

QUESTION TAKEN ON NOTICE

SUPPLEMENTARY BUDGET ESTIMATES HEARING: 1 November 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(70) Output 1.3: Enforcement of Immigration Law

Senator Ludwig (L&C 79) asked:

In relation to Migration Series Instruction 234, particularly in relation to how sections 189 and 196 operate, if you have provided interim advice to your departmental officers, can you make that available so that the committee can see how you are operating and using 234 as provided for by the Comrie report? If you are providing training – I do not want all the training – and there is a section that deals with the detention power and how you explain it to your officers, could that be made available to the committee?

Answer:

MSI 234 (*General Detention Procedures*) is still current. However, the department has issued an interim MSI on *Establishing Identity in the Field and in Detention* (MSI 406). MSI 406 makes it clear that establishing a person's identity is an integral part of deciding whether the person is reasonably suspected of being an unlawful non-citizen, though it is not the only factor. MSI 406 also sets out an escalation mechanism for departmental officers to follow where a person's identity is not established, but the person is being kept in detention under section 189 on the basis that he or she is reasonably suspected of being an unlawful non-citizen. A copy of MSI 406 is attached.

In addition, the department is planning to issue two new MSIs by the end of December 2005 – one is the final of *Establishing Identity in the Field and in Detention* and the other is on *Establishing Immigration Status in the Field and in Detention*. These MSIs will complement each other and clarify the ongoing obligation on departmental officers to continue to reassess the lawfulness of the detention where a person has been detained under section 189 based on a reasonable suspicion that he or she was an unlawful non-citizen.

In response to the Palmer and Comrie reports, the department has prepared transitional training material that is being delivered to state and territory compliance and detention officers by the end of December 2005. One of the components of this training is how to establish reasonable suspicion when initially detaining a person under section 189, and the requirement to continue to know or reasonably suspect a person is an unlawful non-citizen in order for the person to continue to be lawfully detained. A copy of the training material is attached.

MIGRATION SERIES INSTRUCTION

Instructions in this **Migration Series (MSI)** relate to the *Migration Act 1958*, the *Migration Regulations 1994* and other related legislation [as amended from time to time]. For information on the status of this MSI see the latest **Instructions and Legislation Update** or contact Instructions and LEGEND Section (ILS).

Title:	ESTABLISHING IDENTITY IN THE FIELD AND IN DETENTION
MSI no.:	406
Date of issue:	18/4/05 [Refers to the date the instruction first appears on LEGEND].
File no.:	
Author Section:	Biometrics and Identity
Effect on other instructions:	

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1 INTRODUCTION

1.1 Purpose of this instruction

- 1.1.1 This instruction provides procedures for departmental employees establishing identity for the purposes of ascertaining whether detention is required under the *Migration Act 1958* ("the Act").
- 1.1.2 Detention is required in circumstances where an officer knows, or reasonably suspects, that a person is an unlawful non-citizen. The main detention power is in s 189 of the Act.
- 1.1.3 In order to ensure integrity in the exercise of detention powers, it is imperative that departmental employees establish, or seek to establish, the identity of persons to be taken into detention. This is especially so because the power involves the deprivation of a person's liberty, a right which the common law has gone to great lengths to protect.
- 1.1.4 In most cases, establishing a person's identity will be straightforward. In cases where it is problematic, it is not possible to set out the precise identity checks that should be carried out in all circumstances.
- 1.1.5 Different identity checks may be relevant, depending on the circumstances. In cases where establishing identity is difficult, the department will use its investigative resources to pursue all relevant leads.
- 1.1.6 This instruction sets out the minimum identity checks to be undertaken. In addition, departmental employees will need to make a sound judgement about the point at which they become satisfied that they have established a person's identity.

1.2 Obligations of officers in relation to identity checking

- 1.2.1 There is an obligation on staff to resolve identity questions as a matter of urgency given the serious issues around taking a person into detention who may have a right to remain in the community.
- 1.2.2 Where there are unanswered questions about a person's identity, departmental employees should follow up any leads as quickly as possible. This may require working out of hours (including weekends or public holidays in some circumstances) to ensure that a person is not kept in detention unnecessarily.
- 1.2.3 There may be many reasons why a person is not able to give a plausible account of their identity and relationships. The fact that the story does not fit together well may simply reflect issues not associated with their immigration status, and there is a need for departmental employees to continue with investigations.
- 1.2.4 Employees should think of possible explanations for the pieces of information or "identity clues" supplied and follow these up as a matter of priority. This is particularly important where a health condition may be contributing to the person's inability to produce a coherent story.
- 1.2.5 Even apparently unrelated pieces of information may be relevant to confirming their identity, for example, references to obtaining Australian citizenship at some stage in the past or comments that imply the person has been hospitalised.
- 1.2.6 Staff should be creative in trying to resolve questions of identity. While a range of checks are listed in these instructions, there may be others that will be relevant to a particular case and officers are expected to think laterally in finding ways of confirming identity.
- 1.2.7 All leads are to be followed up actively and thoroughly. It is essential that there are no gaps or periods of passivity in investigating identity issues. In cases where confirming identity is proving problematic, the case is to be escalated to senior officers. It will then become a high priority for intensive individual case management.

1.2.8 The following instructions are to be implemented in the light of the messages in this section.

1.3 Establishing identity – general comments

1.3.1 This instruction provides procedures for establishing identity in circumstances where:

- a departmental employee encounters a person and determines whether a requirement to detain that person under s 189 of the Act exists or
- a departmental employee has detained a person under s 189 of the Act in circumstances where the departmental employee is not satisfied regarding the person's identity.

1.3.2 Attachment 1 sets out a flowchart summarising these procedures.

1.3.3 Departmental employees should also familiarise themselves with relevant information contained in the MSI on *National Compliance Operational Guidelines* and the MSIs on:

- *Alternative places of detention*
- *Compliance and enforcement - overview*
- *Detention of unlawful non-citizens*
- *General detention procedures*
- *Non-citizens using false identities and/or bogus or fraudulent documents*
- *Personal identifiers: collection from immigration detainees*
- *Personal identifiers: collection from visa applicants and non-citizens (except immigration detainees)*
- *Travel documents*
- *Unlawful non-citizens.*

1.3.4 Some of these instructions will be more relevant than others, depending on the employee's specific duties.

2 ESTABLISHING IDENTITY IN THE FIELD

2.1 Establishing a person's identity

2.1.1 Under s 189 of the Act an officer is required to detain a person in the migration zone (except for an unlawful arrival at an excised offshore place) where the officer knows or reasonably suspects that the person is an unlawful non-citizen.

2.1.2 Establishing a person's identity is a necessary prerequisite to *knowing* that a person is an unlawful non-citizen, but is not necessary for forming a *reasonable suspicion* that a person is an unlawful non-citizen.

2.1.3 Nevertheless, where an officer has formed a reasonable suspicion that a person is an unlawful non-citizen without having established the person's identity, the officer must continue to seek to establish the person's identity in accordance with this instruction.

2.1.4 It is noted that, apart from immigration clearance procedures, the Act does not provide authority to require evidence of Australian citizenship. The MSI on *Detention of unlawful non-citizens* states that:

... if a person claims to be an Australian citizen, however, it is reasonable to ask the person to provide evidence of being an Australian citizen in order to confirm his or her claim. It is recognised that in most situations documentary evidence of citizenship will not be immediately available. However, data base checks may be used to quickly verify the grant of citizenship, and this avenue should be pursued with the person.

If the person refuses to cooperate in providing evidence of citizenship or identity, that refusal may go towards the founding of a reasonable suspicion that the person is an unlawful non-citizen. The person should be informed of this and of the consequence that the person may then be detained.

2.1.5 There are a number of different scenarios that a departmental employee may come across when trying to establish a person's identity:

- the person provides identity information and the departmental employee is satisfied that the person's identity is established
- the person provides identity information, but the departmental employee is not satisfied that the person's identity is established and
- the person does not provide identity information, and therefore the departmental employee cannot be satisfied about the person's identity.

2.1.6 If the person provides identity information and the departmental employee is satisfied that the person's identity is established, there is no need to conduct further identity checks.

2.1.7 However, if the person provides an identity that does not satisfy a departmental employee, or if the person does not provide an identity, then the departmental employee must conduct further identity checks, as set out in Part 4.

