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Powers under the *Migration Act 1958*

Supporting Material

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1. Purpose

This Supporting Material (SM) provides Australian Border Force (ABF) officers information on exercising powers under the *Migration Act 1958* (the Migration Act).

Note: This SM must be read in conjunction with the following Procedural Instruction and Standard Operating Procedures (SOPs) available on the Policy and Procedure Control Register (PPCR):

- [Field Operations – PI \(BE-6712\)](#)
- [Search Warrant Operations under Section 251 of the Migration Act 1958 – SOP \(BE-6742\)](#)
- [Non-Warrant Field Operations – SOP \(BE-6743\)](#).

2. Introduction

Common law provides all persons with protection against:

- trespass
- assault
- invasion of privacy
- theft
- loss of freedom of movement.

The Migration Act provides officers with express powers, such as those to enter, search, seize or detain, that may override the common law protections if executed lawfully.

In using these powers, officers need to be aware of the scope of the power, when it is appropriate to use the power and the requirements for the use of the power.

Officers must understand the relevant migration law, and consider the policy requirements when using these powers.

2.1. Non Migration Act powers

Officers should be aware they might have other powers available to them under other legislation (including but not limited to) the *Customs Act 1901* (the Customs Act) and the *Criminal Code Act 1995* (the Criminal Code), for example:

- section 210 of the Customs Act - Power of arrest.
- subsection 147(1) of the Criminal Code -Causing harm to a Commonwealth public official.
- subsection 147(2) of the Criminal Code -Threatening to cause harm to a Commonwealth public official.
- subsection 149(1) of the Criminal Code - Obstruction of Commonwealth public officials.

Officers should refer to the PPCR for further guidance.

4. Power to Detain

4.1. Section 189 – Detention of Unlawful non-citizens

Subsection 189(1) provides officers with the power to detain a UNC.

4.1.1. Who can exercise

There is no delegation associated to exercising this power. However, under policy only an ABF officer who has successfully completed the required training can exercise power under s189(1). Without the necessary training, an officer will not be in a position to ensure that they have the state of mind required under s189(1) to detain a person.

For further information, refer to Training section of [Field Operations – PI \(BE-6712\)](#).

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4.1.2. Required state(s) of mind

The officer exercising the power must know or reasonably suspect the person is a UNC. Knowledge and reasonable suspicion represent two different states of mind. Officers must continue to hold one of the above states of mind for the exercising of this power to remain lawful.

Note: Refer to [State\(s\) of Mind](#) for further information on knowledge and reasonable suspicion.

4.1.3. Warrant requirements

A warrant is not required to exercise power under s189.

4.1.4. Recording use of power

Officers will generally record use of power in the LPI form available on the [EICOP SharePoint](#).

However, in some circumstances, use of power under s189 may be recorded in their official notebooks and later recorded in the relevant CCMD Portal field operation report MCP2 or FVR.

4.1.5. Ceasing / ending provision

The ability to lawfully exercise power under s189 ceases if the officer no longer holds the required state of mind.

4.1.6. Additional information

The exercise of this power is mandatory, as indicated by the use of the term must detain in section 189(1) of the Migration Act.

This power can be exercised by officers in a variety of contexts as long as the person is in the migration zone, other than an excised offshore place (for example, in the field, at an airport or seaport, a departmental office or in a prison).

Please refer to the [Detaining Located Persons – SOP \(BE-6901\)](#) on the PPCR.

4.2. Section 192 – Detention of a visa holder whose visa is liable to

s. 22(1)(a)(ii)