

How much access to justice is there for people seeking asylum?

National Access to Justice and Pro Bono Conference 2019

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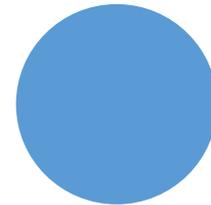
Outline

Refugee obligations under international law vs Australian law

Domestic legal and administrative framework governing people seeking asylum in Australia

Access to justice challenges: Why have constitutional challenges been so unsuccessful?

What are Australia's legal obligations to refugees under international law?



Australia's refugee obligations under international law

Australia has signed the **1951 Refugee Convention** and the **1967 Protocol**. This means it has committed not to defeat the objects of these treaties.

Australia's refugee obligations under international law

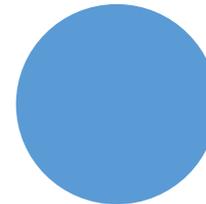
Refugees cannot be sent to a place where they may be persecuted
(non-refoulement)

Refugees who enter a country without a visa or with false documents to seek protection cannot be punished

Refugees should have the same rights as citizens to access courts and legal assistance

UNHCR recommends Convention signatories should provide free legal advice and representation to people seeking asylum

What are Australia's legal obligations to refugees under domestic law?

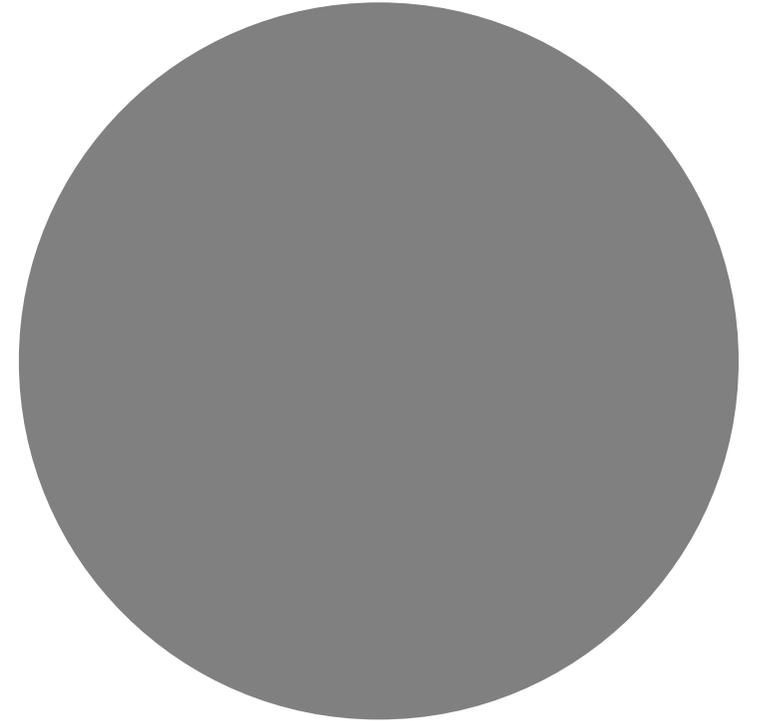


Obligations to refugees under Australian law

Incorporation of treaty obligations into Australian law is **not automatic**, and refugee obligations have been incorporated **selectively**.

