IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M 106 of 2011

PLAINTIFF M106/2011
BY HIS LITIGATION GUARDIAN
PLAINTIFF M70/2011

Plaintiff

AND

MINISTER FOR IMMIGRATION AND CITIZENSHIP

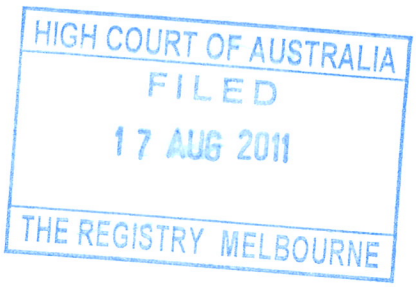
First Defendant

AND

10 THE COMMONWEALTH OF AUSTRALIA

Second Defendant

SUBMISSIONS ON BEHALF OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION (INTERVENING)



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I. CERTIFICATION

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

II. BASIS OF INTERVENTION

2. Section 11(1)(o) of the *Australian Human Rights Commission Act 1986* (Cth) (the **AHRC Act**) provides that the Commission has the function, "where the Commission considers it appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court, to intervene in proceedings that involve human rights issues".

3. The phrase "human rights" is defined by s 3 of the AHRC Act to mean "the rights and freedoms recognised in the Covenant, declared by the Declarations or recognised or declared by any relevant international instrument". For such purposes:

   3.1. the "Covenant" means the International Covenant on Civil and Political Rights (as it applies in relation to Australia);

   3.2. the "Declarations" relevantly include the Declaration of the Rights of the Child proclaimed by the United Nations General Assembly on 20 November 1959 (a copy of which is set out in Schedule 3); and

   3.3. "relevant international instrument" means "an international instrument in respect of which a declaration under section 47 is in force", which includes (pursuant to a declaration made on 22 December 1992) the Convention on the Rights of the Child (**CRC**).

4. These proceedings involve human rights issues concerning the scope and operation of the First Defendant's duties as the legal guardian of the Plaintiff, who is an unaccompanied minor and a "non-citizen child" within the meaning of the *Immigration (Guardianship of Children) Act 1946* (Cth) (**IGOC Act**). As North J observed in *X v Minister for Immigration and Multicultural Affairs*:[1]

> The responsibilities of a guardian under s 6 of the Act include the responsibilities which are the subject of the Convention [on the Rights of the Child]. They are responsibilities concerned with according fundamental human rights to children.

5. The issues raised relate to the principle that the best interests of the child shall be a primary consideration in all actions concerning children (CRC, article 3(1)) and the

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1 (1999) 92 FCR 524 at 537-538 [43].

basic concern of the child's legal guardian (CRC, article 18(1)). In addition, the subject matter of the proceedings potentially affects the right of a child who is temporarily or permanently deprived of his or her family environment to special protection and assistance provided by the State (CRC, article 20(1)), the right of a child seeking refugee status to receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights (CRC, article 22(1)), and the rights of a child who is deprived of his or her liberty (CRC, article 37).

III. WHY LEAVE TO INTERVENE SHOULD BE GRANTED

6. The Commission seeks to make submissions on the relationship between the provisions of the IGOC Act and the powers of Commonwealth officers under ss 198(2) and 198A(1) of the *Migration Act 1958* (Cth) (the ***Migration Act***), including in particular whether and to what extent the powers under ss 198(2) and 198A(1) may be informed by the Minister's obligations as guardian under the IGOC Act.

7. These questions have implications extending beyond the facts of the present case, involving issues of broad public interest and concern. In this regard, the Commission has an established interest and expertise in relation to the rights of children, and in particular the position of unaccompanied minors seeking asylum in Australia.[2] The Commission offers assistance to the Court in relation to the above issues that will supplement the submissions made by other parties.[3]

IV. APPLICABLE STATUTORY PROVISIONS

8. Section 6 of the IGOC Act provides:[4]

> ***6 Guardianship of non-citizen children***
>
> *The Minister shall be the guardian of the person, and of the estate in Australia, of every non-citizen child who arrives in Australia after the commencement of this Act to the exclusion of the parents and every other guardian of the child, and shall have, as guardian, the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have, until the child reaches the age of 18 years or leaves Australia permanently, or until the provisions of this Act cease to apply to and in relation to the child, whichever first happens.*

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2 See paragraphs 11 and 12 of the affidavit of Catherine Branson affirmed on 14 August 2011.

3 See generally *Levy v Victoria* (1997) 189 CLR 579 at 600-605 (Brennan J).

4 For such purposes, the "Minister" is the Minister for the time being administering the IGOC Act, namely the Minister for Immigration and Citizenship: see *Acts Interpretation Act 1901*, s 19A.