2.2 Provision of identity satisfies the departmental employee

2.2.1 A departmental employee may be satisfied about a person's claimed identity in circumstances where, for example:

- a person provides a departmental employee with his or her personal particulars (name, date of birth, place of birth, citizenship and address) and documentary evidence
- the person displays an appropriately detailed level of knowledge regarding the claimed identity, such as is recorded on departmental records (ICSE, Movements Database, TRIM)
- at least one form of documentary evidence contains a recent photograph
- the documentary evidence confirms his or her personal particulars and matches the person's physical appearance and
- there is no reason to suspect that the documentary evidence is fraudulent, forged or tampered with.

2.2.2 Documents should not be accepted at face value. DIMIA issued documents are to be checked against corporate databases. (For third parties, see 4.3).

2.2.3 Documentary evidence may include any, or any combination, of the following types of documents (most of which form part of the Government Agencies Common *Proof of Identity* Framework). The documents presented by the client should include at least one "higher value document":

higher value documents

- an acceptable travel document (original; the MSI on *Travel Documents* explains what is an acceptable travel document)
- a birth or marriage certificate
- a Document for Travel To Australia (DFTTA)
- a Certificate of Evidence of Residence Status (CERS)
- a Visa Evidencing Card (VEC or PLO56)

lower value documents

- an Australian driver's licence (current and original)
- a firearm's licence (current and original)
- a Medicare card
- a credit or account card
- a Centrelink or DVA card or
- an employee or student card.

Lower value documents should not be relied upon in isolation as many examples of forgeries have come to notice.

2.3 Provision of identity does not satisfy the departmental employee

2.3.1 A departmental employee may not be satisfied about a person's claimed identity in circumstances where, for example:

- a person provides a departmental employee with his or her personal particulars and documentary evidence purporting to confirm his or her identity but the documentary evidence does not match the person (impostor)
- a person does not have an appropriately detailed level of knowledge regarding his/her claimed identity, as recorded on departmental records (at a minimum, ICSE, Movements Database, TRIM are to be checked)
- a person provides a departmental employee with his or her personal particulars and documentary evidence purporting to confirm his or her identity but the documentary evidence:
 - is listed on the Document Alert List (DAL)
 - relates to a person who is recorded on departmental databases as being outside Australia
 - was not issued by the responsible authority or
 - appears to be fraudulent, forged or tampered with
- a person provides a departmental employee with his or her personal particulars but is unable to:
 - produce any documentary evidence to confirm the particulars, despite being given a reasonable opportunity to do so or
 - provide a credible explanation for why he or she is unable to produce documents establishing his or her identity or
- a person provides a departmental employee with multiple personal particulars.

2.3.2 If a departmental employee is not satisfied about a person's claimed identity (including about the documentary evidence the person has provided in support of the claimed identity), the departmental employee should conduct checks against relevant departmental databases and/or independently verify the identity information provided (for example by checking the authenticity of a document provided with the relevant issuing authority). This includes following up all relevant leads or information which may assist in establishing identity.

2.4 No identity is provided

2.4.1 A departmental employee cannot be satisfied about a person's identity if he or she refuses, or is unable, to provide his or her personal particulars (see 4 below).

2.5 Section 189 decision

2.5.1 Establishing a person's identity is an integral part of deciding whether the person is or is not reasonably suspected of being an unlawful non-citizen. However, it is not the only factor.

- 2.5.2 If a departmental employee is not satisfied about the person's identity, factors that may lead the departmental employee to reasonably suspect the person is an unlawful non-citizen include:
- the person evades or attempts to evade departmental employees
 - the person is unable to provide a credible explanation for why he or she is unable to produce documentary evidence of being a lawful non-citizen.

3 ESTABLISHING IDENTITY OF PERSONS DETAINED BY POLICE UNDER SECTION 189

- 3.1.1 If the Australian Federal Police, or State or Territory police, detain a person under s 189 of the Act, it is departmental policy that a departmental employee should interview the person to establish and/or verify the person's identity as soon as possible.
- 3.1.2 Wherever practicable, a departmental employee should interview the person:
- in person and
 - within 48 hours (or, if the end of that period falls on a non-working day, on the first working day after that) of the Department being notified of the person's detention.
- 3.1.3 If it is not practical to interview in person within 48 hours, then, at an absolute minimum, telephone contact must be made. All checks that can be followed up from the telephone interview must be conducted urgently.
- 3.1.4 The main purposes of the interview are to apply the guidelines set out above in relation to initially establishing the person's identity, to collect a personal identifier (see MSI on *Personal identifiers: collection from immigration detainees*), to consider whether the person may be eligible for a bridging visa, and to consider whether the person should be released if there is no longer a reasonable suspicion that the person is an unlawful non-citizen.

4 FURTHER IDENTITY CHECKING IN DETENTION WHERE IDENTITY NOT ESTABLISHED EARLIER

4.1 Further identity checking

- 4.1.1 Where a departmental employee detains a person in circumstances where he or she is not satisfied that the person's identity is established, the departmental employee must:
- report the detention to his or her compliance manager within 24 hours and
 - conduct further checks to establish the person's identity.

4.1.2 Depending on the circumstances, the following further steps may be relevant to establishing a person's identity.

4.2 Collecting personal identifiers

- 4.2.1 Non-citizens who are held in a place of immigration detention, if required, must provide officers with one or more personal identifiers, provided they are not a minor who is less than 15 years old or an incapable person.
- 4.2.2 The term "personal identifiers", in this context, refers to:
- a person's fingerprints or handprints
 - a measurement of a person's height and weight
 - a photograph or other image of a person's face and shoulders
 - a person's signature or

- any other identifier of a type prescribed by the *Migration Regulations 1994* (the Regulations).
- 4.2.3 Non-citizens who are minors under the age of 15 or who are incapable persons (as defined in s 5(1) of the Act) must not be required to provide a personal identifier other than a measurement of their height and weight or a photograph or other image of their face and shoulders.
- 4.2.4 Personal identifiers may assist in identifying the person. For example, if a detainee claims to be Person A, his or her personal identifiers may be compared with:
- personal identifiers which may have been collected from Person A when he or she applied for a visa to enter Australia, or when he or she was immigration cleared on entering Australia (in relation to signatures, departmental document examination experts may be able to assist departmental employees in conducting comparative handwriting analyses)
 - personal identifiers collected by the Australian Federal Police or State/Territory police forces or
 - personal identifiers collected by foreign government agencies that issue travel documents.
- 4.2.5 Personal identifiers collected under the Act must only be used and disclosed in accordance with the specific provisions of the Act.
- 4.2.6 For more detailed information about what personal identifiers must be provided by immigration detainees, and procedural matters, see the MSI on *Personal identifiers: collection from immigration detainees*.

4.3 Enquiries with third parties

- 4.3.1 Checks must continue to be made and all reasonable lines of enquiry (based on the identity-related information held) pursued until the identity of the person has been established and the person's immigration status determined. Departmental employees should consider pursuing enquiries with third parties or external resources such as:
- authorities which issued the documents (if any) provided by the person in relation to their claimed identity (this may include Births, Deaths and Marriages Registries)
 - friends, family members and neighbours of the detained person
 - publicly accessible information such as the White Pages telephone directory and the Australian Electoral Roll
 - embassies of foreign governments
 - foreign government agencies that issue travel and identification documents
 - Australian government agencies that issue documents commonly used for identification such as driver's licences and Medicare cards
 - other relevant Australian government agencies such as:
 - the Australian Federal Police and national security agencies
 - the National Missing Persons Unit (www.missingpersons.gov.au)
 - State and Territory police, including their Missing Persons Units
 - the Australian Taxation Office
 - Centrelink
 - Australia Post and
 - the area of the Attorney General's Department which is responsible for the Crimtrac database
 - organisations which may be able to assist with handwriting analysis, language analysis

- Australian and overseas organisations that issue identification documents such as student cards and employee records
- financial institutions and insurance companies and
- hospitals and other relevant health facilities.

4.3.2 Departmental employees need to ensure that any personal information that is disclosed to a third party in the course of making such an enquiry is disclosed in accordance with the relevant legislation. If the information in question is a “personal identifier”, then it can be disclosed only if the disclosure is a “permitted disclosure” pursuant to s 336E.

4.3.3 If the information is personal information other than a “personal identifier” (such as a person’s name, date of birth or address), then it can be disclosed provided such disclosure is in accordance with the *Privacy Act 1988*.

4.3.4 Departmental employees are permitted to disclose a detainee’s personal identifier (such as a fingerprint or a photograph) to Commonwealth, State and Territory police forces for the purpose of checking against their relevant databases in order to identify, or verify the identity of, a detainee.

4.3.5 Such a disclosure would be regarded as a “permitted disclosure” (subject to restrictions in the Act on disclosing identifying information about protection visa applicants). In all cases where it is legally possible, photographs should be supplied with the identity checking request.