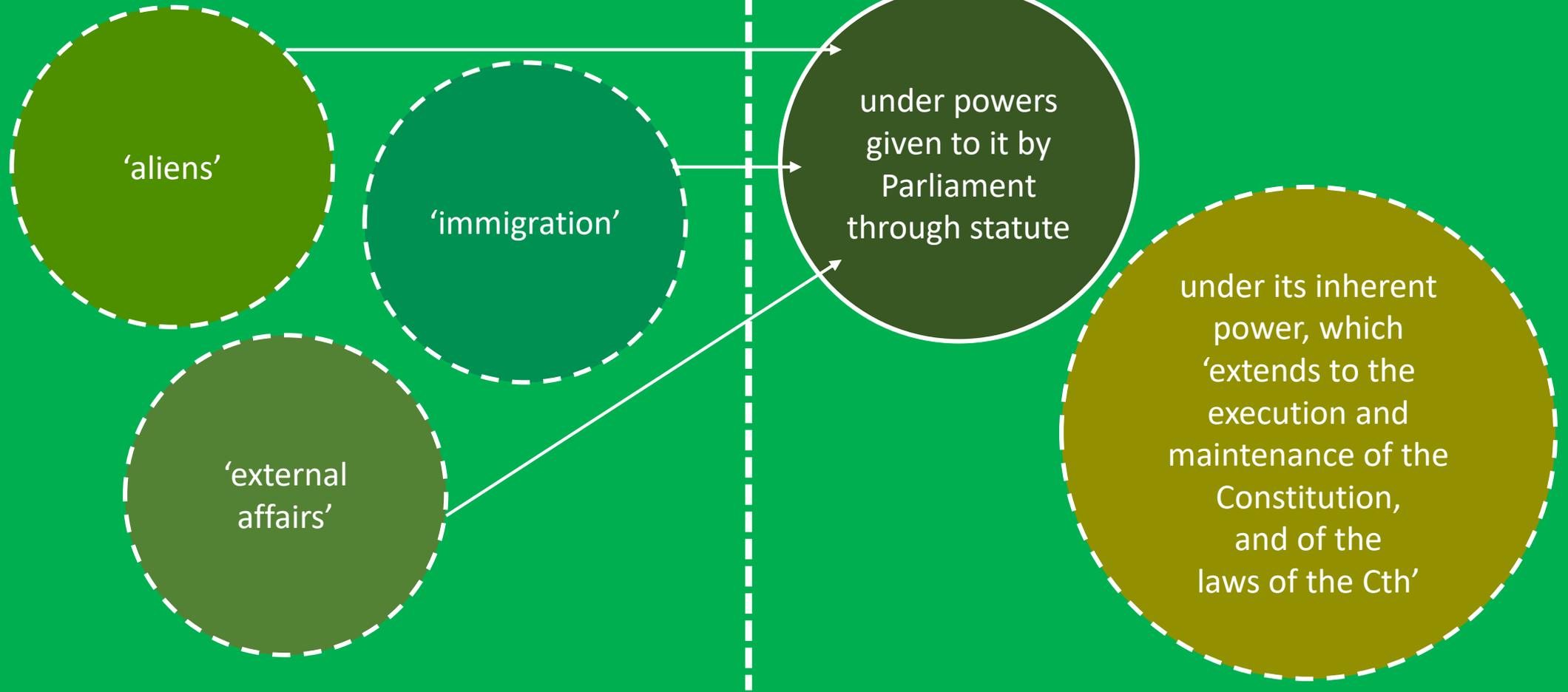
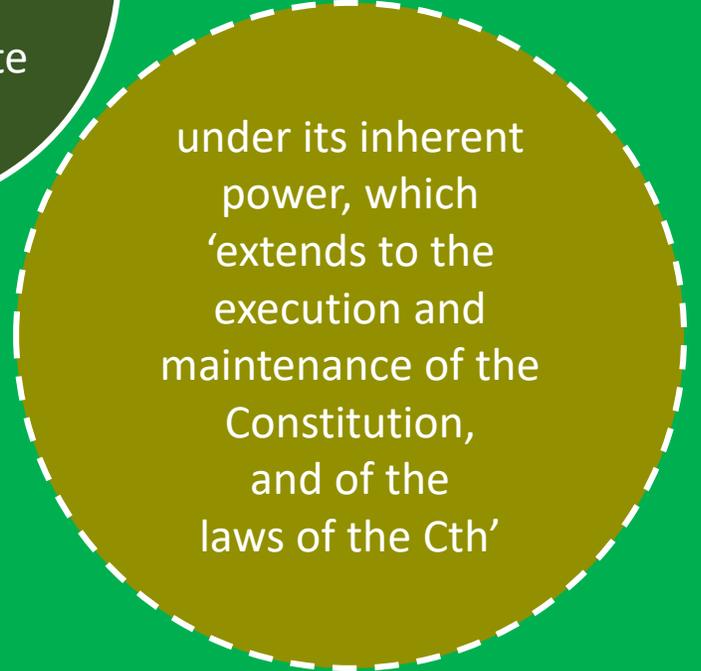
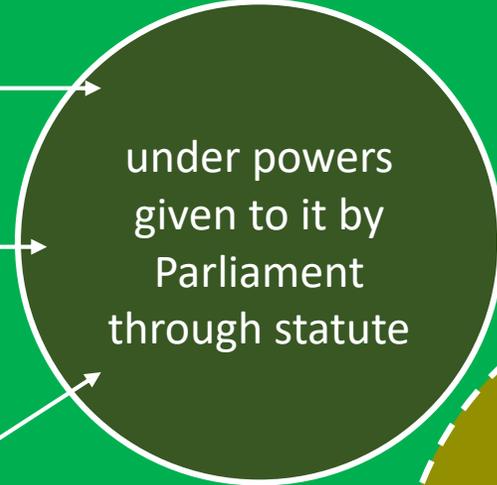
