

DOCUMENTS TABLED WITH THE INSTRUMENT OF
DESIGNATION OF THE REPUBLIC OF NAURU [F2012L01851]

No. 107—10 September 2012

2901

The Parliamentary Secretary for School Education and Workplace Relations (Senator Collins): To move on the next day of sitting—That, for the purposes of section 198AB of the *Migration Act 1958*, the Senate approves the designation of the Republic of Nauru as a regional processing country, by instrument made on 10 September 2012 [F2012L01851].

Documents: Senator Collins tabled the following documents:

Migration Act—Section 198AC—

1. Copy of Instrument IMMI 12/100—Instrument of designation of the Republic of Nauru as a regional processing country [F2012L01851] and explanatory statement.
4. Letter from the United Nations High Commissioner for Refugees (Mr Antonio Guterres) to the Minister for Immigration and Citizenship (Mr Bowen), dated 5 September 2012.
6. Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues, dated 29 August 2012.
13. Statement about arrangements that are in place, or are to be put in place, in Nauru for the treatment of persons taken to Nauru.
15. Statement about the Minister's consultations with the office of the United Nations High Commissioner for Refugees (UNHCR) in relation to the designation of Nauru as a regional processing country, including the nature of those consultations.
16. Statement of reasons for thinking that it is in the national interest to designate Nauru to be a regional processing country, dated 10 September 2012.

10 LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE—LEAVE TO MEET DURING SITTING

The Chair of the Legal and Constitutional Affairs Legislation Committee (Senator Crossin), by leave, moved—That the Legal and Constitutional Affairs Legislation Committee be authorised to hold a public meeting during the sitting of the Senate today, from 5 pm, to take evidence for the committee's inquiry into the Maritime Powers Bill 2012 and a related bill.

Question put and passed.

11 PRIVATE SENATORS' BILLS—CONSIDERATION

The Parliamentary Secretary for School Education and Workplace Relations (Senator Collins) moved—That the following general business orders of the day be considered on Thursday, 13 September 2012 under the temporary order relating to the consideration of private senators' bills:

No. 20 Environment Protection (Beverage Container Deposit and Recovery Scheme) Bill 2010.

No. 78 Government Investment Funds Amendment (Ethical Investments) Bill 2011.

Question put and passed.

Commonwealth of Australia

Migration Act 1958

INSTRUMENT OF DESIGNATION OF THE REPUBLIC OF NAURU
AS A REGIONAL PROCESSING COUNTRY UNDER SUBSECTION 198AB(1) OF THE
MIGRATION ACT 1958

I, CHRIS BOWEN, Minister for Immigration and Citizenship, acting under subsection 198AB(1) of the Migration Act 1958 ("the Act"), thinking it is in the national interest to do so, DESIGNATE that The Republic of Nauru is a regional processing country.

Dated: 10 September 2012



CHRIS BOWEN

Minister for Immigration & Citizenship

NOTE: Subsection 198AB(1) provides that the Minister may, by legislative instrument, designate that a country is a regional processing country. Subsection 198AB(2) provides that the only condition for the exercise of the power under subsection (1) is that the Minister thinks that it is in the national interest to designate the country to be a regional processing country. Subsection 198AB(3) of the Act, provides that in considering the national interest for the purposes of subsection (2), the Minister: (a) must have regard to whether or not the country has given any assurances to the effect that: (i) the country will not expel or return a person taken to the country under section 198AD to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; and (ii) the country will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country under that section is covered by the definition of *refugee* in Article 1A of the Refugees Convention as amended by the Refugees Protocol and: (b) may have regard to any other matter, which in the opinion of the Minister, relates to the national interest.

EXPLANATORY STATEMENT

Migration Act 1958

**INSTRUMENT OF DESIGNATION OF THE REPUBLIC OF NAURU
AS A DESIGNATED COUNTRY UNDER SUBSECTION 198AB(1) OF THE
*MIGRATION ACT 1958***

1. This Instrument is made under subsection 198AB(1) of the *Migration Act 1958* ('the Act').
2. This Instrument operates to designate that The Republic of Nauru is a regional processing country.
3. Subsection 198AB(1) of the Act provides that the Minister may, by legislative instrument, designate that a country is a regional processing country.
4. Subsection 198AB(2) of the Act provides that the only condition for the exercise of the power under subsection 198AB(1) is that the Minister thinks that it is in the national interest to designate the country to be a regional processing country.
5. Subsection 198AB(3) of the Act, provides that in considering the national interest for the purposes of subsection (2), the Minister:
 - (a) must have regard to whether or not the country has given any assurances to the effect that:
 - (i) the country will not expel or return a person taken to the country under section 198AD to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; and
 - (ii) the country will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country under that section is covered by the definition of *refugee* in Article 1A of the Refugees Convention as amended by the Refugees Protocol and:
 - (b) may have regard to any other matter, which in the opinion of the Minister, relates to the national interest.
6. The notes to the Instrument refer the reader to the above provisions, which are relevant to the making of this Instrument.
7. The purpose of the Instrument is to enable the taking of offshore entry persons to The Republic of Nauru, in accordance with subsection 198AD.