9. A "non-citizen child" is relevantly defined in s 4AAA of the IGOC Act. Subsection 4AAA(1) provides:[5]

> ***4AAA Non-citizen child***
>
> *(1) Subject to subsections (2) and (3), a person (the **child**) is a non-citizen child if the child:*
>
> *(a) has not turned 18; and*
>
> *(b) enters Australia as a non-citizen; and*
>
> *(c) intends, or is intended, to become a permanent resident of Australia.*

10. Section 6A of the IGOC Act provides:

> ***6A Non-citizen child not to leave Australia without consent***
>
> *(1) A non-citizen child shall not leave Australia except with the consent in writing of the Minister.*
>
> *(2) The Minister shall not refuse to grant any such consent unless he or she is satisfied that the granting of the consent would be prejudicial to the interests of the non-citizen child.*
>
> *(3) A person shall not aid, abet, counsel or procure a non-citizen child to leave Australia contrary to the provisions of this section.*
>
> *Penalty: Two hundred dollars or imprisonment for six months.*
>
> *(4) This section shall not affect the operation of any other law regulating the departure of persons from Australia.*

11. Section 198A of the *Migration Act* relevantly provides:

> ***198A Offshore entry person may be taken to a declared country***
>
> *(1) An officer may take an offshore entry person from Australia to a country in respect of which a declaration is in force under subsection (3).*
>
> *(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.*

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5 Subsection 4AAA(2) excludes from the definition a child who enters Australia in the charge of, or for the purposes of living in Australia under the care of, a parent, a relative who has turned 21 or an intending adoptive parent. Subsection 4AAA(3) excludes from the definition a child who enters Australia in the charge of, or for the purposes of living in Australia under the care of, an adult who is not less than 21 years of age and who intends to reside with the child in a declared State or Territory, if a prescribed adoption class visa is in force in relation to the child when the child enters Australia. Section 4AA and s 4AAA(4) confer power on the Minster to direct that a person who has not turned 18 shall be the Minister's ward and hence a non-citizen child.

...

(5) *In this section,* ***officer*** *means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.*

V. ISSUES ON WHICH THE COMMISSION MAKES SUBMISSIONS

Immigration (Guardianship of Children) Act 1946 (Cth)

History, purpose and object of the IGOC Act

12. As originally enacted in 1946, the IGOC Act was intended to serve the dual purpose of continuing past arrangements for the Minister to act as the legal guardian of British children who had been evacuated to Australia for the duration of the war, as well as vesting in the Minister an "overriding legal guardianship" in respect of children to be brought to Australia in the future "under the auspices of any governmental or nongovernmental migration organization".[6] In relation to the latter, s 6 of the IGOC Act relevantly provided for the Minister to be the guardian of every "immigrant child" who arrived in Australia after its commencement. "Immigrant child" was defined in s 4 to mean (relevantly) "a person under the age of twenty-one years who comes to Australia as an immigrant otherwise than in the charge of, or for the purposes of living in Australia under the care of, any parent or relative of that person". On the occasion of its amendment in 1948, the object of the Act was described by the Minister as being "to ensure that any immigrant children brought to Australia were properly accommodated and cared for until they reached twenty-one years of age".[7]

13. An academic commentator has summarised the genesis of the IGOC Act as follows:[8]

> The *Immigration (GOC) Act* was drafted to ensure adequate oversight of the welfare of children brought to Australia under voluntary migration schemes sponsored by social welfare organisations and church bodies.[9]
>
> It was enacted following a conference of State premiers on 20 August 1946, at which it was resolved that the Commonwealth should continue to be the sole authority for *Migration Act*ivities overseas and that the States and Territories would carry out the

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6 Second Reading Speech of the Minister for Immigration (Mr Calwell), House of Representatives, *Parliamentary Debates (Hansard)*, 31 July 1946.

7 Second Reading Speech for the Immigration (Guardianship of Children) Bill 1948, House of Representatives, *Parliamentary Debates (Hansard)*, 5 October 1948.

8 Taylor, "Guardianship of Child Asylum-Seekers" (2006) 34 *Federal Law Review* 185 at 186.

9 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 July 1946, 3369 (Arthur Calwell, Minister for Immigration). See also Antonio Buti, 'British Child Migration to Australia: History, Senate Inquiry and Responsibilities' (2002) 9(4) *E-Law – Murdoch University Electronic Journal of Law* <http://www.murdoch.edu.au/elaw/issues/v9n4/buti94.html> at 21 February 2006.

function of reception on arrival in Australia, although this function was often carried out by voluntary agencies.[10] The *Immigration (GOC) Act* was intended to permit the national coordination of services that were to be carried out by the States, giving national uniformity to guardianship of child migrants.[11] The Minister's functions were delegated to State authorities shortly after the Act was passed, and it was intended that State authorities would assume direct control over unaccompanied children.[12]

14. In 1948,[13] the IGOC Act was amended to provide for the Minister to act as the guardian of the estate as well as the person of an immigrant child, and to insert s 6A pursuant to which the written consent of the Minister was required in order for an immigrant child to leave Australia. Such consent could not be refused unless the Minister was satisfied that the grant of consent would be prejudicial to the interests of the immigrant child. Amendments were also made to s 7 of the IGOC Act in order to enable an immigrant child to be placed in the custody of any person (rather than limiting such custodians to persons representing an approved authority or organisation).

15. In 1952,[14] amendments were made to the definition of "immigrant child" in s 4 of the IGOC Act (to ensure that the definition covered minors who came to Australia to join relatives who were under 21 years of age), and a new s 4A was added dealing with certificates evidencing that a person was an immigrant child. Section 11 was amended so as to cater for the revocation of exemption orders.[15]

16. In 1983,[16] amendments were made replacing the term "immigrant child" with "non-citizen child".[17] The definition of "non-citizen child" was further amended in 1985,[18]

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10 Community Affairs References Committee, Parliament of Australia Senate, *Lost Innocents: Righting the Record* (2001) 26 [2.64].