4.4 Escalation of attempts to identify persons

4.4.1 If 7 days after the person was initially detained under s 189 of the Act the person’s identity has not been established the relevant departmental employee should seek further advice from his or her State or Territory Compliance Manager or Regional Director.

4.4.2 If a departmental employee has exhausted all reasonable avenues for establishing a person’s identity but is still not satisfied about his or her identity, further advice should be sought from the Assistant Secretary, Compliance and Analysis Branch and the Assistant Secretary, Unauthorised Arrivals and Detention Operations Branch.

4.4.3 If 28 days after the person was initially detained under s 189 of the Act the person’s identity has not been established, Compliance and Analysis Branch must prepare a report for the Detention Review Committee setting out all the steps undertaken in attempting to establish the person’s identity and recommending further action.

4.4.4 This may include engaging external agencies at a higher level and considering the publication of the detainee’s photo in Australian or overseas newspapers or relevant internet sites for identification purposes.

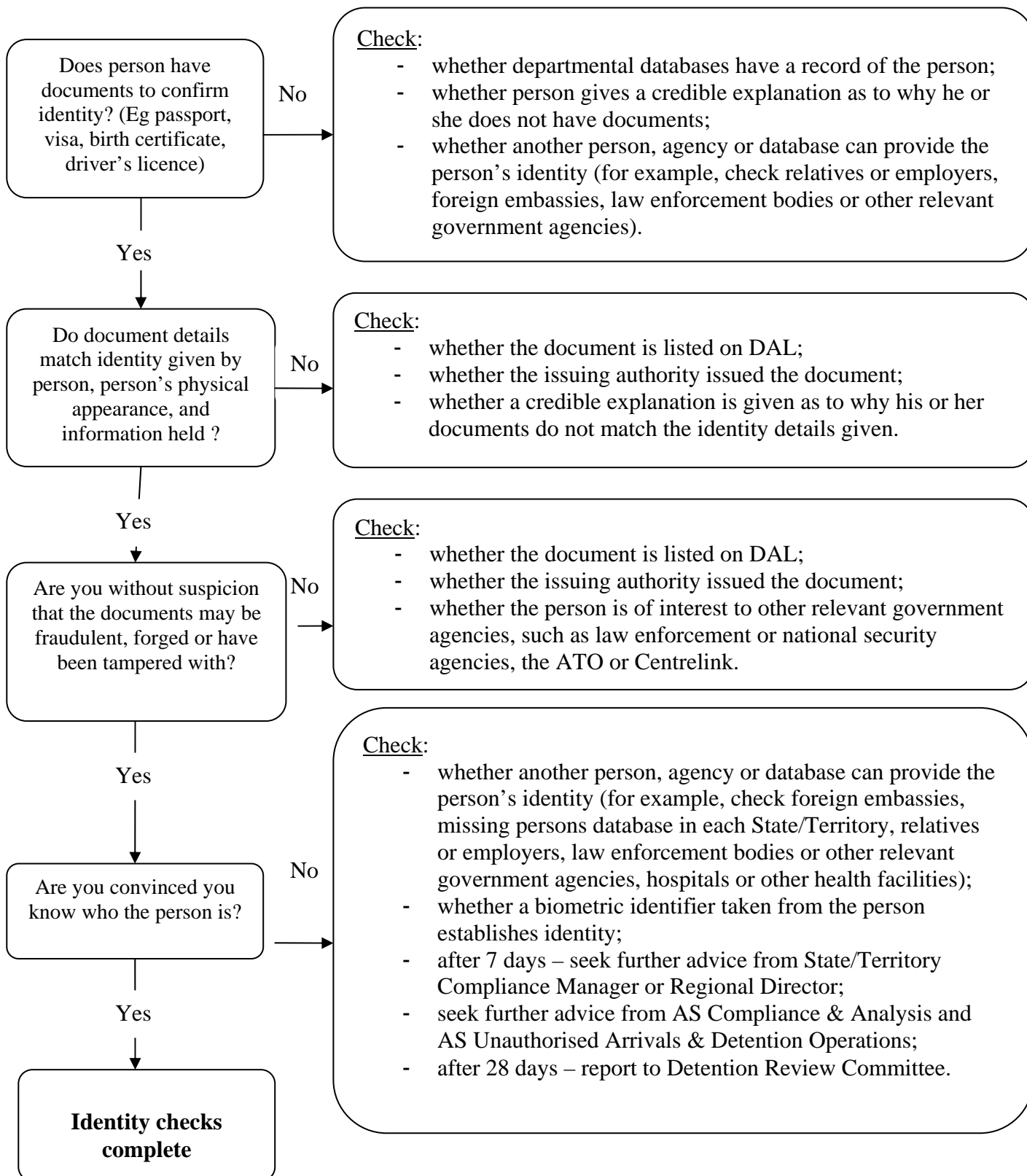
5 DOCUMENTING ACTIONS

5.1.1 Immediately after the action is taken, departmental employees must ensure that all actions taken in attempting to identify a person are documented, included on an individual case file, and an appropriate record created on ICSE.

5.1.2 In determining actions to be taken in attempting to identify a person, the thought process and/or management advice leading to a particular action should be included in the file as a file note.

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ATTACHMENT 1 FLOWCHART FOR ESTABLISHING A PERSON'S IDENTITY





Detention under section 189 “Reasonable Suspicion”



Palmer & Comrie

- Need for legislative training on s189, especially the meaning of 'reasonable suspicion'.
- Need for training on the requirement for reasonable suspicion to be maintained for entire period of detention.

The 9 main points

1. **Liberty as a cornerstone of our legal system**
2. **A state of mind of 'reasonable suspicion' must be formed before detaining**
3. **The ideas of 'reasonable' and 'suspicion' and the related ideas of objectivity and subjectivity**
4. **The need to have information which would cause others to form a suspicion**
5. **The need to conduct reasonable searches and inquiries on which to base your suspicion**
6. **The need to consider all relevant material**
7. **What is reasonable depends on what an officer knew or could be expected to know at the time of decision**
8. **Reasonable suspicion must be maintained for the entire period of detention**
9. **A decision to detain is a 'decision' under s189 and can be reviewed by a court**

1. Liberty and the Common Law

- “No free man shall be taken or imprisoned ... or exiled... but...by the law of the land” Magna Charta, Chapter 39
- “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.” Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR)
- “An alien who is unlawfully within this country is not an outlaw. Neither public officer nor private person can physically detain or deal with his person or property without his consent except under and in accordance with the positive authority of the law.” *Kioa v West* (1985) 159 CLR 550, per Deane J.



Outline of the legislation

- Section 189. Detention of unlawful non-citizens
- **189(1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.**

“Officer”

- An officer of the Department
- A customs officer
- An AFP, State or Territory Police officer.
- A person or class of person authorised by the Minister to be an officer

Migration zone”

- “All Australian states and territories to the low water mark
- all sea within ports and
- piers and similar structures attached to the land or the ground under the sea.

Excised offshore place”

- “the Territory of Christmas Island;
- the Territory of Ashmore and Cartier Islands;
- the Territory of Cocos (Keeling) Islands;
- any other external Territory that is prescribed by the regulations for the purposes of this paragraph;
- any island that forms part of a State or Territory and is prescribed for the purposes of this paragraph;
- an Australian sea installation;
- an Australian resources installation.



Unlawful non-citizen”

- “By ss 13 and 14 an unlawful non-citizen is a non-citizen in the migration zone who does not hold a visa.

“Must”

- The inclusion of the word ‘must’ makes detention mandatory once knowledge or reasonable suspicion of unlawfulness is established.