Commencement

8. Subsection 198AB(1B) of the Act provides that, despite subsection 12(1) of the *Legislative Instruments Act 2003*, this Instrument commences at the earlier of the following times:
- (a) immediately after both Houses of the Parliament have passed a resolution approving the designation;
 - (b) immediately after both of the following apply:
 - (i) a copy of the designation has been laid before each House of the Parliament under section 198AC; or
 - (ii) 5 sitting days of each House have passed since the copy was laid before that House without it passing a resolution disapproving the designation.

Consultation

9. Consultations regarding the designation of The Republic of Nauru as a regional processing country have been undertaken with the Office of the United Nations High Commissioner for Refugees, The Government of the Republic of Nauru, International Organisation for Migration and relevant non-government organisations. In addition, a range of Commonwealth government agencies have been consulted.
10. The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required (OBPR Reference 14206).

Not subject to disallowance

11. Under section 44 of the *Legislative Instruments Act 2003*, this Instrument is not subject to disallowance.

Statement of Compatibility with Human Rights

12. In accordance with section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, a statement of compatibility with human rights has not been completed for this Instrument. This is because that section requires a statement of compatibility to be prepared only for a legislative instrument to which section 42 of the *Legislative Instruments Act 2003*, and the effect of section 44 of that Act is that section 42 does not apply to this Instrument.



Case postale 2500
1211 Genève 2
Suisse

5 September 2012

Sir, *Dear friend*

I have the honour to thank you for your letter of 4 September 2012, seeking UNHCR's views on the possible designation of the Republic of Nauru as a 'regional processing country' and its consideration of what role it might play in Australia's proposed processing arrangements in that country.

My Office fully recognizes the current challenges faced by Australia and other countries in the region in addressing the complex dimensions of the irregular movement of people by sea into and through the South-East Asia region, including towards Australia. We appreciate the many challenges this presents to States in responding to both the security and the humanitarian dimensions of this problem. We share your view that constructive efforts need to be taken, in concert with other similarly affected States in the region, to reduce the tragic loss of so many lives at sea.

Indeed, it has long been UNHCR's view that cooperative approaches in the region, which build and complement effective national asylum procedures and promote responsibility-sharing, can help asylum-seekers and refugees find viable protection options other than through dangerous and exploitative boat journeys. We believe that measures which enhance the quality of protection and improve the availability of solutions for refugees in South-East Asia will serve to expand the 'asylum space' for refugees in those places and reduce the need for onward movements by sea towards Australia, with all the dangers this entails.

In this regard, the creation of the Regional Cooperation Framework (RCF) in March last year, and your efforts, which have led to the setting up of a Regional Support Office (RSO) in Bangkok, are significant and welcome contributions. I am also pleased to note your Government's positive endorsement of the Expert Panel on Asylum-Seekers' recommendations regarding a deeper investment in protection activities in South-East Asia. These will enhance the opportunities for UNHCR, States and other actors, to work together to improve the quality of refugee protection in that region.

Your Government's announcement on 23 August 2012 in which it outlined the increase in Australia's annual Humanitarian Programme to 20,000 places, together with the intention to invest an initial \$10 million in capacity-building activities in the region, is also - from UNHCR's perspective - a welcome development. I deeply appreciate Australia's substantial increase in resettlement capacity, which constitutes an important boost globally. I am aware that constructive discussions have already begun on how these generous commitments can be best employed.

The Hon. Chris Bowen MP
Minister for Immigration and Citizenship of Australia



With respect to your specific request for UNHCR's views on the possible designation of Nauru under section 198AB of the Migration Act 1958, they are based on the information available to us at this time and I recognize that many of the important practical aspects of the arrangements are under active discussion between the Governments of Australia and Nauru and have yet to be finalized. For that reason, UNHCR's observations are necessarily general and subject to review as the operational arrangements become clearer.

First, as a general principle, asylum-seekers arriving at the frontier of a Convention State fall within the responsibility of that State, which includes their access to a fair and effective process. This general practice is elaborated in more detail in the policy paper, to which you specifically refer in your letter, concerning maritime interception and the processing of international protection claims. The paper additionally notes that "claims for international protection made by intercepted persons are, in principle, to be processed in procedures within the territory of the intercepting State."

Following the Expert Panel's recommendation, we note your Government's intention to transfer certain asylum-seekers from Australia to Nauru, which is designed as a 'circuit breaker to reduce the current surge in irregular migration to Australia'.

As a significant exception to the normal practice, arrangements to transfer asylum-seekers to another country should normally only be pursued "as part of a burden-sharing arrangement to more fairly distribute responsibilities and enhance available protection space," and involve countries where appropriate protection safeguards are in place. When it comes to the protection safeguards, they should include the following:

- respect for the principle of *non-refoulement*;
- the right to asylum (involving a fair adjudication of claims);
- respect for the principle of family unity and best interests of the child;
- the right to reside lawfully in the territory until a durable solution is found;
- humane reception conditions, including protection against arbitrary detention;
- progressive access to Convention rights and adequate and dignified means of existence, with special emphasis on education, access to health care and a right to employment;
- special procedures for vulnerable individuals with clear pre-transfer assessments by qualified staff (including best interest determinations for children, especially unaccompanied and separated children) and support for victims of torture/trauma or suffering from disabilities (including aged/disabled); and,
- durable solutions for refugees within a reasonable period.