11 Ibid 26 [2.68].

12 Ibid 27 [2.71].

13 *Immigration (Guardianship of Children) Act 1948* (Cth).

14 *Immigration (Guardianship of Children) Act 1952* (Cth).

15 Exemption orders have been under s 11 made from time to time in respect of certain classes of children. For example, single men between 18 and 21 who came to Australia as "special project workers" were exempted from the Act: see the Second Reading Speech of the Minister for Immigration (Mr Holt) to the Immigration (Guardianship of Children) Bill 1952, House of Representatives, *Parliamentary Debates (Hansard)*, 4 June 1952. See also *Jennifer and Minister for Immigration and Multicultural Affairs* [2006] AATA 302 at [21] (the exemption referred to in that case did not cover children who claim asylum as refugees on their arrival in Australia).

16 *Migration (Miscellaneous Amendments) Act 1983* (Cth).

17 In *R v Director-General of Social Welfare (Vic); Ex parte Henry* (1975) 133 CLR 369, the validity of s 6 of the IGOC Act had been upheld as a law with respect to "immigration and emigration" within s 51(xxvii) of the Constitution, on the basis that the guardianship came to an end once an "immigrant child" had become a member of the Australian community and was no longer an immigrant. However, since the 1983 amendments, the constitutional basis of the

along with the addition of s 4AA conferring power on the Minister to make guardianship orders in respect of non-citizen minors who entered Australia in the charge of or for the purposes of living under the care of a parent or a relative aged 21 or more (for example, in the case of a subsequent breakdown in those care arrangements).

17. In 1994, the *Immigration (Guardianship of Children) Act Amendment 1994* (Cth) inserted s 4AAA, which contains the current definition of "non-citizen child". While incorporating the elements of previous definitions, s 4AAA also excluded a child who entered Australia in the charge of or for the purposes of living under the care of an intending adoptive parent, or to reside with an adult pursuant to a prescribed adoption class visa.

18. Notwithstanding that the IGOC Act was originally enacted in a different historical context, the provisions relating to the guardianship of non-citizen children are capable of application to unaccompanied minors seeking asylum in Australia. This was noted during Parliamentary debate on the second reading of the *Immigration (Guardianship of Children) Amendment Act 1994* (Cth), in the course of which it was observed that the Minister has guardianship under the IGOC Act of "unaccompanied refugee minors".[19] Further, the Minister has accepted that he is the guardian of unaccompanied non-citizen children even if they have entered Australia without a valid visa.[20]

The Minister's obligations as the guardian of a non-citizen child

19. Section 6 of the IGOC Act provides that the First Defendant shall be the guardian of every non-citizen child who arrived in Australia and shall have the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have until the child reaches the age of eighteen or leaves Australia permanently.

20. This includes a conferral on the Minister of all the usual incidents of guardianship, of a set of rights and responsibilities analogous to those of a parent (or "natural

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IGOC Act has been the power conferred by s 51(xix) to make laws with respect to aliens (*i.e.* non-citizens).

18 *Statute Law (Miscellaneous Provisions) Act (No.1) 1985* (Cth).

19 House of Representatives, *Parliamentary Debates (Hansard)*, 3 March 1994, 1693, 1694; see also Taylor, "Guardianship of Child Asylum-Seekers" (2006) 34 *Federal Law Review* 185 at 188.

20 Agreed Statement of Facts, para 22; *WACB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 210 ALR 190; (2004) 79 ALJR 94 at [105]; *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 29 at 47-48 [92].

guardian").[21] It encompasses the full range of rights and powers that can be exercised by an adult in respect of the welfare and upbringing of a child,[22] including the duty to protect the child from harm, and the right to make decisions relating to the long-term welfare of the child.[23] The legal concept of guardianship requires the guardian to provide or address the basic human needs of the child.[24]

21. The concept of guardianship for the purposes of the IGOC Act confers a "varying spectrum of powers and duties", the nature and extent of which must be assessed and evaluated from the language, scope and object of the statute.[25] Guardianship of a child may be separate and distinct from the care and custody of the child. It can involve duties that encompass "the defence, protection and guarding of the child, or his property, from danger, harm or loss that may enure from without".[26] As Kriewoldt J noted in *Ross v Chambers*,[27] "[t]he relationship of guardian and ward exists because the ward, for some reason acknowledged by the law to be sufficient, requires the protection, care or oversight of some other person".

22. In *X v Minister for Immigration and Multicultural Affairs*,[28] North J accepted that the responsibilities of a guardian under s 6 of the [ICOG] Act include the responsibilities concerned with according fundamental human rights to children which are the subject of the Convention on the Rights of the Child.[29] North J stated:[30]

> The guardian must therefore address the basic human needs of a child, that is to say, food, housing, health and education. Over the course of this century, attention to the needs has come to be recognised as a fundamental human right of children, including in various international instruments to which Australia is a party.