“Detain”

- take into immigration detention; or
- keep, or cause to be kept, in immigration detention;
- and includes taking such action and using such force as are reasonably necessary to do so;



2. Overview of S189:

- A state of mind of 'reasonable suspicion' must be formed before detaining



3. Reasonable Suspicion, objectivity and subjectivity

Subjective: Definitions

- Proceeding from or taking place in a person's mind rather than the external world: a subjective decision.
- Particular to a given person; personal: subjective experience
- Relating to or determined by the mind as the subject of experience: subjective reality
- Characteristic of or belonging to reality as perceived rather than as independent of mind
- Arising out of or identified by means of one's perception of one's own states and processes and not observable by an examiner: a subjective symptom of disease

Objective: Definitions

- Of or having to do with a material object.
- Having actual existence or reality.
- Uninfluenced by emotions or personal prejudices: an objective critic.
- Based on observable phenomena; presented factually: an objective appraisal.
- Perceptible to persons other than the affected individual: an objective symptom of disease
- Undistorted by emotion or personal bias; based on observable phenomena; "an objective appraisal"; "objective evidence"
- Emphasizing or expressing things as perceived without distortion of personal feelings or interpretation; "objective art"
- Belonging to immediate experience of actual things or events; "concrete benefits"; "a concrete example"; "there is no objective evidence of anything of the kind"

Increasing certainty

SUBJECTIVE CERTAINTY

speculation

suspicion

belief

purported knowledge



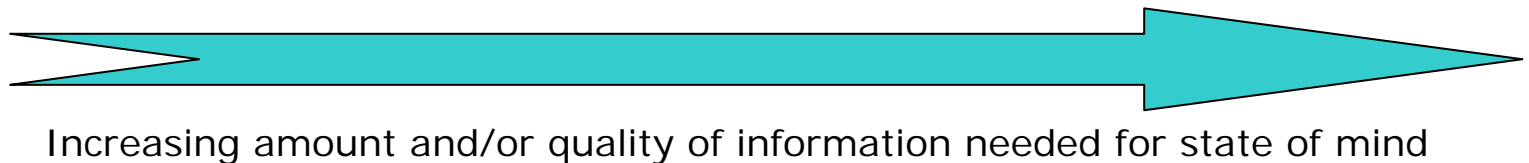
OBJECTIVE CERTAINTY

speculation

reasonable suspicion

reasonable belief

knowledge





Speculation

- idle wondering. You wonder whether something is so. Eg I wonder whether there is a chicken under my desk.
- No positive feeling. You are simply asking the question. I wonder whether it will be sunny tomorrow. Eg someone who is religiously agnostic.
- You can speculate even if you are wrong.

Suspicion

- More than idle wondering. It requires a slight degree of satisfaction.
- A positive feeling of apprehension amounting to a slight opinion without sufficient evidence. I suspect that there is/may be a chicken under my desk.
- You have a slight inclination about a certain state of affairs. I suspect it will be sunny tomorrow.
- You can have a suspicion even if you are wrong

Belief

- A positive state of mind regarding the existence of something or about a state of affairs. I believe there is a chicken under my desk.
- You are no longer wondering or suspicious. Now you believe that there is a chicken under your desk. I believe it will be sunny tomorrow. Eg religious belief in God.
- You can have a belief even if you are wrong.



Knowledge

- A state of mind where your thought meets reality.
- You believe that there is a chicken under your desk and there is in fact a chicken under your desk. You believe that a person is unlawful and they are in fact unlawful.
- If your belief is wrong, no matter how sure you think you are you do not have knowledge. You can not know there is a chicken under your desk if there is no chicken under your desk. You can not have knowledge of something that is not true.

4. The meaning of 'reasonable suspicion':

- **The need to have information which would cause others to form a suspicion**



In *George v Rocket* (1990) 170 CLR 104 the High Court said a reasonable suspicion:

- **“...requires the existence of facts which are sufficient to induce that state of mind in a reasonable person. ”**

5. 'Reasonably' imports an objective test:

- **The need to conduct reasonable searches and inquiries on which to base your suspicion**

Reasonable as objective:

Goldie v Commonwealth of Australia [2002] FCAFC 100:


- “A reasonable suspicion must be grounded in objective facts”: Stone J
- “The suspicion must be justifiable upon objective examination of relevant material.” Gray and Lee JJ
- “An officer in forming a reasonable suspicion is obliged to make due inquiry to obtain material likely to be relevant to the formation of that suspicion”: Gray and Lee JJ
- “Such relevant material will include that which is discoverable by efforts of search and inquiry that are reasonable in the circumstances”: Gray and Lee
- “A suspicion that is not grounded in fact to the point of becoming reasonable does not become reasonable because of a perceived need to act quickly.” Gray and Lee JJ

6. All relevant material must be considered: *Goldie v Commonwealth of Australia*

- “Each case depends on its circumstances but all circumstances must be considered.” Gray and Lee JJ
- “If, at the time of forming the suspicion, the officer is aware of conflicting facts, it may not be reasonable simply to discard those facts and to form a suspicion on the basis of a single fact capable of supporting such a suspicion.” Gray and Lee JJ
- “In deciding if an officer's suspicion is reasonable all relevant doubts and circumstances including contradictory or insufficient evidence should be taken into account”

7. Ruddock v Taylor (2005) HCA 48

- That the lawfulness of detention must be determined by the reasonableness of the suspicion of unlawfulness rather than whether other decisions which lead to the detention were lawful
- That a reasonable suspicion is the minimum requirement for detention and that any state of mind greater than a reasonable suspicion will also allow detention
- That what is reasonable is to be assessed by what an officer knew or could have known at the time of detention – point 7



8. Reasonable suspicion must be maintained for the entire period of detention



**9. A decision to detain is a ‘decision’
under s189 and can be reviewed
by a court**



SUMMING UP

- Reasonable suspicion formula
- Reasonable suspicion must be maintained throughout detention



Reasonable suspicion formula

- To have a reasonable suspicion you need information on which to base your suspicion of unlawfulness
- Therefore you need to conduct reasonable searches and inquiries to obtain information on immigration status
- Once you have the information, you have to consider all of the information and perform balancing of information
- Finally, determine whether the information would cause a reasonable person to suspect unlawfulness.



Short reasonable suspicion formula

- NEED INFORMATION
- SEARCH FOR INFORMATION
- CONSIDER ALL INFORMATION AND BALANCE INFORMATION
- DOES INFORMATION CAUSE SUSPICION IN REASONABLE PERSON?



Ongoing reasonable suspicion

- Section 189 requires that a reasonable suspicion be held for detention to be lawful
- Therefore a reasonable suspicion must be held for the entire period of detention
- So searches and inquiries must be ongoing to ensure the suspicion held continues to be reasonable
- Any new information which comes to light must be viewed in light of all the other information, the information should be balanced again
- Finally, determine whether the all information would cause a reasonable person to suspect unlawfulness.

Exercise 1: Is your suspicion reasonable?

Scenario 1

A man comes to the counter and tells you his name and that he is a citizen of Italy. He produces his passport and drivers licence which confirm he is who he says. You look him up on ICSE where it is recorded that the Minister cancelled his visa under s501 for character reasons. There does not appear to be any indication that he has sought judicial review of the cancellation decision or any other information on ICSE which would suggest that he is not unlawful. No bridging visas are recorded. No system indicates that he is an Australian citizen or that he has a visa of any kind.

Scenario 2

Same as the previous example but this time ICSE indicates that he applied for judicial review in relation to the cancellation and that the court decision was due to be handed down yesterday but ICSE has not recorded the outcome.

Scenario 3

You are tipped off that there are a number of men of Asian appearance working on a building site and that they may be unlawful. When you question one of the men he is reluctant to answer any of your questions and seems agitated with you. You establish the man's identity. Your system checks find that in some places in ICSE he is recorded as having a visa where as others indicate he doesn't.

Scenario 4

Same as the previous example, you do not establishment the man's identity. The man says that he does not think he has a visa. System checks reveal no one with the name he gave you. The man seems agitated with you and attempts to walk away. He does not stop when you ask him to.

Scenario 5

A fellow officer tells you that he suspects that the local Indian restaurant may have unlawful non-citizen employees. You show up at the restaurant and on announcing that you are from DIMIA you notice that one employee runs to the bathroom.

Exercise 2: Short Quiz

True or False

- a) At law, you alone determine whether your 'suspicion' is reasonable. That is, your suspicion is reasonable if you say it is.
- b) You need information relevant to the lawfulness of a person in order for your suspicion to be reasonable.
- c) You must conduct reasonable searches and inquiries to obtain information on which to base your suspicion.
- d) If you find information on ICSE that indicates that the person is unlawful you can disregard information from a colleague that indicates that he is lawful.
- e) If you have information which tends to suggest that a person is unlawful and information which indicates that a person is lawful you can't form a reasonable suspicion.

Multiple choice

1. If a person is detained and new information comes to light which goes to his lawfulness you should:
 - a) refuse to release him because he is not being removed, deported or granted a visa;
 - b) weigh up all the information again including the new information to see if the information would be sufficient to cause a reasonable person to form a suspicion of unlawfulness; or
 - c) put the information on file and do no more
2. Which is most accurate? You will have a reasonable suspicion if:
 - a) The person looks suspicious and is not cooperative;
 - b) Your supervisor tells you to detain the person; or
 - c) You have searched the systems for information confirming his unlawfulness and have found enough information to cause a reasonable person to suspect unlawfulness.
 - d) You have searched the system for information regarding his immigration status and have sufficient information to cause a reasonable person to suspect unlawfulness

DETENTION UNDER SECTION 189:

“REASONABLE SUSPICION”

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Introduction

You are all no doubt aware of the Palmer and Comrie reports into our detention practices and procedures. One of the recommendations in both reports was that there be legislative training on detention under section 189. Palmer gave particular emphasis to training on the meaning of 'reasonable suspicion' in section 189 and that once a person is detained, that continual enquiry should take place to ensure that the suspicion of unlawfulness is reasonable.