Against the above background, it is not clear from the information available to us that transfer of responsibilities for asylum-seekers to Nauru is fully appropriate. Whilst UNHCR welcomes steps taken by the Government of Nauru to accede to the 1951 Refugee Convention last year, at present, there is no domestic legal framework, nor is there any experience or expertise to undertake the tasks of processing and protecting refugees on the scale and complexity of the arrangements under consideration in Nauru. Barring receipt of information to the contrary, it is difficult to see how Nauru might meet the conditions set out in UNHCR's paper on maritime interception and the processing of international protection claims.



From the language of the Memorandum of Understanding itself, which you attach to your letter, it seems that the common intention is "that all persons entering Nauru...will depart within as short a time as is reasonably necessary...", "that transferees will be treated with dignity and respect and that relevant human rights standards are met", and for "the oversight of practical arrangements required to implement this MOU". These are welcome acknowledgements which go some way to addressing the issue of protection safeguards. This indicates that both Australia and Nauru accept that they have shared and joint legal responsibility for the protection of refugees identified in the processing arrangements under discussion.

However, from the information available to UNHCR at this time, it is not clear how this responsibility will be apportioned between the two contracting States. This is important because all operational and ancillary details will be predicated necessarily on how the question of legal responsibility is framed. In UNHCR's view, it would be prudent for the legal responsibilities of both the transferring and receiving State to be very clearly and unambiguously set out in the formal arrangements, and that oversight mechanisms exist to ensure their full implementation in practice.

This said, we also note the indications received from your officials to the effect that Australia does not see itself as having any legal responsibilities under the Convention after an asylum-seeker has been physically transferred to the territory of Nauru. If, indeed, regardless of the tenor of the MoU, it is the intention of the parties for full legal responsibility to pass to Nauru, it raises questions about whether the aforementioned protection safeguards are in place and in addition, whether Nauru has presently the ability to fulfill its Convention responsibilities. I welcome Australia's undertaking to "provide Nauru with the capacity and resources necessary to ensure Nauru is able to meet its Convention obligations."

The issue of timely durable solutions for refugees needs very careful consideration. In particular, the 'no-advantage' test endorsed by your Government contemplates a time-frame that is assessed against and consistent with the period a refugee might face had s/he been assessed 'by UNHCR within the regional processing arrangement'. The practical implications of this are not fully clear to us. The time it takes for resettlement referrals by UNHCR in South-East Asia or elsewhere may not be a suitable comparator for the period that a Convention State whose protection obligations are engaged should use. Moreover it will be difficult to identify such a period with any accuracy, given that there is no 'average' time for resettlement. UNHCR seeks to resettle on the basis of need and specific categories of vulnerability not on the basis of a 'time spent' formulation. Finally, the 'no advantage' test appears to be based on the longer term aspiration that there are, in fact, effective 'regional processing arrangements' in place. We share this aspiration. However, for the moment, such regional arrangements are very much at their early conceptualization. In this regard, UNHCR would be concerned about any negative impact on recognized refugees who might be required to wait for long periods in remote island locations.

In response to your request for consideration of what role UNHCR might play in the proposed arrangements, I am conscious that a number of important questions still need to be clarified which would inform the degree to which UNHCR might be involved.

Our preliminary view is that the arrangements being contemplated are essentially between two Convention States and that UNHCR would not have any operational or active role to play in their implementation. However, as we have already indicated, UNHCR has a statutory role under Article 35 of the 1951 Refugee Convention which requires the Office to supervise implementation of the Convention by States parties. This role is adaptive to the context of particular situations and we would be pleased to discuss how, in the specific context of the current arrangements, this can be most usefully employed.



Allow me to reiterate my appreciation for the opportunity to provide this advice in relation to the possible designation of Nauru under section 198AB of the Migration Act 1958. My Office remains at your disposal to discuss any of these matters in greater detail, should you find this to be of value. I look forward to continuation of our ongoing positive and very fruitful cooperation on refugee protection, both in your region and globally.

Please accept, Sir, the assurances of my highest consideration.

*With my warmest personal regards
and deep appreciation*

A handwritten signature in dark ink, appearing to read 'António Guterres', with a long horizontal stroke extending to the right.

António Guterres

**MEMORANDUM OF UNDERSTANDING BETWEEN THE REPUBLIC OF NAURU
AND THE COMMONWEALTH OF AUSTRALIA, RELATING TO THE TRANSFER
TO AND ASSESSMENT OF PERSONS IN NAURU, AND RELATED ISSUES**

The Republic of Nauru and the Commonwealth of Australia ('the Participants'), wishing to strengthen their friendly relations, have come to the following Memorandum of Understanding (the MOU) in relation to the assessment in Nauru of certain persons, and related issues.