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21 *Sadiqi v Commonwealth of Australia (No 2)* [2009] FCA 1117 at [299].
22 Dickey, *Family Law* (4th ed 2002) at 341.
23 Dickey, *Family Law* (4th ed 2002) at 344.
24 *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524 at 534-535 [33]-[34]; *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 29 at 47 [88].
25 Compare *Trevorrow v South Australia (No.5)* (2007) 98 SASR 136 at 240-243 [439]-[450]; *South Australia v Lampard-Trevorrow* (2010) 106 SASR 331 at 376 [209], 378-379 [222]-[226].
26 *Wedd v Wedd* [1948] SASR 104 at 106-107, cited in *Trevorrow v South Australia (No.5)* (2007) 98 SASR 136 at 241 [442].
27 Unreported, Supreme Court of the Northern Territory, 5 April 1956, at 78 (cited in *Trevorrow v South Australia (No.5)* (2007) 98 SASR 136 at 242 [448]).
28 (1999) 92 FCR 524; see also *Jaffari v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 10 at 15-16 [15]-[18] (French J).
29 (1999) 92 FCR 524 at 535-538 [34]-[43].
30 (1999) 92 FCR 524 at 535 [34].

23. The best interests of the child are an overriding limit on the exercise of the powers of a guardian.[31]

The interaction between the IGOC Act and the Migration Act

24. The plaintiff is a "non-citizen child" within the meaning of s 4AAA of the IGOC Act. He has not turned 18; he entered Australia as a non-citizen; and (by seeking asylum in Australia) he intends to become a permanent resident of Australia.[32]

25. The *Migration Act* confers a range of powers and duties on the Minister and on "officers" (as defined in s 5), including powers and duties in respect of unlawful non-citizens and offshore entry persons. A non-citizen child in respect of whom the Minister is the guardian pursuant to s 6 of the IGOC Act may be an unlawful non-citizen or an offshore entry person. Prima facie, the powers and duties under the *Migration Act* are capable of application in respect of such a non-citizen child. In the exercise of those powers and the performance of those duties, questions arise as to the relationship between the relevant provisions of the *Migration Act* and the provisions of the IGOC Act which impose statutory obligations on the Minister.

26. Relevantly to the present case, s 198A(1) of the *Migration Act* confers power on an officer to take an "offshore entry person" from Australia to a country in respect of which a declaration is in force under subs 198A(3).

27. The Minister's statutory obligations as the legal guardian of a non-citizen child may give rise to a potential "conflict of roles" in respect of the performance of functions under the *Migration Act*.[33] Any such conflict cannot be completely avoided simply by a delegation by the Minister of his "powers and functions" under s 5 of the IGOC Act.[34] Such a delegation does not prevent the Minister from exercising his powers

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31 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 240; *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 at 184 (Lord Scarman), 200 (Lord Templeman).

32 See Agreed Statement of Facts, para 22. *Cf. WACB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 210 ALR 190; (2004) 79 ALJR 94 at [42] (fn 35) (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Minister for Immigration and Citizenship v SZGUR* [2011] HCA 1 at [55] (fn 36) (Gummow J).

33 *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 29 at 47-48 [90]-[92].

34 The Minister has delegated to various officers of the Department of Immigration and Citizenship his powers and functions under the IGOC Act in relation to non-citizen children: see e.g. *Immigration (Guardianship of Children) Delegation 2011* dated 16 June 2011. The identity of the officers to whom powers and functions are delegated differ between those children who are in immigration detention, and those who are not in immigration detention. The Minister has also delegated to specified officers of State and Territory agencies his powers and functions

and functions: IGOC Act, s 5(3). Further, the delegation of powers and functions does not absolve the Minister of his "rights, powers, duties, obligations and liabilities as a natural guardian of the child" pursuant to s 6 of the IGOC Act. And the officers having functions or powers under the *Migration Act* are subject to the directions of the Minister in relation to the performance of those functions and the exercise of those powers: s 499.

The Acts are to be read together

28. In construing the *Migration Act* and the IGOC Act respectively, the starting point should be "the very strong presumption that the ... legislature did not intend to contradict itself, but intended that both Acts should operate".[35]

29. In *Butler v Attorney-General (Vict)*,[36] Fullagar J said:

> The books contain, of course, plenty of examples of an implied repeal - total or partial - of an earlier statute by a later statute of the same legislature. But it is a comparatively rare phenomenon, and it has been said again and again that such a repeal will not be held to have been effected unless actual contrariety is clearly apparent. I would say that it is a very rare thing for one statute in affirmative terms to be found to be impliedly repealed by another which is also in affirmative terms.

30. Gaudron J referred to the same principle in *Saraswati v R*:[37]

> It is a basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is necessarily to be implied. There must be very strong grounds to support that implication, for there is a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other.

31. In considering whether the provisions of a later Act effect an implied repeal of an earlier enactment, courts have generally adopted the criteria of direct conflict or repugnancy, as opposed to the "covering the field" doctrine derived from cases on

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under the IGOC Act in relation to non-citizen children who are in alternative care arrangements, community detention, or otherwise not in immigration detention.

35 *Butler v Attorney-General (Vict)* (1961) 106 CLR 268 at 276.

36 (1961) 106 CLR 268 at 275, see also at 290 (Windeyer J); see also *South Australia v Tanner* (1989) 166 CLR 161 at 171; *Rose v Hvric* (1963) 108 CLR 353 at 360; *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1 at 7, 13-14.

37 (1991) 172 CLR 1 at 17.

s 109 of the Commonwealth Constitution.[38] The approach is whether the two statutes are capable of standing together.

32. The IGOC Act was first enacted in 1946. The *Migration Act* was enacted in 1958. Each has been amended from time to time. Relevantly to the present case, s 198A was inserted on 27 September 2001 by the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001*. The IGOC Act, including s 6, has been the subject of subsequent amendment.[39] Neither Act expressly provides that it should be read as subject to the other Act.