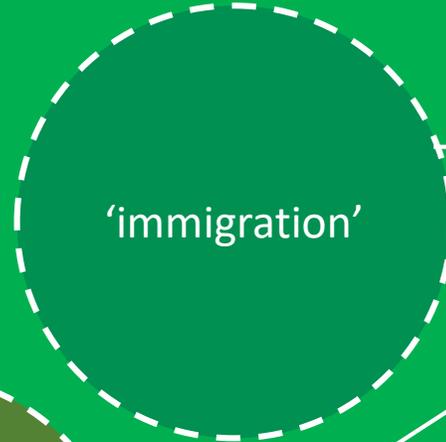
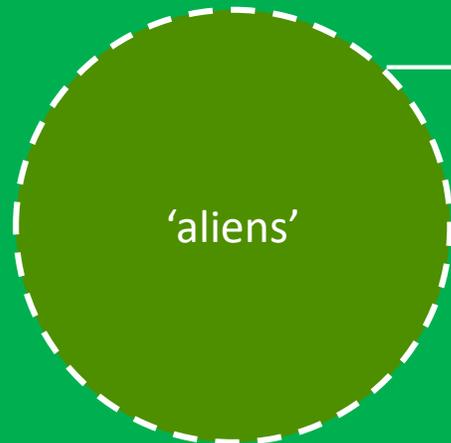


