary duties.

515 In the end, the Court held that the Aborigines Protection Board did not owe to the appellant fiduciary duties as alleged. As is apparent from [337], significant in that reasoning was that the putative duties "[were] not proscriptive duties, which such duties usually are, but duties of affirmative action, which fiduciary duties usually are not". The Court relied upon *Breen* at 113, whereat Gaudron and McHugh JJ said the following, in distinguishing the Canadian position:

... Australian courts only recognise proscriptive fiduciary duties. ... In this country, fiduciary obligations arise because a person has come under an obligation to act in another's interests. As a result, equity imposes on the fiduciary proscriptive obligations — not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. If these obligations are breached, the fiduciary must account for any profits and make good any losses arising from the breach. But the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed.

(Citations omitted.)

516 The final case that I mention in this connection is *Webber v New South Wales* (2004) 31 Fam LR 425. The plaintiff alleged that, while a state ward in the care of the defendant, he had been sexually and physically assaulted. He advanced a negligence claim and also sought equitable damages for breach of fiduciary duty. The defendant sought to strike out the latter claim. Dunford J granted the application. His Honour noted (at [25]) that in *Hospital Products* Mason J identified the "critical feature" of fiduciary relationships as being that the fiduciary "undertakes or agrees to act for or on behalf of or in the interest of another person in the exercise of a power or discretion which will affect the interest of that other person in a legal or practical sense." On the other hand, said Dunford J (at [29]), "a parent or guardian does not act on behalf of, or

exercise a power or discretion affecting the interests of, a child or ward in a legal or practical sense,” except with certain irrelevant exceptions. In particular, “he or she does not exercise a power or discretion affecting the interests of that other person when failing to provide proper care, nurture or supervision of the child or ward”. At [34], Dunford J identified that no conflict of interest or unauthorised profit-making was alleged, and that instead that the plaintiff alleged “simply a failure to take reasonable care.” That, his Honour held, enlivened tortious principles, not equitable ones. Summarising, at [47], his Honour said this:

... I am satisfied that even if one person stands in a fiduciary relationship to another, such as guardian and ward, the fiduciary duties which arise from such relationship and breach of which gives rise to a right to equitable compensation:

- a) are confined to cases where the fiduciary acts for, or exercises a discretion on behalf of, the other party;
- b) concern economic or proprietary rights only, including possible confidential information (which is itself really a form of property);
- c) are proscriptive and not prescriptive; and
- d) are not a substitute or alternative description for breaches of duty owed in tort or contract arising out of the same facts or circumstances.

517 The latter two principles, and in particular the final one (which has really been the focus of my discussion above), are enough, in my judgment, to dispose of the applicant’s fiduciary duty argument. What is alleged is that the Minister would expose the applicant to risk of harm in failing to discharge a duty that he assumed to procure for her a safe and lawful abortion. Allegations of that kind are in the purview of the law of tort. As in *Paramasivam*, there is not obvious advantage to be gained from the superimposition of equitable duties.

518 It seems to me that *Paramasivam* and *Cubillo* are sufficiently analogous to the present case that, if the applicant were able to establish a fiduciary duty by reference to the similarity of a guardian/ward relationship to the relationship she has with the Minister, the limitations on fiduciary duties arising therefrom would nevertheless defeat this aspect of her claim.

Legal unreasonableness

519 At [23]-[26] of her amended statement of claim, the applicant pleaded that on 14 April 2016, she had applied to the Minister for an exercise of power under s 198AHA or s 198B such that she was brought to Australia for the purpose of enabling her to receive a safe and lawful abortion. It was pleaded that it would be legally unreasonable for the Minister to refuse that application, and that any decision to that effect would be invalid. The applicant also sought that the following decisions should be set aside as legally unreasonable:

- (i) the Minister’s decision that the applicant should go to Papua New Guinea rather than Australia for an abortion; and
- (ii) the Minister’s decision on 26 April 2016 that he would not follow IHMS’s Third RMM (which recommended Australia as the location of her treatment), and would instead continue to procure for her an abortion at PIH.