33. Section 198A(1) of the *Migration Act* is not so irreconcilable with s 6 of the IGOC Act that the two provisions cannot stand together.[40] The maintenance and observance of the Minister' guardianship obligations of the under s 6 of the IGOC Act does not defeat the purpose of s 198A(1), nor would it give rise to any inconvenience or incongruity. In that regard, the operation of s 6 of the IGOC Act is not displaced by "hypothetical or possible conflicts" with the provisions of the *Migration Act*; rather, the inquiry is into "the practical ways in which the legislation operates together and whether, in that context an irreconcilable conflict of duties really arises".[41]

34. It is possible for the IGOC Act and the *Migration Act* (including in particular s 198A(1)) to be read together. One useful way of testing the consistency of the two provisions may be by notionally writing s 6 of the IGOC Act into the relevant provisions of the *Migration Act*,[42] for example by importing into s 198A(1) a qualification or proviso in cases involving a non-citizen child, requiring the exercise of the power to be informed by the existence of the Minister's guardianship obligations. In any event, s 198A(1) does not manifest an intention to override the duties imposed on the Minister as the guardian of a non-citizen child under s 6 of the IGOC Act.

35. Some, although perhaps limited, assistance may be gained by a consideration of which of s 6 of the IGOC Act or s 198A(1) of the *Migration Act* is a "specific" provision and which is "general" provision.[43] In this regard, the IGOC Act makes specific provision in relation to the guardianship of a limited class of persons, namely, non-

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38 *Suatu Holdings Pty Ltd v Australian Postal Corporation* (1989) 86 ALR 532 at 547.

39 *E.g. Statute Law Revision Act 2008* (Cth).

40 *cf. Goodwin v Phillips* (1908) 7 CLR 1 at 10.

41 *Royal Automobile Club of Australia v Sydney City Council* (1992) 27 NSWLR 282 at 294.

42 *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603 at 626.

43 The presumption that a later general enactment is not intended to interfere with an earlier special enactment dealing with the same subject matter (*generalia specialibus non derogant*) operates as a qualification to the presumption that a later enactment effects an implied repeal of an inconsistent earlier enactment: see *e.g. Bank Officials Association (SA Branch) v Savings Bank of South Australia* (1923) 32 CLR 276 at 282, 299.

citizen children. The class of non-citizen children within the meaning of the IGOC Act is a sub-class of unlawful non-citizens and offshore entry persons within the meaning of the *Migration Act*. The *Migration Act* does not deal directly or explicitly with the subject of guardianship of non-citizen children. The discretionary powers conferred by the *Migration Act* in relation to detention and removal of unlawful non-citizens and offshore entry persons may be construed subject to the earlier specific provisions in the IGOC Act which impose guardianship duties on the Minister in respect of his wards.

36. The above approach to the construction of s 198A of the *Migration Act* is not inconsistent with the observations made by this Court in *WACB v Minister for Immigration and Multicultural and Indigenous Affairs*.[44]

36.1. *WACB* was concerned with the construction of a provision of the *Migration Act* (former s 478(1)(b)) which required an application for review to be lodged with the Federal Court "within 28 days of the applicant being notified of the decision". One of the arguments advanced by the appellant was that proper notification of the decision for the purposes of this provision was affected by the Minister's duties as the appellant's statutory guardian under the IGOC Act.[45] The Court concluded that the Minister's role as guardian was irrelevant to the construction of the phrase "notified of the decision" s 478(1)(b).[46] However, this does not mean that the Minister's role as guardian is of no relevance to the exercise of discretionary powers conferred by the *Migration Act*.

36.2. Gleeson CJ, McHugh, Gummow and Hayne JJ also rejected as "ill-founded" a submission that "for the Minister, as statutory guardian, the interests of the minor were paramount and took precedence over the Minister's statutory obligations under the Act as the opposing litigant in the Federal Court and this Court".[47] However, the Commission does not rely on any real or perceived conflict of interest between the Minister's role as statutory guardian and his role as the respondent to proceedings seeking judicial review of decisions made under the *Migration Act*. Rather, the Commission submits that the

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44 (2004) 210 ALR 190; (2004) 79 ALJR 94 at [42] (Gleeson CJ, McHugh, Gummow and Hayne JJ), [102]-[107] (Kirby J); compare *Plaintiff P1/2003 v Ruddock* [2007] FCA 65 at [73]-[84].

45 See *WACB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 210 ALR 190; (2004) 79 ALJR 94 at [102].

46 *WACB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 210 ALR 190; (2004) 79 ALJR 94 at [42] (Gleeson CJ, McHugh, Gummow and Hayne JJ), [103] (Kirby J).

47 *WACB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 210 ALR 190; (2004) 79 ALJR 94 at [42].

Minister's obligations as statutory guardian must inform the exercise of powers and the making of decisions under the *Migration Act* that affect a non-citizen child.