Preamble

Noting that:

- The Participants are State parties to the *1951 Convention Relating to the Status of Refugees* and its *1967 Protocol*, and acknowledge the importance of inter-country cooperation to undermine the People Smuggling industry;
- The Participants share a long-standing and close bilateral relationship;
- Irregular Migration is a continuing challenge for the Asia-Pacific region;
- While border control and law enforcement measures are important, practical cooperative solutions that also address humanitarian needs are required; and
- The Commonwealth of Australia appreciates the acceptance by the Republic of Nauru of the request made by the Commonwealth of Australia to host a Regional Processing Centre for Asylum Seekers.

Recalling that:

- At the Fourth Ministerial Conference of the Bali Process on People Smuggling, Trafficking and Related Transnational Crime (the MCBP) held in Indonesia on 29-30 March 2011, Ministers agreed:
 - to a regional cooperation framework that would provide a more effective way for interested states to cooperate to reduce Irregular Migration in the region;
 - that the framework would be operationalised through arrangements entered into between interested participating states on a bilateral or sub-regional basis (noting the cooperation that might be available from relevant international organisations regarding implementation);
 - that those arrangements would be consistent with the core principles at paragraph 16 and guided by the considerations set out in paragraph 19 of the MCBP Co-Chairs' Statement;
 - that any arrangements should seek to undermine the People Smuggling model and create disincentives for irregular travel, including through possible transfer and readmission arrangements in appropriate circumstances; and
 - that due to the large scale of irregular movement it would be appropriate to focus arrangements on a selected caseload or caseloads.

Recognising:

- the need for practical action to provide a disincentive against Irregular Migration, People Smuggling syndicates and transnational crime and intended to promote orderly migration and humanitarian solutions;
- the need to take account of the protection needs of persons who have moved irregularly who may be seeking asylum;
- the impact that an arrangement could have in providing a disincentive for Irregular Migration and creating increased protection opportunities for those in need of international protection; and
- the need to ensure, so far as is possible, that no benefit is gained through circumventing regular migration arrangements;

the Participants have reached the following common understanding regarding a transfer arrangement, whereby Australia would Transfer persons to Nauru for processing of any asylum claims that Transferees may raise.

Interpretation

“Participants” means the Republic of Nauru and the Commonwealth of Australia.

“Transferee” means a person transferred to Nauru under this MOU.

“Transfer” means transfer from Australia to Nauru under this MOU.

“Irregular Migration” means the phenomenon of people moving without proper authorisation to a country including for the purpose of seeking asylum.

“Refugee” means a person outside their country of nationality, or in the case of a person not having a nationality, who is outside their country of habitual residence, and who is unable or unwilling to return because of a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group.

“People Smuggling” means the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a country of which the person is not a national or a permanent resident.

“Regional Processing Centre” means the facility to be established in Nauru pursuant to this MOU.

Objectives

1. The Participants have determined that combating People Smuggling and Irregular Migration in the Asia-Pacific region is a shared objective.

2. This MOU will enable joint cooperation, including the development of enhanced capacity in Nauru, to address these issues.
3. The Participants understand the importance of regional cooperation and have determined to continue discussions as to how the Regional Processing Centre might over time undertake a broader range of functions under the regional cooperation framework.

Guiding Principles

4. The Commonwealth of Australia will conduct all activities in respect of this MOU in accordance with its Constitution and all relevant domestic laws.
5. The Republic of Nauru will conduct all activities in respect of this MOU in accordance with its Constitution and all relevant domestic laws.
6. The Commonwealth of Australia will bear all costs incurred under and incidental to this MOU as agreed between the Participants.

Operation of this MOU

7. The Commonwealth of Australia may transfer and the Republic of Nauru will accept Transferees.
8. Administrative measures giving effect to this MOU will be settled between the Participants. Any further specific arrangements may be made, as jointly determined to be necessary by the Participants, on more particular aspects of this MOU, for the purpose of giving effect to its objectives.

Persons to be transferred to Nauru for processing

9. Persons to be transferred to Nauru are those persons who:
 - a. have travelled irregularly by sea to Australia; or
 - b. have been intercepted at sea by Australian authorities or rescued in the course of trying to reach Australia by irregular means; and
 - c. are required by Australian law to be transferred to Nauru.

The site

10. The Participants will establish a processing centre at a site or sites to be jointly determined and agreed between the Participants.

Timing

11. The Commonwealth of Australia will make all efforts to ensure that all persons entering Nauru under this MOU will depart within as short a time as is reasonably necessary for the implementation of this MOU, bearing in mind the objectives set out in the *Preamble* and *Clause 1*.

Commitments

12. The Participants will ensure that Transferees will be treated with dignity and respect and that relevant human rights standards are met.
13. Special arrangements will be developed and agreed to by the Participants for vulnerable cases including unaccompanied minors.
14. The Republic of Nauru assures the Commonwealth of Australia that it will:
 - a. not expel or return a transferee to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; and
 - b. make an assessment, or permit an assessment to be made, of whether or not a transferee is covered by the definition of *refugee* in Article 1A of the *1951 Convention Relating to the Status of Refugees* as amended by the *1967 Protocol Relating to the Status of Refugees*; and
 - c. not send a transferee to another country where there is a real risk that the transferee will be subjected to torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or the imposition of the death penalty.