Australian refugee protection Domestic framework



Cth Parliament can make laws
'with respect to'...

Cth Executive can take action...



Migration Act 1958 (Cth)

Migration Regulations 1994 (Cth)



Lawful non-citizens
(valid visa upon entry)

Applying from offshore

Applying from onshore

Permanent protection visa

Claim for protection assessed by govt official

Not successful and exhausted all removal pathways

Detention and removal as soon as practicable

If rejected, can seek merits review (MRD-AAT)

If refusal upheld, judicial review (Fed Ct, Fed Cct Ct)

Last resort: personal intervention by Minister

Unlawful non-citizens
(no valid visa upon entry)



Arrived 13/8/12-31/12/13 & applied before 1/10/17

Temporary Protection Visa

Safe Haven Enterprise Visa

If rejected, can seek limited review by IAA

If refusal upheld, judicial review (Fed Cct Ct)

Request permission to make new visa application

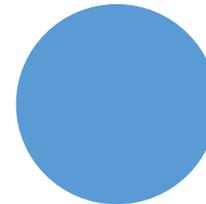
Arrivals from 1/1/14

Regional processing

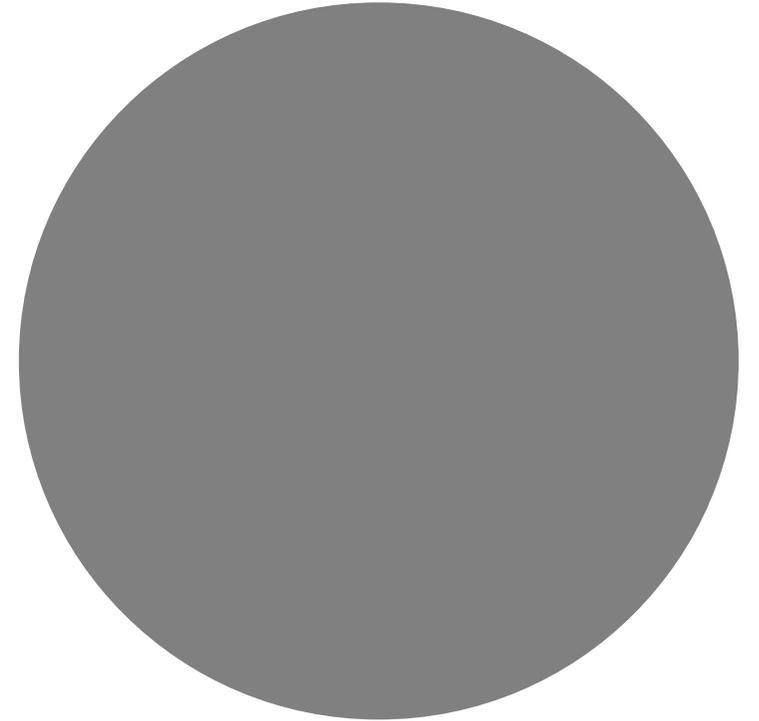
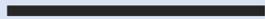
Processing in RPC under local laws

If recognised as a refugee, resettlement in RPC or third country (not Australia)

Access to justice challenges:
Why have constitutional challenges
been so unsuccessful?



Why are constitutional challenges so appealing?



Limitations on power

Cth Parliament can make laws
'with respect to'...

'aliens'

'immigration'

'external
affairs'

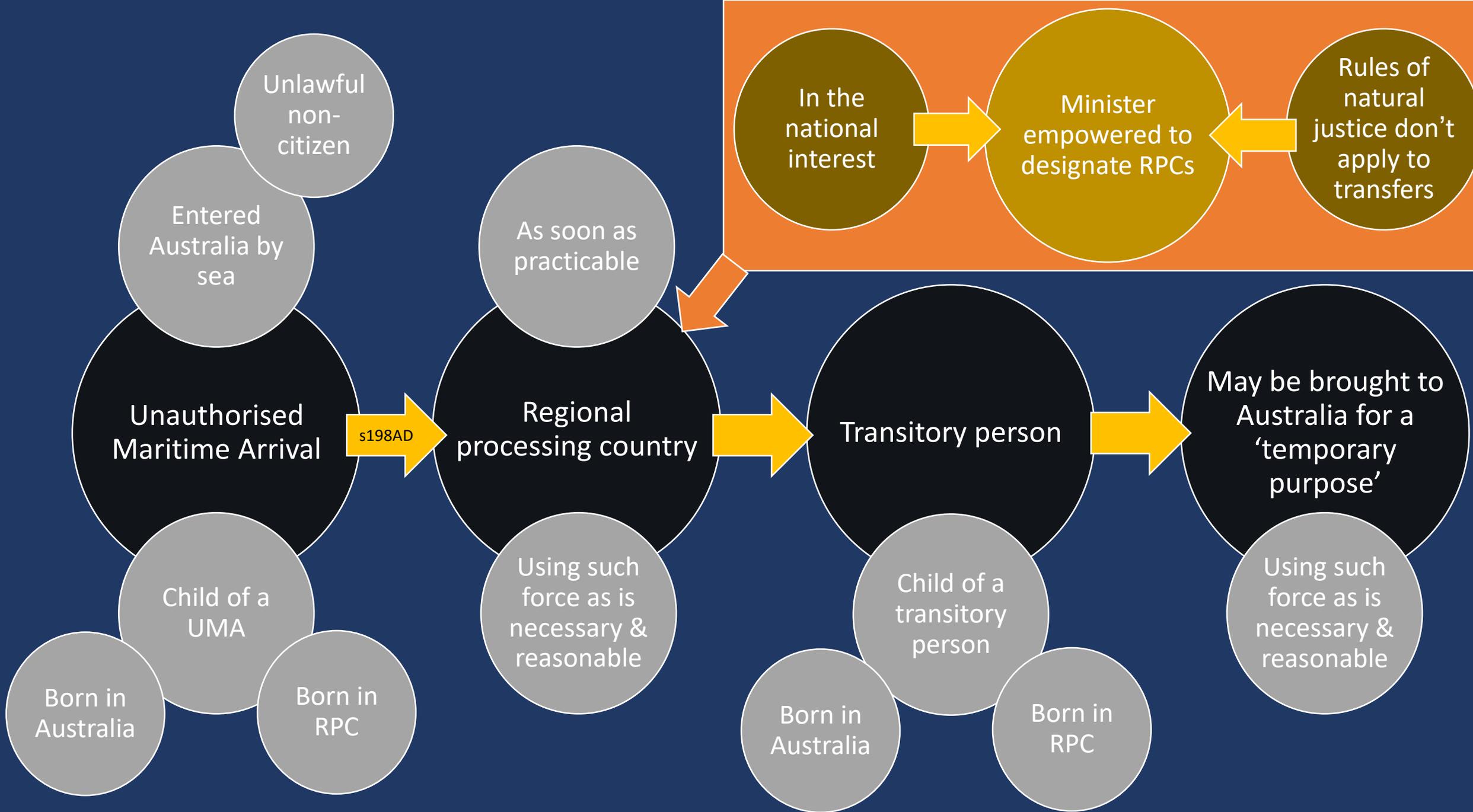
Cth Executive can take action...