36.3. Kirby J stated that, assuming (without deciding) that the Minister was the statutory guardian of an alien child in the position of the appellant, this would not alter the operation of the express terms of s 478 of the *Migration Act*, on the basis that "[a]ny *general* powers and obligations of the Minister under the Guardianship Act would have to be read as subject to the more *specific* provisions of the *Migration Act*, enacted to apply with respect to all applications for judicial review of decisions of the Tribunal created by the latter Act".[48] Again, this observation does not address the construction of provisions of the *Migration Act* conferring a discretionary power on the Minister or his officers which may be exercised in relation to a non-citizen child within the meaning of the IGOC Act. The construction of such provisions, and their reconciliation with the provisions of the IGOC Act, raises different issues. As submitted above, an attempt to distinguish between specific and general provisions does not greatly assist in the resolution of such issues.

The IGOC Act and the Migration Act should be interpreted consistently with fundamental rights and international law obligations

37. In the absence of clear and unambiguous language, s 198A of the *Migration Act* and s 6 of the IGOC Act should not be construed as abrogating or curtailing any fundamental rights or freedoms.[49]

38. Further, s 198A of the *Migration Act* and s 6 of the IGOC Act should be interpreted and applied as far as their language admits as not to be inconsistent with the established rules of international law.[50] In particular, those sections should be interpreted consistently with Australia's obligations under relevant international

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48 *WACB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 210 ALR 190; (2004) 79 ALJR 94 at [106].

49 See e.g. *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at [30] (Gleeson CJ); *Coco v The Queen* (1994) 179 CLR 427 at 437.

50 *Jumbunna Coal Mine NL v Victorian Coalminers' Association* (1908) 6 CLR 309 at 363 (O'Connor J); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 (Mason CJ and Deane J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [97] (Gummow and Hayne JJ).

instruments, including the CRC.[51] Australia's ratification of the CRC was "a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention".[52]

39. For such purposes, provisions of the CRC which are of particular relevance include:

39.1. Article 2, which deals with non-discrimination;

39.2. Article 3(1), which deals with the best interests of the child;

39.3. Article 18(1), which deals with guardianship;

39.4. Article 20, which deals with children who are deprived of their family environment;

39.5. Article 22, which deals with refugee children; and

39.6. Article 37, which deals with denial of liberty.

40. Article 3(1) of the CRC provides:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 3(1) requires consideration of the best interests of individual children in particular circumstances.[53] The principle set out in article 3(1) had been previously recognised in the 1959 Declaration on the Rights of the Child.[54] The principle requires that the best interests of a child must be the subject of active consideration of all administrative authorities, legislative bodies and courts of law, and taken into account as a primary consideration.[55]

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51 The CRC was adopted by the United Nations General Assembly on 20 November 1989. Australia ratified the CRC on 17 December 1990, and it came into effect for Australia on 16 January 1991.

52 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 291 (Mason CJ and Deane J).

53 *Implementation Handbook for the Convention on the Rights of the Child*, United Nations Children Fund (UNICEF), 2002, at p 43. UNICEF has a specific role in providing expert advice to the Committee on the Rights of the Child on matters relating to the implementation of the CRC, and technical advice and assistance to parties to the CRC: see Articles 45(a) and (b).

54 Principle 2 provided: "The child shall enjoy special protection, and shall be given opportunites and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration."

55 Van Bueren, *The International Law on the Rights of the Child*, 1995, p 46; *Minister of State of Immigration and Ethnic Affairs* v *Teoh* (1995) 183 CLR 273 at 289 (Mason CJ and Deane J).

41. Article 18(1) of the CRC provides:

> States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

42. Article 20(1) of the CRC:

> A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

This article recognises the special vulnerability of unaccompanied children.[56] The appointment of a competent guardian in respect of an unaccompanied child "serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child".[57] The United Nations Committee on the Rights of the Child has commented on articles 18(2) and 20(1) of the CRC:[58]

> States are required to create the underlying legal framework and to take necessary measures to secure proper representation of an unaccompanied or separated child's best interests. Therefore, States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State, in compliance with the Convention and other international obligations. The guardian should be consulted and informed regarding all actions taken in relation to the child. The guardian should have the authority to be present in all planning and decision-making processes, including immigration and appeal hearings, care arrangements and all efforts to search for a durable solution. The guardian or adviser should have the necessary expertise in the field of childcare, so as to ensure that the interests of the child are safeguarded and that the child's legal, social, health, psychological, material and educational needs are appropriately covered by, inter alia, the guardian acting as a link between the child and existing specialist agencies/individuals who provide the continuum of care required by the child. Agencies or individuals whose interests could potentially be in conflict with

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56 An "unaccompanied child" is a person who is under the age of eighteen who is separated from both parents and is not being cared for by an adult who by law or custom has responsibility to do so: UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*, February 1997, paragraph 3.1.

57 United Nations Committee on the Rights of the Child, *General Comment No. 6 (2005), Treatment of Unaccompanied and Separated Children Outside Their Country of Origin* (UN Doc. CRC/GC/2005/6, 39th Session) (1 September 2005) (**General Comment No.6**) at [21].

58 General Comment No.6 at [33].

> those of the child's should not be eligible for guardianship. For example, non-related adults whose primary relationship to the child is that of an employer should be excluded from a guardianship role.

43. The United Nations Committee on the Rights of the Child has also recognised that any resettlement decision of an unaccompanied child "must be based on an updated, comprehensive and thorough best-interests assessment, taking into account, in particular, ongoing international and other protection needs".[59]

44. Article 22(1) of the CRC provides:

> States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

45. The international community has recognised that unaccompanied children seeking asylum warrant special attention in the process of determining their claims to refugee status.[60] The United Nations High Commissioner for Refugees (UNHCR) has developed guidelines which contain safeguards for status determinations in respect of unaccompanied children, including the appointment of a guardian or adviser to safeguard the child's interests and to promote a decision that is in the child's best interests.[61]

46. In the absence of a contrary legislative intention, s 198A(1) of the *Migration Act* and s 6 of the IGOC Act should be interpreted consistently with Australia's international obligations under the CRC.