This training is primarily focused on the legal meaning of the term reasonable suspicion. Some may find it amazing how these two words will fill up an hour and a half worth of training. This may in part be because the term seems straight forward enough. Do we really need to be trained on the meaning of something so self evident? Well often times with law, the meaning of a term may not have the normal every day usage that it would normally have. In addition, because the formation of a reasonable suspicion will lead to detention, the courts have given the term a lot of attention. Today I will be talking about how the courts interpret a reasonable suspicion.

The training will focus on the following 9 points:

- 1. Liberty as a cornerstone of our legal system**
- 2. A state of mind of 'reasonable suspicion' must be formed before detaining**
- 3. The ideas of 'reasonable' and 'suspicion' and the related ideas of objectivity and subjectivity**
- 4. The need to have information which would cause others to form a suspicion**
- 5. The need to conduct reasonable searches and inquiries on which to base your suspicion**
- 6. The need to consider all relevant material**
- 7. What is reasonable depends on what an officer knew or could be expected to know at the time of decision**
- 8. Reasonable suspicion must be maintained for the entire period of detention**
- 9. A decision to detain is a 'decision' under s189 and can be reviewed by a court**

1. Liberty, Detention And The Common Law

Liberty is most often considered as the condition of being immune from the arbitrary exercise of authority.

Liberty is one of the most important foundational ideas of the Common Law. The common law right to liberty is second only to the right to life according to John Locke one of the fathers of our ideas on political philosophy. Other advocates of the importance of liberty to democratic government include Thomas Hobbes, David Hume and AV Dicey. The ancient Greeks understood the importance to democracy of liberty. Aristotle said: "The defining principle of democracy is liberty".

The Magna Charta itself which is the foundational document of the common law dating back to 1215 emphasises the importance of liberty. Chapter 39 of the Magna Charta provides:

"No free man shall be taken or imprisoned ... or exiled... but...by the law of the land" Magna Charta, Chapter 29.

These same ideas are echoed in modern international law. Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) provides that "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

These sentiments have been adopted in this country by the High Court of Australia. What is more, the High Court has found that these ideas apply equally to Aliens as to others. In *Kioa v West* (1985) 159 CLR 550 the seminal judgment of the High Court relating to natural justice, Deane J said

"An alien who is unlawfully within this country is not an outlaw. Neither public officer nor private person can physically detain or deal with his person or property without his consent except under and in accordance with the positive authority of the law. Nor is such an alien without status or standing in the land. He can invoke the protection of the law, including the protection of the writ of habeas corpus, against any government official or private citizen who acts unlawfully against him or his property. He can look to, and demand the observance of, the ordinary restraints which control the exercise of administrative power including, unless they be excluded by reason of statutory provision or the special nature of the case, the standards of procedural fairness which are recognised as fundamental by the common law." *Kioa v West* (1985) 159 CLR 550 per Deane J at 631.

Again in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, Brennan, Deane and Dawson JJ said

"Under the common law of Australia ... an alien who is within this country, whether lawfully or unlawfully, is not an outlaw. Neither public official nor private person can lawfully detain him or her or deal with his or her property except under and in accordance with some positive authority conferred by the law. Since the common law knows neither *lettre de cachet* nor other executive warrant authorizing arbitrary arrest or detention, any officer of the Commonwealth Executive who purports to authorize or enforce the detention in custody of such an alien without judicial mandate will be acting lawfully only to the extent that his or her conduct is justified by valid statutory provision. *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 19 per Brennan, Deane and Dawson JJ"

The power to issue the writ of Habeas Corpus, which is a remedy for unlawful detention, is a significant common law power vested in the courts. It is said that the legal representative of a person unlawfully detained can come before any court of relevant jurisdiction and ask that the detained person be brought before the court in order for his detainers to prove the lawfulness of his detention. Traditionally, it has been said that an application for such a writ can be made even during live proceedings in a court regarding another matter. Such is the importance of liberty in the common law.

The importance of liberty is also seen in rules of statutory interpretation, where the High Court has found that important individual rights can not be taken away by legislation unless the legislation has shown clear statutory intent to do so. *Coco v Queen*

The reason I have gone through this discussion is to impress upon you the importance of liberty to the law in Australia and how the deprivation of liberty is a serious matter which can only be undertaken with express statutory authority. The need for Departmental detainers to be diligent and thorough when considering detaining someone. As we will see the obligation to maintain a reasonable suspicion goes on after the point of detaining and is an obligation which must be maintained throughout the applicant's entire period of detention.

The power to detain under s 189 is in many ways extraordinary. Under this power, all that is required is a reasonable suspicion that a person is a non-citizen without a visa for the person to be detained. In theory that person could remain in detention for their entire life without trial or sentence. There is no other power of detention that I know of where such a low threshold requirement could result in such a long period of detention. Even a person arrested by a police officer on 'reason to suspect' of committing a crime is assured of a trial – of judicial determination of their circumstance. This is not so for a suspected unlawful non-citizen held under s189.

It is imperative that you, officers of the Commonwealth, who administer the laws of Australia, act with the utmost diligence and professionalism when considering the detention of a person.

Outline of the legislation

Section 189. Detention of unlawful non-citizens

189(1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.

“Officer”

- An officer of the Department
- A customs officer
- An AFP, State or Territory Police officer.
- A person or class of person authorised by the Minister to be an officer

“Knows or reasonably suspects”

We will come to this in a moment.

“Migration zone”

- All Australian states and territories to the low water mark
- all sea within ports and
- piers and similar structures attached to the land or the ground under the sea.

“Excised offshore place”

- the Territory of Christmas Island;
- the Territory of Ashmore and Cartier Islands;
- the Territory of Cocos (Keeling) Islands;
- any other external Territory that is prescribed by the regulations for the purposes of this paragraph;
- any island that forms part of a State or Territory and is prescribed for the purposes of this paragraph;
- an Australian sea installation;
- an Australian resources installation.

“Unlawful non-citizen”

By ss 13 and 14 an unlawful non-citizen is a non-citizen in the migration zone who does not hold a visa.

“Must”

The inclusion of the word ‘must’ makes detention mandatory once knowledge or reasonable suspicion of unlawfulness is established.

“Detain”

- take into immigration detention; or
- keep, or cause to be kept, in immigration detention; and includes taking such action and using such force as are reasonably necessary to do so;

2. Overview of S189: A state of mind of ‘reasonable suspicion’ must be formed before detaining

Section 189 Detention of unlawful non citizens

If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.

Section 189 gives an officer the power to detain those who he/she ‘knows or reasonably suspects’ are unlawful non-citizens. Section 189 not only gives an officer the power to detain, it provides that once an officer ‘knows or reasonably suspects’ that a person is unlawful the officer is under a legal obligation to detain that person, thus mandatory detention. However, it is important to remember that the obligation to detain does not arise until knowledge or reasonable suspicion is established. That is knowledge or reasonable suspicion **must** be established **before** people are detained. You can not detain in order to establish knowledge or reasonable suspicion.

It is crucial to remember that the detaining officer need to turn their mind to whether they reasonably suspect the person is unlawful. It is not enough to simply act on instruction.

Once a person is detained under s 189, unless they are released by a court order, s189 provides for detention as long as the 'reasonable suspicion' is held. Where a suspicion is no longer held, or where the suspicion held is no longer 'reasonable' the person must be released from detention. If the person is in fact an unlawful non-citizen, they can only be released if they are:

- (a) removed from Australia under s 198 or 199; or
 - (b) deported under s 200; or
 - (c) granted a visa.
- See s196 (1)

3. Reasonable Suspicion and objectivity and subjectivity

A reasonable suspicion of unlawfulness is the state of mind required in order to detain. The term 'reasonable suspicion' consists of two ideas. The idea of a 'suspicion' and the idea of reasonableness. A suspicion is a subjective state of mind while what is reasonable is measured objectively. If you have a suspicion that is not reasonable, there is no power to detain. Similarly, if it would be reasonable to form a suspicion but you do not in fact have a suspicion, there is no power to detain. Put simply, in order to detain you need a suspicion that a person is unlawful and that suspicion must be reasonable.