under powers
given to it by
Parliament
through statute

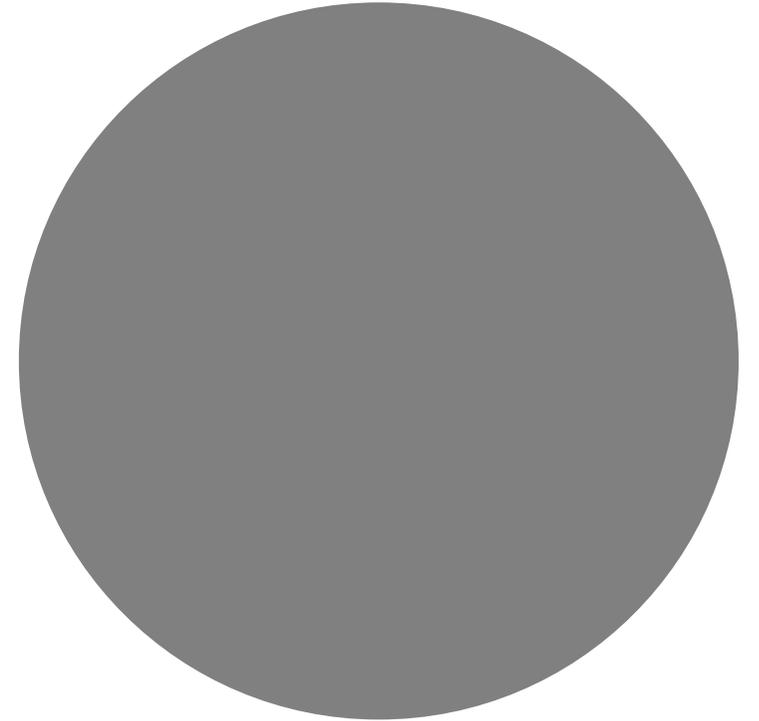
under its inherent
power, which
'extends to the
execution and
maintenance of the
Constitution,
and of the
laws of the Cth'

