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:

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.

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 of 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.

……..

Chris Bowen MP

Minister for Immigration and Citizenship

September 2012