In order to properly understand what a reasonable suspicion is we have to understand the ideas of objectivity and subjectivity.

Objectivity and Subjectivity

Subjective: Definitions

Proceeding from or taking place in a person's mind rather than the external world: a subjective decision.

Particular to a given person; personal: subjective experience

Relating to or determined by the mind as the subject of experience: subjective reality

Characteristic of or belonging to reality as perceived rather than as independent of mind

Arising out of or identified by means of one's perception of one's own states and processes and not observable by an examiner: a subjective symptom of disease

Objective: Definitions

Of or having to do with a material object.

Having actual existence or reality.

Uninfluenced by emotions or personal prejudices: an objective critic.

Based on observable phenomena; presented factually: an objective appraisal.

Perceptible to persons other than the affected individual: an objective symptom of disease

Undistorted by emotion or personal bias; based on observable phenomena; "an objective appraisal"; "objective evidence"

Emphasizing or expressing things as perceived without distortion of personal feelings or interpretation; "objective art"

Belonging to immediate experience of actual things or events; "concrete benefits"; "a concrete example"; "there is no objective evidence of anything of the kind"

Discussion

From the above we can see that something that is subjective is something which is particular to an individual, it is experienced only by the individual. A subjective view is one which does not need to be based in reality. Someone can have a subjective suspicion that a person is unlawful without any basis for this suspicion in reality. Someone can subjectively fear that they will be persecuted even when there is no basis in reality for such a fear. Others can not necessarily perceive a subjective experience. For example, only you know how you feel when you have a stomach ache. Only you know exactly how you felt when someone insulted you. These are subjective experiences.

What is 'subjective' is to be contrasted with what is 'objective'. Unlike a subjective view, an objective view is one which corresponds with reality. An objective view of the existence of something is based on observable phenomena. Something objective is perceptible by other observers. Others can objectively know you are ill (by observing medical studies of your body etc) but only you can subjectively know the exact pain that you feel as a result. It makes no sense to talk about objectively knowing something if that something is untrue. One can not know something which does not correspond with reality.

So in short when we talk about something subjective, we are talking about something as perceived by an individual. When we talk about something objective, we are talking about something real which is able to be perceived by all.

'Reasonable' as objective

The term reasonable is used in many different ways in common language. A common definition which is most akin to reasonable in reasonable suspicion says that something is reasonable if it is":

"supported or justified by fact or circumstance; a *reasonable* belief that force was necessary for self-defence"

While it is straight forward to talk about a thing being objectively true where it can be shown or proved by empirical means (such as saying that $2 + 2 = 4$, a distance is one km), this is more complicated when speaking of something like reasonableness. It would appear that something is objectively reasonable only to the extent that there is consensus about its reasonableness (or consensus by judges). So something will be reasonable if there is consensus that the thing is supported or justified by fact or circumstance. Whether a suspicion at any particular point in time is reasonable will depend on existing circumstances. We will look at reasonableness in more depth shortly.

What is a suspicion?

A suspicion is a subjective state of mind and does not need any factual basis. As the majority of the FFC said in Goldie:

"By itself, the word 'suspects' would be capable of being construed to include the formation of an imagined belief, having no basis at all in fact, or even conjecture."

In *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266 Kitto J described a suspicion as follows:

“A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust amounting to “a slight opinion, but without sufficient evidence”, as Chambers’s Dictionary expresses.”

In *Commissioner for Corporate Affairs v Guardian Investments Pty Ltd* [1984] VR 1019 Ormiston J considered the meaning of suspicion in another context. His Honour observed that:

“The word ‘suspect’ requires a degree of satisfaction, not necessarily amounting to belief, but at least extending beyond speculation as to whether an event has occurred or not.” Both Kitto J and Ormiston J were concerned to point out that having a suspicion involves something more than mere speculation. There must at least be a positive subjective feeling. Idle wondering as to the possibility of unlawfulness is not suspicion.

Example: Speculation, Suspicion, Belief, Knowledge

Your satisfaction that your state of mind = reality	
----->	
Speculation	Suspicion
Belief	Knowledge
Speculation	idle wondering. You wonder whether something is so. Eg I wonder whether there is a chicken under my desk. No positive feeling. You are simply asking the question. I wonder whether it will be sunny tomorrow. Eg someone who is religiously agnostic. You can speculate even if you are wrong.
Suspicion	More than idle wondering. It requires a slight degree of satisfaction. A positive feeling of apprehension amounting to a slight opinion without sufficient evidence. I suspect that there is/may be a chicken under my desk. You have a slight inclination about a certain state of affairs. I suspect it will be sunny tomorrow. You can have a suspicion even if you are wrong.
Belief	A positive state of mind regarding the existence of something or about a state of affairs. I believe there is a chicken under my desk. You are no longer wondering or suspicious. Now you believe that there is a chicken under your desk. I believe it will be sunny tomorrow. Eg religious belief in God. You can have a belief even if you are wrong.
Knowledge	A state of mind where your thought meets reality. You believe that there is a chicken under your desk and there is in fact a chicken under your desk. You believe that a person is unlawful and they are in fact unlawful. If your belief is wrong, no matter how sure you think you are you do not have knowledge. You can not know there is a chicken under your desk if there is no chicken under your desk. You can not have knowledge of something that is not true.

- If s 189 did not mention reasonable suspicion and said that you must detain only if you know that a person is unlawful then only if the person was actually unlawful could you detain. However, because s 189 says you must detain if you have knowledge or a reasonable suspicion of unlawfulness, even if it turns out that the person you detained was in fact lawful, your actions will be legal so long as you had a reasonable suspicion that the person was unlawful. As Stone J points out in *Goldie v Commonwealth of Australia* [2002] FCAFC 100:
- **“The context of the phrase ‘reasonably suspects’ suggests that something substantially less than certainty is required. Reasonable suspicion should be placed on that spectrum not too close to irrationality.”**

Certainty or even belief is not required, what is required is a suspicion which is reasonable. A suspicion which is based on relevant material and is logical. As a majority of the High Court said in *Ruddock v Taylor*: **'The primary reference in the phrase "knows or reasonably suspects" is to the officer's subjective state of mind. ... Once an officer "knows or ... suspects" that the person is an unlawful non-citizen ... the critical question would be whether the certainty of belief professed by the officer was reasonably based.'**

4. The meaning of 'reasonable suspicion: The need to have information which would cause others to form a suspicion

In *Liversidge v Anderson* [1942] AC 206 Lord Atkin (dissenting) was considering the width of a clause in wartime legislation which gave the Minister the power to detain a person where the Minister "has reasonable cause to believe to be of hostile enemy origins". Lord Atkin rejected an argument by the crown that the Minister was the sole judge of what was reasonable and said that what is reasonable must be objectively determined.

Lord Atkin's dissenting judgment has been accepted as good law in Australia. In *George v Rockett* (1990) 170 CLR 104 the High Court said:

"When a statute prescribes that there must be "reasonable grounds" for a state of mind – including suspicion or belief – **it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person.** That was the point of Lord Atkin's famous, and now orthodox, dissent in *Liveridge v Anderson* ... That requirement opens many administrative decisions to judicial review and precludes the arbitrary exercise of many statutory provisions."

Why does the Act require a reasonable suspicion?

"By itself, the word 'suspects' would be capable of being construed to include the formation of an imagined belief, having no basis at all in fact, or even conjecture. Plainly, to empower an arrest on the basis of an irrational suspicion would offend the principle of the importance of individual liberty underlying the common law. It would also allow the possibility of arbitrary arrest, with the consequence that Australia would be in breach of its international obligations pursuant to Article 9 of the International Covenant on Civil and Political Rights. To avoid these consequences, the word 'reasonably' has been placed before the word 'suspects' in s 189(1)."

"The requirement of 'reasonableness' serves the ... purpose... to remove the untrammelled subjectivity of mere speculation and ground the suspicion in objective facts" 49[Stone J]"

***Goldie v Commonwealth of Australia* [2002] FCAFC 100**

The leading case on the meaning of 'reasonably suspects' in s189 is the Full Federal Court decision in *Goldie v Commonwealth of Australia* [2002] FCAFC 100 (Goldie).