Co-operation

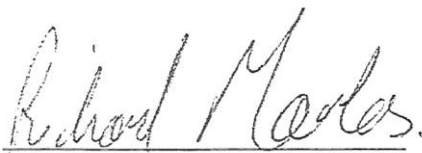
15. The Participants may jointly decide to vary this MOU in writing.
16. Communications concerning the day-to-day operation of activities undertaken in accordance with this MOU will be between the Department of Foreign Affairs & Trade of Nauru and the Australian High Commission Nauru.

17. The Participants will establish a Joint Committee with responsibility for the oversight of practical arrangements required to implement this MOU including issues relating to the duration of stay of Transferees. The Joint Committee will meet regularly no less than once monthly and will be co-chaired by mutually agreed representatives of the Australian High Commission Nauru and the Republic of Nauru. Participation in the Joint Committee will be as agreed but may include relevant non-government organisations and service providers where appropriate.
18. This MOU will come into effect on the date of signature by both Participants and will remain in effect until terminated by mutual agreement.

Settlement of Disputes

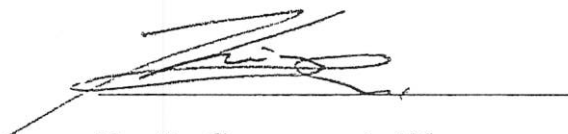
19. The Participants will resolve any differences arising under or in relation to this Memorandum amicably and by consultation and as soon as reasonably practicable.

This Memorandum of Understanding is signed at Rarotonga on the 29th day of August in the year 2012



For the Government of Australia

The Hon Richard Marles MP
Parliamentary Secretary for
Pacific Island Affairs
Parliamentary Secretary for Foreign Affairs



For the Government of Nauru

Hon. Dr. Kieren Keke MP
Minister for Foreign Affairs and Trade

**STATEMENT ABOUT ARRANGEMENTS THAT ARE IN PLACE, OR ARE TO BE PUT IN PLACE, IN NAURU
FOR THE TREATMENT OF PERSONS TAKEN TO NAURU**

1. This document sets out the arrangements that are in place for the treatment of persons taken to Nauru under s 198AD of the *Migration Act 1958* (the Act).

Status of transferees in Nauru

2. The Nauruan Government has advised the Commonwealth that:
 - a. it will issue visas to all transferees upon arrival in Nauru to enable them to live lawfully in Nauru while any claims that they may make for protection under the Refugees Convention, as amended by the Refugees protocol are assessed;
 - b. transferees will have freedom of movement throughout Nauru. It is anticipated, but not legally required, that they will ordinarily return to their accommodation by sunset.

Accommodation

3. Initially, transferees will be accommodated in newly constructed tents, 4.2 metre by 4.2 metre each, with solid flooring, fans, and insect netting over the beds. There are five beds to each tent. There are currently 70 tents which have been constructed with a further 70 tents to be constructed in the week commencing 10 September 2012.
4. Recreation, living, and dining facilities are available in a large breezeway area (approximately 80 metres x 7.5 metres).
5. A new commercial catering kitchen is under construction and is expected to be operational by 14 September 2012.
6. A separate faith room has been set aside at the site. It will be available for use by all denominations for worship.
7. New ablution facilities are being constructed in the existing building currently being renovated in close proximity to the sleeping areas on the site. These facilities are expected to be completed by 13 September 2012.
8. Building contractors are being engaged to construct more permanent accommodation facilities to replace the initial tent accommodation. These facilities will be completed as quickly as possible. It is estimated that this work will take approximately 6 months. When complete, the new accommodation facilities will house a maximum of 900 people.
9. Work is also progressing to establish a facility at a second site on Nauru which will accommodate another 600 people.

Medical care

10. Medical facilities will be provided to transferees by International Health & Medical Services (IHMS). Medical practitioners and nurses will provide health care, with provision for Nauruan nationals to be trained in ancillary roles, including as nurse aides.
11. Hospital facilities are also available on Nauru, including X-ray, pharmacy, pathology and dental services.
12. A large freestanding building is currently under major renovations and will accommodate a medical facility, including a series of consulting and treatment rooms. These renovations are expected to be ready for occupation by 10 September 2012.
13. For medical emergencies which cannot be dealt with in Nauru, medical evacuation arrangements to Australia are in place. Where appropriate, the Australian government will permit transferees to travel to Australia for non-emergency medical care that cannot be provided in Nauru.

Education

14. Children and unaccompanied minors on Nauru will be provided with access to education, either in Nauruan schools or, if necessary or appropriate, through the direct provision of schooling by contractors engaged for that purpose.
15. A range of accredited training courses will be available to transferees. These courses will be provided by the Salvation Army, which is a Registered Training Authority. These courses will also be available for Nauruans. These courses will be designed to meet both transferee and community needs.