520 On 27 April 2016 I caused an email to be sent to the parties saying that I wished to hear submissions as to whether, in the light of s 476A of the Act, this Court had jurisdiction to deal with that part of the applicant’s case that raises whether it is legally unreasonable for the respondents to refuse (or have refused)

to exercise powers under s 198AHA or s 198B of the Act. The Minister submitted that, because of s 476A, there was no jurisdiction. As to the possibility of s 44 of the *Judiciary Act 1903* (Cth) being a source of jurisdiction, the Minister said as follows:

The judicial review aspects of the Applicant's claim were not a part of the Applicant's case in the High Court. They were only added when the statement of claim was filed in this Court. It is possible that s 44(2) of the *Judiciary Act 1903* (Cth) might overcome part of this problem, if it is taken that the Federal Court, on remitter, is exercising the same jurisdiction as the High Court (*Plaintiff P1/2003 v Ruddock* (2007) 157 FCR 518 at [98], [108]-[109]). However, the difficulty with that argument is that, if the judicial review claim had been part of the Applicant's case in the High Court, it could not have been remitted to this Court: s 476B(2). Further, s 476B, like s 494AB, is expressed to have effect despite any other law, and expressly overrides s 44 of the Judiciary Act. In the face of these provisions, remitter cannot create a power to add further claims which are beyond this Court's jurisdiction and which could not themselves have been part of a remitted matter. It is submitted that the reasoning in *Plaintiff P1/2003* does not apply directly in those circumstances and the limits on jurisdiction outlined above render the Applicant's claims in paragraphs [23]-[27] of the statement of claim, and the prayer for relief in paragraph F, incompetent.

521 The reference to "F" of the relief was to the applicant's original statement of claim. In the amended statement of claim, the reference would be to paragraph "H".

522 The applicant did not make submissions against the proposition that I had no jurisdiction. In the course of hearing some suggestion was made that the applicant might commence a proceeding alleging legal unreasonableness in the Federal Circuit Court and then seek to have it transferred to this Court and joined with this proceeding. However, I was advised on 2 May 2016 that the applicant no longer intended to take that course.

523 I regard the legal unreasonableness claims as not pressed. In the absence of argument on the s 44 *Judiciary Act* point, I decline to express a view.

Exceeding limits of power

524 At [12(b)], the applicant pleaded that for the Minister to fail to procure for her a safe and lawful abortion would constitute an excess by him of the limits of the power conferred by s 198AHA of the Act and s 61 of the Constitution.

525 Very little was said on the question in the applicant's written submissions. The essence is at [146], namely that "the Commonwealth will exceed its power if it purports to engage in the commission of a tort or a breach of the [Papua New Guinean] Criminal Code". Nothing was said to the point in oral submissions. I am in no position to make a finding that the Minister's conduct breached the criminal law of another country. Thus, this claim rises or falls with the tort claim. Putting aside the Criminal Code, if there was no tort then (on the applicant's submissions) there is no excess of power. If there is a tort, then the excess of power argument might succeed but *ex hypothesi* the applicant is already entitled to relief due to the tort. The relief would be the same: an injunction restraining the commission of the tort.

526 In the circumstances, I propose to say nothing further on the issue.

Issues associated with mandatory injunctions

527 The Minister made two submissions concerning mandatory injunctions. The first can be summarised by saying that the test for mandatory injunctions is

strict (cf *Redland Bricks*), that such injunctions are rare, and that the test is in this case unfulfilled. The second can be summarised by saying that the Court would not issue a mandatory injunction where mandamus would not lie (cf *Plaintiff M168/10 v Commonwealth* (2011) 85 ALJR 790 at [37]).

528 I do not propose to issue a mandatory injunction. The applicant's case was that she apprehended a tort, constituted by the failure by the Minister to exercise due care in discharging the responsibility that he assumed to procure for her a safe and lawful abortion. I am satisfied that the apprehended tort should be restrained. My relief will restrain the Minister from failing to discharge his duty.

529 In that light, it is not necessary to consider the Minister's submissions that I outlined at [527] above.

Orders accordingly

Solicitors for the applicant: *National Justice Project Ltd, Allens Linklaters* as town agents.

Solicitors for the respondents: *Australian Government Solicitor*.

NICHOLAS DERRINGTON