Punitive detention can only be ordered by a court following criminal conviction

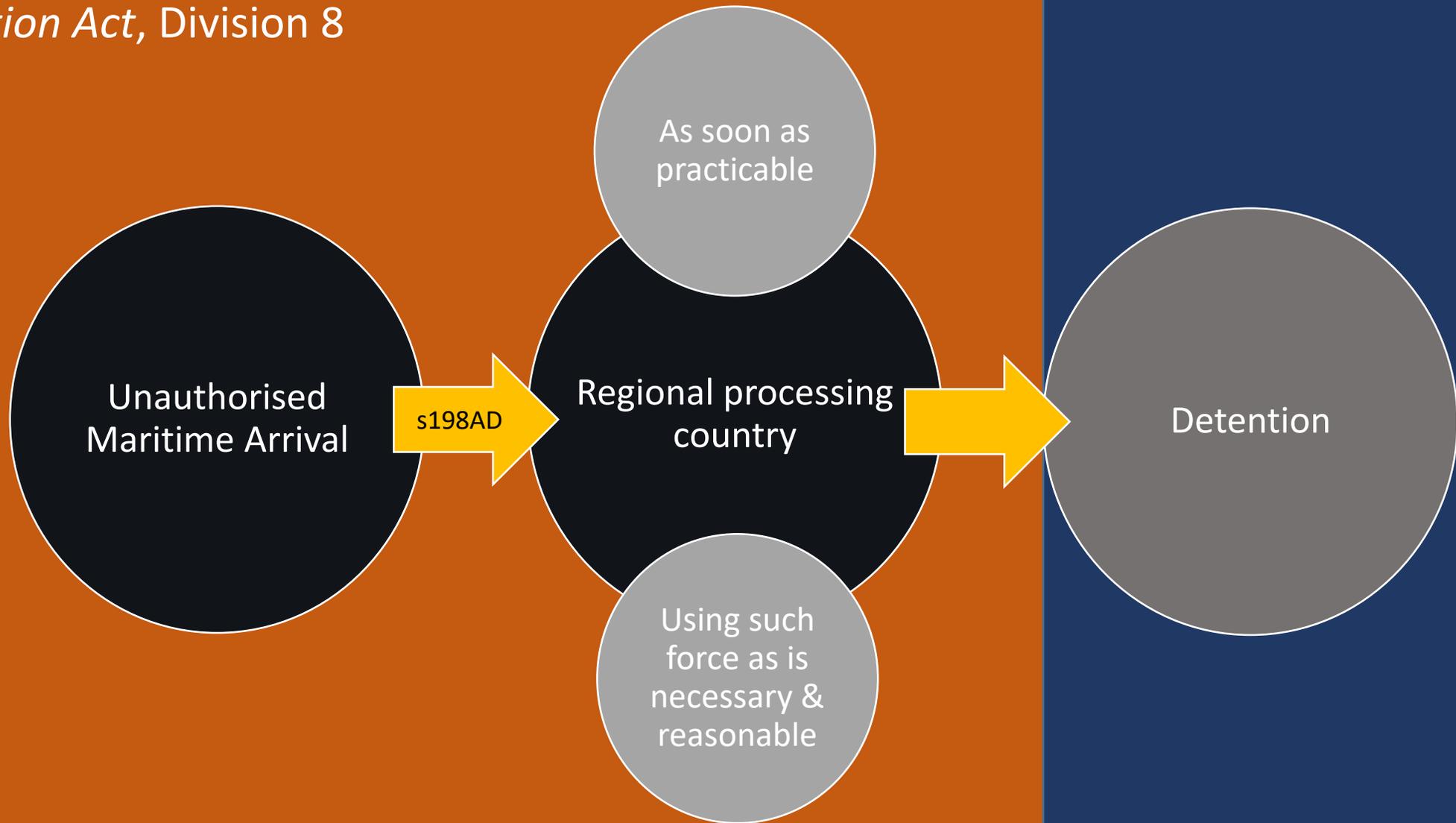
Implied freedom of communication about political matters



Why is it so hard to win a constitutional case?