Other

16. Programs and activities for transferees will be provided by the Salvation Army, which has agreed to have at least 17 staff in Nauru initially, and will increase the number of staff as the number of transferees increases. The Salvation Army will also provide welfare and other support to transferees.
17. Existing buildings on site are being refurbished to establish a number of separate computer rooms and a library/reading room. These are expected to be completed by 13 September 2012. Access to computers and telephones will be provided by the Salvation Army.
18. Local Nauruan church groups have indicated that transferees will be welcome to participate in church based activities. Visits from religious leaders will be arranged from time to time in consultation with transferees.
19. Minibuses will operate as shuttle buses to allow transferees to move about country.

Commonwealth of Australia

Migration Act 1958

**STATEMENT ABOUT THE MINISTER'S CONSULTATIONS WITH THE
OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR)
IN RELATION TO THE DESIGNATION OF NAURU AS A REGIONAL PROCESSING COUNTRY,
INCLUDING THE NATURE OF THOSE CONSULTATIONS**

On 15 August 2012, representatives from my department met with the Regional Representative of the UNHCR Regional Office for Australia, New Zealand, Papua New Guinea and the Pacific to discuss implementation of the recommendations of the Expert Panel on Asylum Seekers, including discussions regarding the designation of Nauru as a regional processing country.

On 21 August 2012, I met with the Regional Representative of the UNHCR Regional Office Australia, New Zealand, Papua New Guinea to discuss implementation of the recommendations of the Expert Panel on Asylum Seekers, including discussions regarding the designation of Nauru as a regional processing country under section 198AB of the *Migration Act 1958* (The Act).

4 September 2012, I wrote to the UNHCR, H.E. Mr António Guterres, in relation to the implementation of the recommendations of the Expert Panel on Asylum Seekers. The letter also sought UNHCR's views on the designation of Nauru as a regional processing country under section 198AB of the Act.

On 4 September 2012, representatives from my department, led by the Acting Secretary of my department, Mr Martin Bowles, discussed the designation of Nauru with the UNHCR Assistant High Commissioner for Protection, Ms Erika Feller and other UNHCR representatives.

A further meeting was held on 5 September 2012, between representatives from my department and the Acting Regional Representative of the UNHCR Regional Office for Australia, New Zealand, Papua New Guinea and the Pacific to discuss arrangements for persons to be transferred to Nauru, following designation of Nauru as a regional processing country under section 198AB of the Act.

**STATEMENT OF REASONS FOR THINKING THAT IT IS IN THE
NATIONAL INTEREST TO DESIGNATE NAURU TO BE A REGIONAL
PROCESSING COUNTRY**

THE DESIGNATION

1. I, CHRIS BOWEN MP, Minister for Immigration and Citizenship, have exercised my power under s 198AB(1) of the *Migration Act 1958* (**the Act**) to designate that the Republic of Nauru (**Nauru**) is a regional processing country.
2. This document sets out my reasons for thinking that it is in the national interest to designate Nauru to be a regional processing country.

THE LEGISLATIVE FRAMEWORK

3. The power conferred on me by s 198AB(1) to designate that a country is a regional processing country is contained in Part 2 Division 8 Subdivision B of the Act. That Subdivision was introduced into the Act by the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (**the Amendment Act**). Section 198AA states that the Subdivision was enacted because 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) offshore entry persons, including offshore entry persons in respect of who 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;

- (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.
- 4. Subsection 198AB(2) provides that the only condition for the exercise of the power conferred on me by s 198AB(1) is that I think it is in the national interest to designate the country to be a regional processing country.
- 5. Subsection 198AB(3) provides that, in considering the national interest for the purposes of s 198AB(2), I must have regard to whether or not the country has given Australia any assurances to the effect that:
 - (i) the country will not expel or return a person taken to the country under section 198AD to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; and
 - (ii) the country will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country under that section is covered by the definition of refugee in Article 1A of the Refugees Convention as amended by the Refugees Protocol;

and I may have regard to any other matter which in my opinion relates to the national interest.
- 6. Subsection 198AB(4) provides that the assurances referred to in s 198AB(3) need not be legally binding.
- 7. Section 198AD of the Act has the effect that, subject to ss 198AE, 198AF and 198AG, an officer must, as soon as reasonably practicable, take an offshore entry person who is detained under s 189 from Australia to a regional processing country. Section 198AE confers on me a personal non-compellable power to determine in writing that s 198AD does not apply to an offshore entry person, if I think that it is in the public interest to do so. Section 198AF provides that s 198AD does not apply to an offshore entry person if there is no regional processing country. And s 198AG provides that s 198AD does not apply to an offshore entry person if the regional processing country, or each

regional processing country (if there is more than one such country), has advised an officer that the country will not accept the offshore entry person.