5. 'Reasonably' imports an objective test: The need to conduct reasonable searches and inquiries on which to base your suspicion

- **A reasonable suspicion must be grounded in objective facts:** Stone J
- **The suspicion must be justifiable upon objective examination of relevant material.** Gray and Lee JJ

This picks up on the objective requirement presented by the term 'reasonably'. An officer must base his/her suspicion on relevant material. For a suspicion to be reasonable there must be 'evidence' which goes to unlawfulness. This evidence does not necessarily have to be written evidence and can include the answers to questions, information from databases, visa checks etc. Objective examination of the relevant material is required, meaning that the examination of material must be uninfluenced by emotions or personal prejudices. The examination of material should be impartial, logical and reasonable.

- **An officer in forming a reasonable suspicion is obliged to make due inquiry to obtain material likely to be relevant to the formation of that suspicion:** Gray and Lee JJ

A reasonable suspicion must be based on relevant material so officers are obliged to make inquiry to obtain relevant material. The information sought should be information about the person's immigration status, not just information which tends to indicate unlawfulness.

- **Such relevant material will include that which is discoverable by efforts of search and inquiry that are reasonable in the circumstances:** Gray and Lee JJ

As just mentioned, a reasonable suspicion must be based on relevant material. The above point talks about what the relevant material will include. It is not an exhaustive definition of relevant material. Relevant material will include what is discoverable from searches and enquiry which are reasonable in the circumstances. This seems to imply that the amount of search and inquiry required will depend on the circumstances. This may mean that if the circumstances allow a more thorough inquiry process that this may be necessary if it is to be reasonable. Conversely, if the circumstances do not allow for a time consuming inquiry it may be that less inquiry is required in order to form a reasonable suspicion. **However**

- **"A suspicion that is not grounded in fact to the point of becoming reasonable does not become reasonable because of a perceived need to act quickly."** Gray and Lee JJ

This point is very important to remember. Although the circumstances may influence how much inquiry is necessary to establish a reasonable suspicion, a suspicion that is not based on relevant material to the point of becoming reasonable does not become reasonable because of a perceived need to act quickly. Just because an officer thinks he/she must act quickly will not make an unreasonable suspicion reasonable.

- **"It may be that the existence of a particular fact would ground a reasonable suspicion in the mind of the officer if it were the only fact known to him or her."** Gray and Lee JJ

There may be circumstances where one piece of information would be sufficient to ground a reasonable suspicion if the fact was the only one known to the officer and the circumstances were such that there was no need for further inquiry before forming the reasonable suspicion. It would seem that this would only be the case where the relevant information was very probative in relation to the person's migration status.

6. All relevant material must be considered

- **Each case depends on its circumstances but all circumstances must be considered.** Gray and Lee JJ
- **"If, at the time of forming the suspicion, the officer is aware of conflicting facts, it may not be reasonable simply to discard those facts and to form a suspicion on the basis of a single fact capable of supporting such a suspicion.** Gray and Lee JJ

These two points make it clear that all of the material that the officer has before him/her (including all information acquired through searches and inquiries) must be taken into account in forming a reasonable suspicion. A suspicion may not be reasonable if an officer decides to ignore certain material and base the suspicion only on material that supports the suspicion. An officer must take all relevant information into account before forming a reasonable suspicion.

- **The word, "reasonable" expresses an indeterminate standard. In deciding if an officer's suspicion is reasonable all relevant doubts and circumstances including contradictory or insufficient evidence should be taken into account.[51]**

Again in the dissenting judgment of Stone J, her honour emphasises the importance of considering all relevant material in coming to a decision.

Once a reasonable suspicion is formed

- **an officer who "reasonably suspects" that a person is an unlawful non-citizen is not entitled to delay detaining that person until doubts are resolved. 50 Stone J.**

Once a reasonable suspicion is formed that a person is unlawful, the officer must detain. The officer does not have to refrain from detaining until they are certain that the person is in fact unlawful.

- **The Act, in imposing a duty to detain on reasonable suspicion, contemplates situations where there are issues to be resolved before a final view is formed as well as situations where the reasonable suspicion turns out to be incorrect.**
- **It may in the event turn out that the suspicion turns out to be incorrect but that does not mean that it was not reasonable.** *Wai Yee Yeoh v MIMA* (1997) 1316 FCA per Emmett J ex tempore

The Act allows detention on reasonable suspicion of unlawfulness. After a person is detained further inquiries and searches should be carried out to firm up your view. These searches may support your suspicion to a point where you have a solid belief or they may show that the person is in fact lawful, but so long as you possessed a reasonable suspicion on detaining

and throughout the period of detention, the detention will be lawful. As the majority of the High Court said in *Ruddock v Taylor*: **“So long always as the officer had knowledge or reasonable suspicion that the person was an unlawful non-citizen, the detention of the person concerned is required by s 189.”**

- **Section 189 may apply in cases where the person detained proves, on later examination, not to have been an unlawful non-citizen.** *Ruddock v Taylor* (2005) HCA 48

This quote from the majority in the High Court in *Taylor* emphasises the last point.

- **An officer may have a reason to suspect that the person does not have a visa in circumstances where it would be unreasonable to form a concluded opinion to this effect.**

You don't need a reasonable belief or conviction that the applicant is unlawful, all you need is a reasonable suspicion.

Do computer records always found a reasonable suspicion?

- **it is not difficult to imagine cases where despite the Department computer records showing that the non-citizen does not have a visa, it would not be reasonable to suspect that the person is an unlawful non-citizen. It might be, for example, that the relevant officer is personally acquainted with the particular case or has other knowledge that makes such a suspicion unreasonable.**

This point speaks for itself. It may not be reasonable to detain even where computer records indicate unlawfulness in circumstances where you have other information which tends to suggest that the applicant is lawful. For example where you knew that a court had set aside a decision to cancel the applicant's visa.

***Ruddock v Taylor* (2005) HCA 48**

For our purposes this case was important for three reasons. The court found:

- That the lawfulness of detention must be determined by the reasonableness of the suspicion of unlawfulness rather than whether other decisions which lead to the detention were lawful
- That a reasonable suspicion is the minimum requirement for detention and that any state of mind greater than a reasonable suspicion will also allow detention
- That what is reasonable is to be assessed by what an officer knew or could have known at the time of detention

The legality of detention under s 189 is not dependent on the lawfulness of a decision deeming an applicant unlawful: “separate consideration must be given to the application of s 189 – separate, that is, from consideration of the lawfulness of the Minister's exercise of power”

For example in the *Taylor* case itself, the Minister purported to cancel Mr Taylor's visa under s501 for character reasons. As a result, officers of the department determined that Mr Taylor was unlawful and detained him under s189. The High Court later held that the Minister's decision to cancel Mr Goldie's visa was unlawful. But in a later High Court decision, the court

found that just because the s501 decision was unlawful, this did not make the s189 decision unlawful. This was because the officers involved had a reasonable suspicion that Taylor was unlawful which was in turn based on the fact that all the information at the time of detention indicated that Taylor was unlawful.

A reasonable suspicion is the minimum requirement for detention and that any state of mind greater than a reasonable suspicion will also allow detention

One of the minority judges in Taylor suggested that in Taylor's case the officers did not 'reasonably suspect' but rather thought they 'knew' that Taylor was unlawful. As you can not have knowledge unless the state of affairs actually exists the Judge found that the officer did not have know that Taylor was unlawful because he was in fact lawful neither did he have a reasonable suspicion because his state of mind was more certain than a suspicion and therefore there was no basis for detention.

The Majority found that a reasonable suspicion is the minimum requirement for detention and that any more positive state of satisfaction will also allow detention

7. What is reasonable depends on what an officer knew or could be expected to know at the time of decision

What constitutes reasonable grounds for suspecting a person to be an unlawful non-citizen must be judged against what was known or reasonably capable of being known at the relevant time. 40

The other side in Taylor put an argument that the officers who detained Mr Taylor could not have had a reasonable suspicion that he was unlawful because it turned out afterwards that he was lawful.

The High Court said that a reasonable suspicion must be judged by what was known or capable of being known at the time when the decision to detain is taken. If a court later says that the person is lawful this of itself will not make the suspicion unreasonable.

8. Reasonable suspicion must be maintained for the entire period of detention

This is a crucial point to remember. A reasonable suspicion must be held for the entire period of detention for the detention to be lawful. So remember – at any given time during the detention period, a reasonable suspicion must be possessed. Again this means that you have a suspicion which is supported by objective evidence which would cause a reasonable person to have the suspicion.

Under s189 an officer must 'detain' where there is a reasonable suspicion of unlawfulness.

As we have seen 'detain' means

1. To take into immigration detention; or
2. To keep or cause to be kept in immigration detention.

When an officer first detains someone they are detaining under the first limb of the definition of detain – to take into immigration.