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59 General Comment No.6 at [92].

60 See *e.g.* Conclusions on the International Protection of Refugees, adopted by the UNHCR Executive Committee, No 47 (XXXVIII), "Refugee Children", 1987; Council of the European Union, Resolution on "Unaccompanied Minors who are Nationals of Third Countries", Official Journal C 221, 19 July 1997, at 23-27. In addition, countries such as Canada, the United States of America, the United Kingdom and New Zealand have previously adopted special procedures and rules of evidence governing the determination of applications for refugee status by children, including unaccompanied children.

61 UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (February 1997); UNHCR, *Refugee Children: Guidelines on Protection and Care* (1994).

The exercise of powers under the Migration Act

47. For the reasons set out above, an exercise of the discretionary power conferred by s 198A(1) to take a non-citizen child from Australia to a declared country must be informed by the existence of the Minister's guardianship obligations in relation to that child.

48. In the same way that a public authority may be subject to a duty of care in relation to the exercise of statutory powers where such a duty is not forbidden by or inconsistent with the statutory scheme,[62] the discretionary powers under the *Migration Act* may be qualified or affected by the existence of the Minister's duties as the guardian of a non-citizen child.

49. In practical terms, this requires an officer to exercise the power conferred by s 198A(1) in, or at least having regard to, the best interests of the non-citizen child.

50. As is the case with the duty imposed by s 198(2) of the *Migration Act*, the power under s 198A(1) is conferred on an "officer" as defined in s 5. The definition of "officer" does not cover the Minister himself. Nevertheless, the Minister has power under s 499 of the *Migration Act* to give written directions to a person or body having functions or powers under this Act about the performance of those functions or the exercise of those powers. Accordingly, in the discharge of his duties of guardianship under the IGOC Act in relation to any non-citizen child who is an offshore entry person, the Minister may address the question whether it is in the best interests of that child to be taken from Australia to a declared country, and could direct his officers accordingly in relation to the exercise of the power conferred by s 198A(1). This could either be done on a case-by-case basis, or by a general direction requiring officers to address the best interests of the non-citizen child as the governing consideration when deciding whether or not to take the child from Australia under s 198A(2).

51. Alternatively, s 6A(1) of the IGOC Act imposes a requirement of Ministerial consent in order for a non-citizen child to leave Australia. Although s 6A(4) preserves the operation of "any other law regulating the departure of persons from Australia", the Commission submits that s 198A should not be characterised as such a law regulating the departure of persons from Australia. Subsection 6A(4) is directed to ensuring that a non-citizen child who leaves Australia (with Ministerial consent) must

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62 See *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; *Trevorrow v South Australia (No.5)* (2007) 98 SASR 136 at 348-358; *South Australia v Lampard-Trevorrow* (2010) 106 SASR 331 at 405-407.

still comply with any laws of general application which regulate the departure (such as laws requiring appropriate travel documentation or otherwise affecting the capacity to travel). It is difficult to regard a law which creates a power to require the forced removal of an offshore entry person from Australia as a law regulating the departure of persons from Australia.

52. Assuming that the effect of s 6A(1) of the IGOC Act is to require the Minister to give his written consent before a non-citizen child can leave Australia, an officer would be precluded from exercising the power conferred by s 198A(1) to take a non-citizen child from Australia to a declared country unless the Minister had given such written consent. In deciding whether or not to give consent under s 6A(1), the Minister is required to have regard to the child's best interests and in particular whether "the granting of consent would be prejudicial to the interests of the non-citizen child": s 6A(2).

53. The making of a declaration or declarations under s 198A(3) of the *Migration Act* does not itself require any offshore entry person to be taken from Australia to a declared country. This depends on the exercise of discretion by an officer under s 198A(1). In exercising that discretion in relation to any non-citizen child within the meaning of the IGOC Act, the officer cannot ignore the fact that the Minister is the guardian of the child. Nor can the Minister avoid his obligations as guardian to protect the child's interests by allowing the child to be taken from Australia to a declared country. The Minister is obliged to exercise his powers, including under s 499 of the *Migration Act* and s 6A of the IGOC Act, in the light of his guardianship obligations and the child's special need for protection as recognised by the IGOC Act. The Minister stands in the position of a natural guardian of the non-citizen child. Accordingly, before consenting to or otherwise permitting the removal of the child from Australia, the Minister must address the question whether it is in the best interests of the child to be taken to the relevant declared country. To fail to do so would involve an abrogation of the Minister's obligations as the child's legal guardian.

54. This is not to say that there might not be cases in which it is in the best interests of a particular non-citizen child to be taken to a declared country where any claims to protection under the Refugees Convention may be assessed. For example, there might be a natural parent or other adult relative of the child who is living in the declared country, so that it might be reasonable to form the view that the child would be properly cared for in that country. However, if the Minister forms the view that it is *not* in the best interests of a non-citizen child to be removed to a declared country, he

should take any available steps to prevent the child from being taken from Australia. In such circumstances, it would be open to the Minister to direct that any protection claims made by the non-citizen child under the Refugees Convention should be assessed in Australia, for the purposes of determining whether the child should be permitted to make an application for a visa under s 46A or should be granted a visa under s 195A of the *Migration Act*.