BACKGROUND

8. On 28 June 2012, the Prime Minister appointed an independent expert panel (**the panel**) to provide advice and recommendations to the Government on policy options available to prevent asylum seekers risking their lives on dangerous boat journeys to Australia. The panel consisted of Air Chief Marshal Angus Houston AC AFC (Retired), Mr Paris Aristotle AM, Director of the Victorian Foundation for Survivors of Torture Inc and Professor Michael L'Estrange AO, Director, National Security College.
9. The panel consulted widely on asylum issues with political leaders, other members of the Parliament, agencies and departments of Government, non-government organisations, academics and other experts as well as those in the wider community. The panel also held discussions with representatives of some refugee communities in Australia and refugees who travelled to Australia through irregular means. The panel received more than 550 written submissions.
10. The panel released its report on 13 August 2012. The panel recommended, among other things, that "a capacity be established in Nauru as soon as practical to process the claims of IMAs [irregular maritime arrivals] transferred from Australia in ways consistent with Australian and Nauruan responsibilities under international law".
11. Following the report of the panel, the Government introduced the *Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012*. That Bill passed both Houses of Parliament with the support of both the Government and the Opposition.

SUBMISSION

12. To facilitate my consideration of whether I think that it is in the national interest to designate Nauru to be a regional processing country, a submission

was provided to me by my Department, which included the following attachments:

- (1) *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues*, which was signed on 30 August 2012 (**the MOU**) (**Attachment A**)
- (2) a statement about arrangements that are in place, and are to be put in place, in Nauru for the treatment of persons taken there under s 198AD of the Act (**the statement of arrangements**) (**Attachment B**)
- (3) advice received from the Office of the United Nations High Commissioner for Refugees (**the UNHCR**) in relation to the designation (**the UNHCR advice**) (**Attachment C**).

MY REASONS

13. I think that it is in the national interest to designate Nauru to be a regional processing country, because:

- (1) Nauru has given Australia the assurances referred to in s 198AB(3)(a)(i) and (ii) of the Act and other assurances;
- (2) I consider designating Nauru to be a regional processing country will discourage irregular and dangerous maritime voyages and thereby reduce the risk of the loss of life at sea;
- (3) I consider designating Nauru to be a regional processing country will promote the maintenance of a fair and orderly Refugee and Humanitarian Program that retains the confidence of the Australian people;
- (4) I consider designating Nauru to be a regional processing country will promote regional co-operation in relation to irregular migration and address people smuggling and its undesirable consequences;

(5) I consider the arrangements that are already in place in Nauru and that are proposed to be put in place in Nauru to be satisfactory.

14. It is my opinion that, in addition to the assurances to which I must have regard pursuant to s 198AB(3), each of the other matters referred to in the preceding paragraph relates to the national interest.

Assurances by Nauru

15. As stated above, s 198AB(3) provides that, in considering the national interest for the purposes of s 198AB(2), I must have regard to whether or not the country has given Australia any assurances to the effect set out in paragraph 5 above.
16. Nauru has given those assurances. They are contained in clause 14 of the MOU. I consider that the "Transferees" who are referred to in clause 14 of the MOU are people who will be taken to Nauru pursuant to s 198AD of the Act.
17. Nauru has given an additional assurance in clause 14 of the MOU that it will not send a transferee to another country where there is a real risk that the transferee will be subjected to torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or the imposition of the death penalty.
18. Nauru has also assured Australia that it will permit Australian officials to prepare assessments against Article 1A of the Refugees Convention, as amended by the Refugees Protocol.
19. Whether or not the assurances referred to above are legally binding, I expect that Nauru will act in accordance with them and that, as a consequence, offshore entry persons who are transferred to Nauru will not be at risk of being sent to another country where they have a well founded fear of persecution, and will have any claims that they may make to be refugees within Article 1A of the Refugee Convention assessed. That was part of my thinking as to why it is in the national interest to designate Nauru to be a regional processing country.

Discouragement of irregular and dangerous maritime voyages

20. I think that it is in the national interest to take action that is directed to discouraging irregular and dangerous maritime voyages to Australia and thereby to reducing the risk of loss of life at sea. In my view, s 198AA(a) of the Act supports that conclusion.
21. I think that designating Nauru to be a regional processing country may act as a circuit breaker in relation to the recent surge in the number of irregular and dangerous maritime voyages to Australia. The surge in arrivals is indicated by the following figures my Department has provided to me:
 - (1) From 2002 to 2008 there were fewer than 10 boats a year. The total number of passengers was fewer than 200 each year.
 - (2) In 2009, there were 60 boats carrying 2,726 passengers.
 - (3) In 2010, there were 134 boats carrying 6,555 passengers.
 - (4) In 2011, there were 69 boats carrying 4,565 passengers.
 - (5) In the year to 8 September 2012, there have been 135 boats carrying 8,851 passengers. The number of passengers who arrived in Australia in the first seven months of 2012 (7,120) exceeded the number who arrived in total in each of 2011 and 2010. The number of passengers who arrived in August 2012 (1,933) constituted the largest ever monthly number and was the largest ever number for the fourth month in a row.
 - (6) Passenger numbers per boat arrival have also been increasing.
22. A substantial number of lives have been lost at sea as a result of the activities of people smugglers. Since 2001, it is estimated that 1064 passengers have died (or gone missing, presumed dead). Of these, 704 deaths have occurred since October 2009. The figures above include the most recent tragedy on 30 August 2012, during which an estimated 100 people lost their lives following the sinking of a vessel some 42 nautical miles off the Indonesian coast.