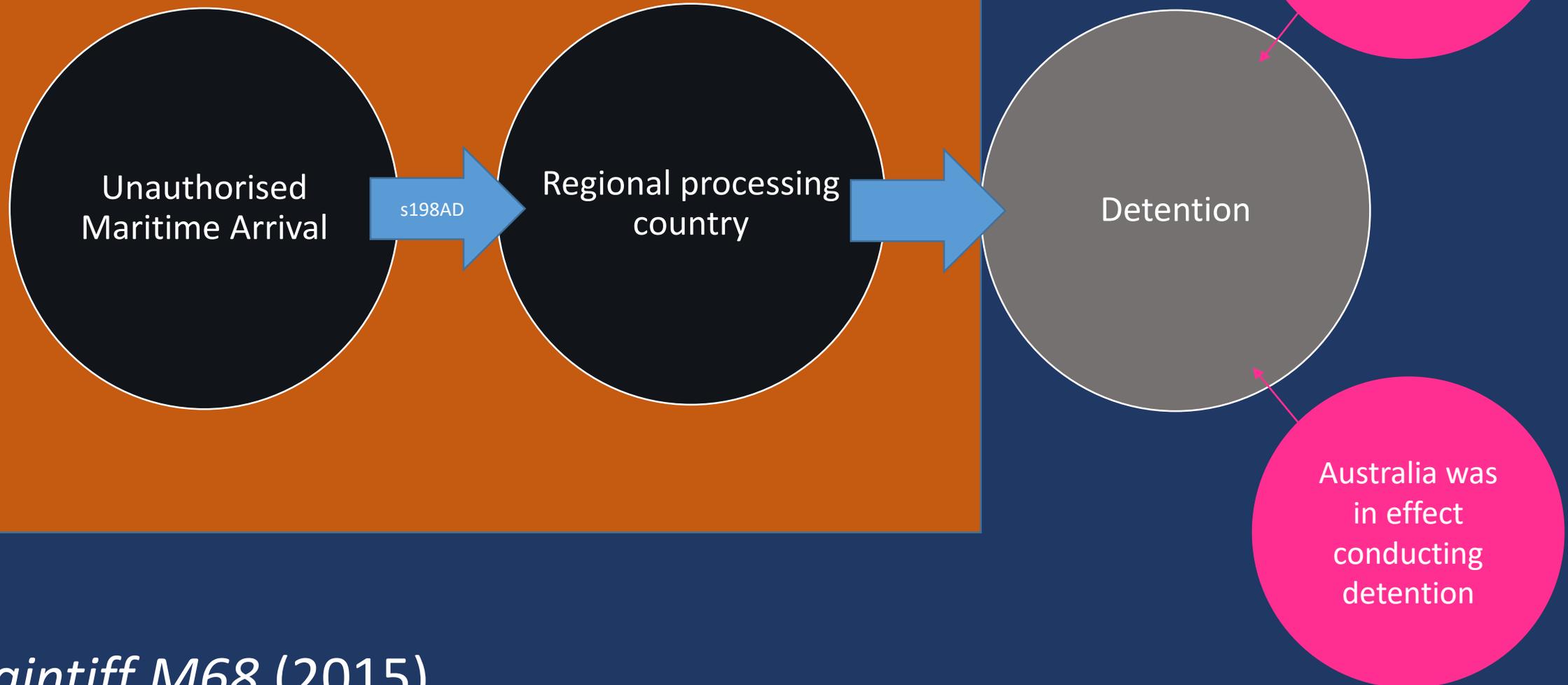


Migration Act, Division 8



Plaintiff S156 (2014)