But in keeping the person detained, the second limb of the definition is at work. **BUT REMEMBER:**

Detention is only lawful if at any given time there is a reasonable suspicion, so as soon as the reasonable suspicion is not held, there is no longer a legal basis for detention.

In order to maintain a reasonable suspicion, checks and inquiry must continue through the period of detention to ensure that the suspicion of unlawfulness is maintained. What checks are necessary to maintain reasonableness will of course depend on the circumstances. If someone's visa was cancelled under s501 for character concerns and you positively knew that the person you were holding was the person who had his visa cancelled under s501 the checking that is required to maintain a reasonable suspicion may be limited. It may simply be checking to see whether the person has sought review of the decision and if so to continue to monitor the court proceedings. If the court ended up setting the cancellation decision aside then the applicant would be lawful as he/she would still have a visa and would have to be released from detention immediately.

Such a situation has to be contrasted with a case where someone was detained on a reasonable suspicion where the identity of the person or the person's immigration status was more uncertain. These are the cases where utmost diligence is required to continue to inquire as to the person's immigration status and identity. You should consider whether there may be a reason particular to the person which is preventing them from fully disclosing their identity and/or immigration status. These things could include:

Mental condition
Speech or hearing impediment
English language proficiency
Cultural differences

It is also important to remember to that if the issue of lawfulness of detention comes before a court, the judge will have the benefit of hindsight. He/she will have most if not all of the information available to or held by the Department in front of them. What may seem like a sound and reasonable suspicion at the time you detained, may look quite different in light of all the information that will be before a court. So it is always especially important to do attempt to gain as much relevant information as you can in forming your reasonable suspicion. In the same way once you have detained a person on a reasonable suspicion, thorough checks and inquiries will decrease the chance that a court will find that your suspicion was not reasonable. This also highlights the need to properly document all the enquiries and searches conducted as well as all relevant information found relating to the persons lawfulness. If the reasonable suspicion was contributed to by answers which the person gave or by their actions (for example attempting to evade an officer) these should all be documented in detail. Unless you document these things a judge will not see that these things contributed to your suspicion.

9. A decision to detain is a 'decision' under s189 and can be reviewed by a court

A decision to detain under s 189 is a decision for the purposes of judicial review and can be reviewed in Federal Courts including the High Court.

An officer makes a decision under s189 as to whether or not to detain. This decision is based on whether or not the officer known or reasonably suspects someone to be an unlawful non-citizen. In both the Palmer and Comrie reports, it was identified that many officers were under the impression that

- no 'decision' was made under s189,
- people were detained by operation of law and
- there was no review of detention effected by s189.

All of these propositions are incorrect.

When you detain a person you are making a decision under s 189 of the Migration Act. This decision, as a decision of a commonwealth officer is reviewable by the Federal Court under s 39B of the Judiciary Act and by the High Court under s75(v) of the Constitution.

While it is true that a decision to detain is not a decision under s65 (decisions relating to granting or refusing visas) it is a decision under s189 which is reviewable. It is important to remember that detention of unlawful non-citizens occurs because of a decision of an officer and does not arise simply as a matter of the operation of law. An example of an occurrence of an operation of law is where a persons BVA is cancelled automatically if the person leaves Australia. The cancellation happens automatically without a decision having to be made. In order for a person to be detained an 'officer' must decide to detain. The officer must detain if they have a reasonable suspicion that the person is unlawful.

What is reasonable can differ from person to person [May be confusing may not include]

It is important to remember that there is not one 'right' answer in forming a reasonable suspicion. Reasonable minds can differ and can come to different conclusions. What will form a reasonable suspicion in the mind of one officer may not form the same suspicion in the mind of another officer. The important point is that whatever conclusion is reached the suspicion must be reasonable. Different officers may weigh evidence differently, of base their suspicion on different thought processes. It does not matter how one reaches a reasonable suspicion so long as the suspicion is reasonable. As the High Court said in *George v Rockett*(1990) 170 CLR 104 : what is required for a suspicion to be reasonable is 'the existence of facts which are sufficient to induce that state of mind in a reasonable person'. So what is important is that the information on which your suspicion is based must be such as to cause a reasonable person (the court) to have the same suspicion.

In *Goldie* for example, although the all three judges were basically in agreement over the legal tests to be applied, two judges came to the conclusion that the suspicion held by the officer was not reasonable while the third thought the suspicion was reasonable.

'The 'reasonable' involves, of course, a value or normative judgment. Objectively considered or considered by reference to what 'the reasonable person' might think there may well be differences of opinion as to what can fall within the term at issue' (*Greiner v ICAC* (1992) 28 NSWLR 125 at 167).

Can a s189 decision to detain be lawful in relation to a citizen? [do not discuss unless necessary]

The High Court, in *Taylor* refrained from addressing this issue and it remains unresolved. One view is that this may be possible if a reasonable suspicion exists that the citizen is an unlawful non-citizen. However, it would be very difficult to convince a court in retrospect that it was reasonable to suspect that a citizen was an unlawful non-citizen.

A contrary view is that the constitution would not allow for laws like those in the migration act which deal with non-citizens and migration to apply to citizens so there would be no power to detain a citizen and any citizen detained under the migration act would be unlawfully detained.

In any event, where there is any hint that a person may be a citizen extreme caution must be employed in consideration of detaining them.

SUM UP [Briefly go over 9 points again]

DETENTION UNDER SECTION 189:

“REASONABLE SUSPICION”

- 1. Liberty as a cornerstone of our legal system**
- 2. A state of mind of ‘reasonable suspicion’ must be formed before detaining**
- 3. The ideas of ‘reasonable’ and ‘suspicion’ and the related ideas of objectivity and subjectivity**
- 4. The need to have information which would cause others to form a suspicion**
- 5. The need to conduct reasonable searches and inquiries on which to base your suspicion**
- 6. The need to consider all relevant material**
- 7. What is reasonable depends on what an officer knew or could be expected to know at the time of decision**
- 8. Reasonable suspicion must be maintained for the entire period of detention**
- 9. A decision to detain is a ‘decision’ under s189 and can be reviewed by a court**

1. Liberty as a cornerstone of our legal system

Liberty is of fundamental importance to our legal and governmental systems. Therefore, judges will always carefully scrutinise detention provisions and decisions taken under them. You need to be professional, impartial and thorough in making detention decisions.

2. A reasonable suspicion must be formed BEFORE you detain

The power to detain arises only once you have formed a reasonable suspicion. The detaining officer has to turn their mind to the person’s immigration status. It is only once the officer reasonably suspects that the person is unlawful that they must detain.

3 & 4. A reasonable suspicion is one which is justified on the information you have or could obtain

To have a reasonable suspicion, you need information which would cause a ‘reasonable person’ to suspect unlawfulness. This is the central idea about a reasonable suspicion.

5. The need to conduct reasonable searches and inquiries on which to base your suspicion

Because you need information to have a reasonable suspicion, you must conduct searches and inquiries to obtain the information. The information sought should be information about the person's immigration status, not just information which tends to indicate unlawfulness.

6. The need to consider all relevant material

Once you have gathered information about a person's lawfulness, you have to consider all the information, and balance it before coming to a decision. You must consider both information which tends to suggest lawfulness and information which tends to suggest unlawfulness.

7. What is reasonable depends on what an officer knew or could be expected to know at the time of decision

The best that you can do is conduct thorough checks and inquiries to gain information to form your suspicion. If there is information which you could not have known at the time (like a subsequent court decision) this will not affect the reasonableness of your suspicion at the point you made the decision. However, once the information is available a reassessment of your suspicion should be undertaken.

8. Reasonable suspicion must be maintained for the entire period of detention

A reasonable suspicion must be held for the entire period of detention for the detention to be lawful. So remember – at any given time during the detention period, a reasonable suspicion must be possessed. Again this means that you have a suspicion which is supported by objective evidence which would cause a reasonable person to have the suspicion. On obtaining any new information, a reassessment should be made to see if the information as a whole still supports your suspicion.

9. A decision to detain is a 'decision' under s189 and can be reviewed by a court

When you detain you are making a decision under s189. This decision can be reviewed both in the Federal Court and the High Court.

REASONABLE SUSPICION FORMULA

- To have a reasonable suspicion you need information on which to base your suspicion of unlawfulness
- Therefore you need to conduct reasonable searches and inquiries to obtain information on immigration status
- Once you have the information, you have to consider all of the information and perform balancing of information
- Finally, determine whether the information would cause a reasonable person to suspect unlawfulness.

If 'Yes' then you have reasonable suspicion, therefore detention should follow
If 'No' then no reasonable suspicion