55. Any failure by the Minister to discharge his guardianship obligations by addressing the best interests of the non-citizen child would be amenable to judicial review. A decision to take a non-citizen child from Australia to a declared country under s 198A(1) without addressing the Minister's guardianship obligations or the best interests of the child would involve a failure to take into account a mandatory relevant consideration which s 198A(1), read in the light of s 6 of the IGOC Act, requires to be taken into account. Further, the inadequate performance by the Minister of his obligations as the statutory guardian of a non-citizen child may be subject to supervision by a court of competent jurisdiction,[63] including in the exercise of *parens patrie* jurisdiction in relation to the child.[64]

The position of unaccompanied minors in Malaysia

56. In relation to any proposed action to take the plaintiff or any other non-citizen child from Australia to Malaysia (on the assumption that the declaration made under s 198A(3) is valid), it is not clear under whose care or custody an unaccompanied minor such as the plaintiff would be placed in Malaysia. Malaysian law permits, but does not require, the appointment of a guardian in respect of persons seeking asylum who are unaccompanied minors.[65] No arrangements have been made for the appointment of a guardian for the plaintiff upon his arrival in Malaysia.[66] Malaysian

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63 See, for example, *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524 at 546-547 [76]-[80]; *cf. WADG of 2001 v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 162 at [33]. The Federal Court of Australia may have a supervisory jurisdiction under s 6 of the IGOC Act and s 39A(1A)(c) of the *Judiciary Act 1903* (Cth).

64 The *parens patriae* jurisdiction has its origin in the prerogative, although it ultimately came to be exercised through the Court of Chancery (and courts whose jurisdiction is defined by reference to the jurisdiction of that Court). See *Marion's case* (1992) 175 CLR 218 at 258-259 (Mason CJ, Dawson, Toohey and Gaudron JJ), 279-280 (Brennan J), 293 (Deane J); *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 20 [38 ER 236 at 243]; *Re Eve* [1986] 2 SCR 388; (1986) 31 DLR (4th) 1. See also *Reg v Gyngall* [1893] 2 QB 232 at 239, 241: "It was a paternal jurisdiction, a judicially administrative jurisdiction, in virtue of which the Chancery Court was put to act on behalf of the Crown, as being the guardian of all infants, in the place of a parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent."

65 Agreed Statement of Facts, para 55.

66 Agreed Statement of Facts, para 57.

courts do not generally exercise a jurisdiction equivalent to the *parens patrie* jurisdiction in respect of unaccompanied minors seeking asylum.[67]

57. Clause 8(2) of the Arrangement between Australia and Malaysia on Transfer and Resettlement dated 25 July 2011 (the **Arrangement**)[68] provides that "[s]pecial procedures will be developed and agreed by the participants to deal with the special needs of vulnerable cases and unaccompanied minors".

58. Under clause 9(1) of the Arrangement, the Government of Australia agrees to meet the costs of (among other things) the education of minor children, as well as additional "safety net" costs relating to the special welfare needs of transferees in "vulnerable cases".

59. Clause 9(3) contemplates that the Government of Australia will put in place "an appropriate pre-screening assessment mechanism in accordance with international standards before a transfer is effected". The assessment of the UNHCR that the Arrangement was "workable" was conditional "upon proper protection and vulnerability safeguards determining the pre-transfer/pre-removal assessment process in Australia, prior to the taking of any decisions on who will be transferred under the Arrangement and when".[69] In particular, UNHCR stressed that "the pre-transfer process must ... be particularly sensitive to the best interests of the child, particularly when it comes to the circumstances of unaccompanied minors." At that stage, the details of the pre-transfer process had not yet been formulated.

60. The Operational Guidelines[70] for the implementation of the Arrangement contemplate that a transferee will be "handed over" to Malaysian authorities upon arrival in Malaysia: clause 1.4. From that point, an unaccompanied minor will be beyond the care and custody of the Minister. The Operational Guidelines are largely silent on the position of unaccompanied minors who are transferred to Malaysia under the Arrangement. Clauses 3.1 and 3.2 indicate that a transferee will be allowed to live in the community and will be encouraged to become "self-sufficient" – it is unclear how such provisions would be applied to an unaccompanied minor. Clause 3.3 provides that transferees "of school age" will be permitted access to education arrangements. Clause 3.5 deals with the identification of "vulnerable cases" to be addressed by existing UNHCR arrangements, including "support arrangements for minors", with a backup "safety net" provided by the International Organisation for Migration (**IOM**).

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67 Agreed Statement of Facts, para 56.
68 Agreed Statement of Facts, Attachment 30.
69 Statement of Agreed Facts, Attachment 34 (Attachment C).
70 Statement of Agreed Facts, Attachment 31.

61. In the circumstances, real questions would arise as to whether it is in the best interests of a non-citizen child (such as the plaintiff) to be taken from Australia to Malaysia under s 198A. On the proper construction of s 198A of the *Migration Act* in the light of the Minister's obligations as the plaintiff's guardian under s 6 of the IGOC Act, such questions must be addressed in any exercise of the power conferred by s 198A in relation to a non-citizen child.

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