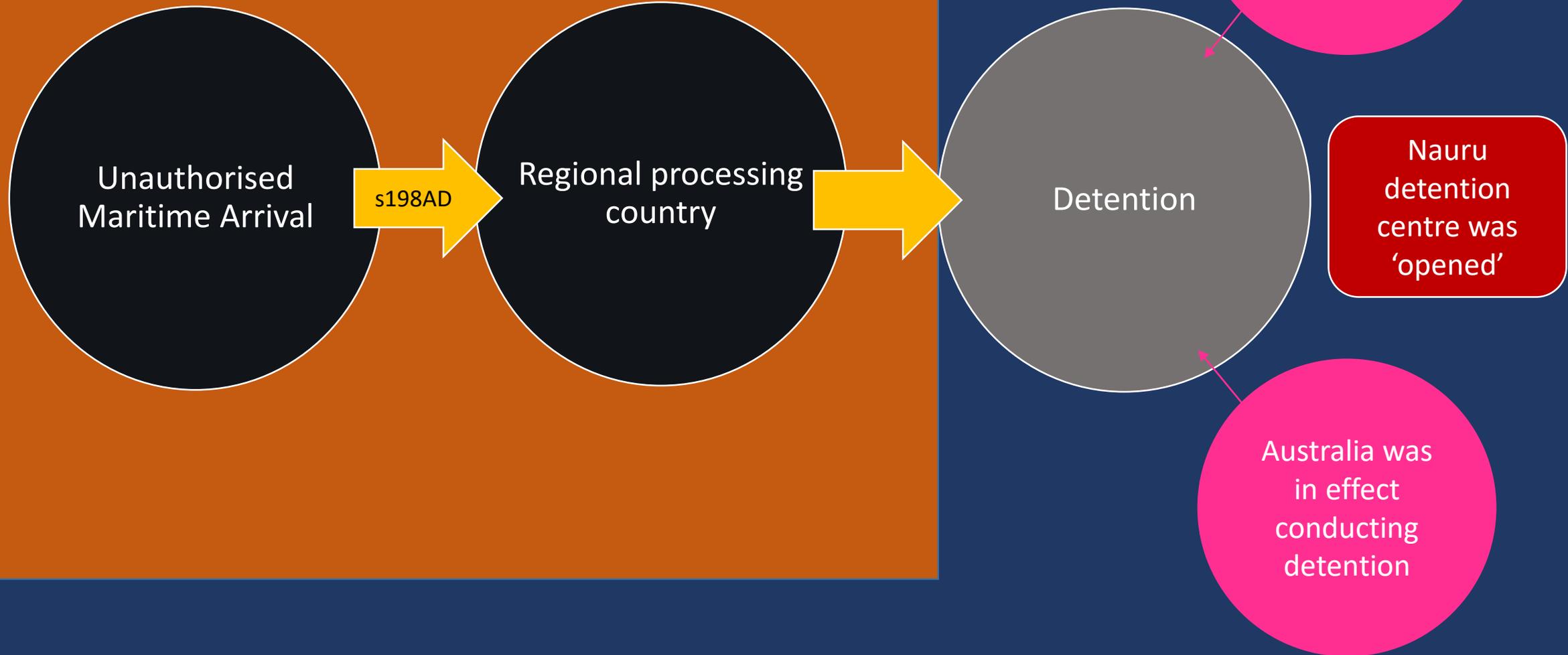
Migration Act, Division 8



Plaintiff M68 (2015)

Migration Act, Division 8

S 198AHA: Legislative authority for executive financing and other action re regional processing



Unauthorised
Maritime Arrival

s198AD

Regional processing
country

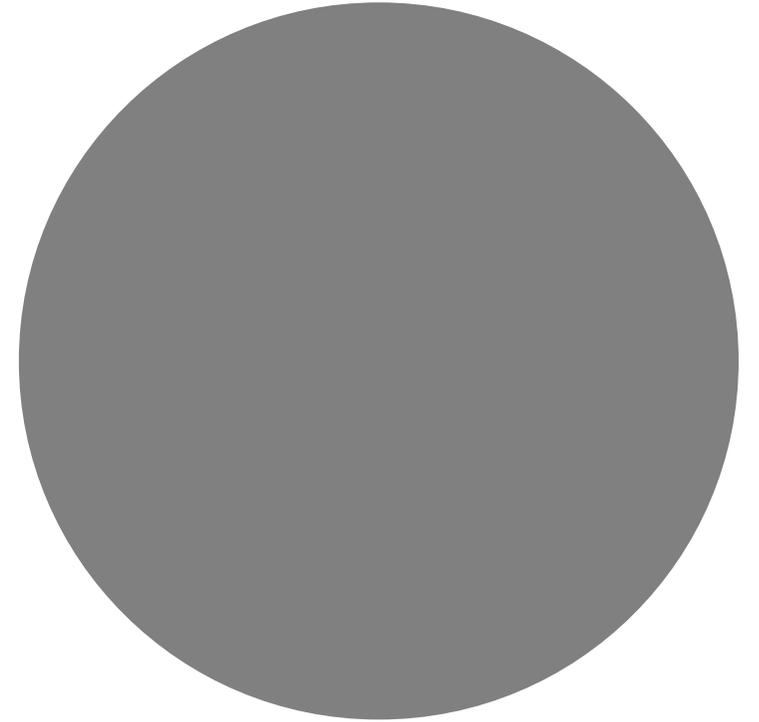
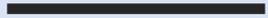
Detention

Executive
financing
without
statutory
authorisation

Nauru
detention
centre was
'opened'

Australia was
in effect
conducting
detention

Takeaways



Narrow
grounds
available

Legislation
silent on key
features of
asylum seeker
regime

Need to agree
a stated case

Hard to find a
plaintiff with
standing

Legislative
change to
circumvent
challenges