23. I think that the cost of irregular maritime voyages, in terms of the loss of human life and in respect of the substantial financial and resourcing costs to the Commonwealth in dealing with such arrivals (estimated to be in excess of \$5 billion over the forward estimates period), means that it is in the national interest to attempt to reduce the number of such voyages, and to do so urgently.
24. I think that, as people who are considering travelling to Australia on irregular maritime voyages become aware that their protection claims may be assessed in Nauru rather than in Australia, they may be discouraged from risking their lives by so doing, because it will change the equation between risk and reward for prospective IMAs.

I also think that designating Nauru to be a regional processing country will make it more difficult for people smugglers to sell the opportunity to resettle in Australia

Maintenance of a fair and orderly Refugee and Humanitarian Program

25. I think that it is in the national interest to take action that will promote the maintenance of a fair and orderly Refugee and Humanitarian Program that retains the confidence of the Australian people.
26. Many of the people who arrive in Australia as IMAs are refugees within the meaning of Article 1A of the Refugees Convention. But many persons who need protection under that Convention are also located outside Australia. While the Australian Government has recently increased the number of visas available under its Refugee and Humanitarian Program each year, that number remains limited. The policy of successive governments has been that grants of visas to both offshore and onshore refugees, including those who have arrived as IMAs as a result of the activities of people smugglers, are required to be within this limit. As a result, for each visa granted to an onshore claimant in a given year, there is one less visa available to be granted to an offshore claimant in that year. In 2011–2012, for the first time more visas were granted to onshore claimants than to offshore claimants, shifting the balance of the program from its traditional offshore focus.

27. The designation of Nauru as a regional processing country will have the effect that officers will be obliged to take offshore entry persons who are detained under s 189 of the Act from Australia to Nauru as soon as reasonably practicable (unless I also designate another country or countries to be regional processing countries or I exercise my personal non-compellable power under s 198AE). For that reason, I consider that the designation of Nauru to be a regional processing country is likely to have the effect that a greater proportion of visas will be given to offshore claimants than is presently the case. I think that this would result in a fairer and more orderly Refugee and Humanitarian Program, and one which is more likely to retain the confidence of the Australian people. This is because I think that the allocation of protection visas to refugees under Australia's Refugee and Humanitarian Program should not be determined by whether or not the refugee has undertaken an irregular and dangerous maritime voyage to Australia.

Promotion of regional co-operation

28. I think that it is in the national interest to take action that will promote regional co-operation in relation to addressing people smuggling and its undesirable consequences.
29. Irregular migration is a continuing challenge for the Asia-Pacific region. At the Fourth Ministerial Conference of the Bali Process on People Smuggling, Trafficking and Related Transnational Crime held in Indonesia on 29-30 March 2011, Ministers agreed to a regional cooperation framework that would provide a more effective way for interested states to cooperate to reduce irregular migration in the region. That framework was to be given effect through arrangements entered into on a bilateral or sub-regional basis.
30. I think that the designation of Nauru as a regional processing country will encourage the development of further regionally integrated arrangements to address the humanitarian and other problems caused by people smuggling, by providing a practical demonstration of regional co-operation to address irregular migration.

Arrangements

31. I think that the arrangements that are in place and are to be put in place, in Nauru for the treatment of persons taken to Nauru – being the arrangements described in the statement of arrangements – are satisfactory.
32. I am aware that:
 - (1) some aspects of the arrangements that it is proposed would operate in Nauru if I designate Nauru to be a regional processing country are still the subject of negotiation between the Commonwealth and Nauru;
 - (2) work is still continuing to establish the accommodation and other facilities that will be available to Transferees taken to Nauru.

These facts do not alter my view as to the national interest.

International obligations

33. If Nauru is designated as a regional processing country it will follow, as is noted in s 198AA(b), that offshore entry persons, including offshore entry persons in respect of whom Australia has or may have protection obligations under the Refugees Convention as amended by the Refugees Protocol, may be taken to Nauru.
34. The content of Australia's international obligations is contestable. In particular, there is a range of views held by lawyers, academics, non-government organisations and others as to the content of Australia's international obligations with respect to persons transferred to another country, some of which differ from the Department's position.
35. On the basis of the material set out in the submission from the Department, I think that it is not inconsistent with Australia's international obligations (including but not limited to Australia's obligations under the Refugees Convention) to designate Nauru as a regional processing country, notwithstanding that this will create a duty under s 198AD to take offshore

entry persons to Nauru (subject to the exercise of my personal non-compellable power in s 198AE).

36. However, even if the designation of Nauru to be a regional processing country is inconsistent with Australia's international obligations, I nevertheless think that it is in the national interest to designate Nauru to be a regional processing country.
37. In considering whether I think it is in the national interest to designate Nauru to be a regional processing country, in addition to the matters outlined above I have:
- (1) had regard to the UNHCR advice;
 - (2) chosen not to have regard to the international obligations or domestic law of Nauru.

Concluded opinion

38. In light of the matters identified above, I think that it is in the national interest to designate Nauru to be a regional processing country.



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Chris Bowen MP

Minister for Immigration and Citizenship

16 September 2012