HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY **NO M84 OF 2022**

BETWEEN: **AZC20**

Appellant

AND: **MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS**

First Respondent

COMMONWEALTH OF AUSTRALIA

Second Respondent

SECRETARY, DEPARTMENT OF HOME AFFAIRS

Third Respondent

NO M85 OF 2022

BETWEEN: **AZC20**

Appellant

AND: **MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS**

First Respondent

COMMONWEALTH OF AUSTRALIA

Second Respondent

SECRETARY, DEPARTMENT OF HOME AFFAIRS

Third Respondent

SUBMISSIONS OF THE RESPONDENTS

Filed on behalf of the Respondents by:

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PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUES PRESENTED BY THE APPEALS

2. These appeals give rise to the following four issues:

   (a) whether there was a "matter" within the meaning of s 77 of the *Constitution* in the appeals before the Full Federal Court (**ground 1(i)**);

   (b) whether the Full Court was obliged to apply a test of "substantial injustice" before granting leave to appeal, or otherwise erred in the exercise of its discretion to grant leave to appeal (**ground 1(ii)**);

   (c) whether the Full Court erred in finding that orders for the detention of the appellant in a private home pending compliance with an order for mandamus were contrary to the terms of the *Migration Act 1958* (Cth) (**Act**) (**ground 2(a)-(b)**); or

   (d) whether those detention arrangement orders were beyond the power granted to the Full Court by ss 22 or 23 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) (**ground 2(c)**).

PART III SECTION 78B NOTICE

3. The appellant has issued notices under s 78B of the *Judiciary Act 1903* (Cth).

PART IV FACTS

A. Appellant's facts

4. The respondents agree with the summary of facts in **AS [3]-[10], [12]-[14], [16]-[19], [21]**. As to **AS [11],** the evidence before the primary judge was limited to the Hermanns being willing to have the appellant "stationed on [their] property" (not necessarily in their home): **J [157]: CAB 53-54.** As to **AS [15],** orders were made on 29 October 2021 dismissing the interlocutory applications (cf **AS fn 7**). The respondents do not know and therefore cannot agree with **AS [20]**, but it is irrelevant to this proceeding. The respondents supplement the appellant's facts with Parts B, C and D below.

B. Procedural history

5. On 25 February 2021, the appellant commenced proceedings in the Federal Court of Australia seeking (inter alia) orders requiring his removal from Australia and a writ of habeas corpus (relying on the decision of Bromberg J in *AJL20 v Commonwealth*,[1] since overturned by this Court[2]) (the **habeas proceeding**).[3] The appellant contended that the applicable removal provisions were those concerning removal to a regional processing country, namely the duty in s 198AD(2) of the Act. After the primary judge heard the habeas claim, but while judgment was reserved, this Court delivered judgment in *AJL20.*

6. In response, the appellant commenced proceedings in the (then) Federal Circuit Court, seeking an order in the nature of mandamus to compel compliance with the duty in s 198AD(2). That proceeding was subsequently transferred to the Federal Court (the **mandamus proceeding**).[4]

7. The mandamus proceeding was heard by the primary judge and, on 13 October 2021, the primary judge published orders and reasons in respect of both the habeas proceeding and the mandamus proceeding: *AZC20 v Minister for Home Affairs* [2021] FCA 1234 (**J**) (**CAB 13-57**). His Honour dismissed the claim for habeas corpus, but made a declaration that s 198AD(2) applies to the appellant and an order in the nature of mandamus requiring the third respondent (**Secretary**) to cause to be performed the duty under s 198AD(2) as soon as reasonably practicable. His Honour also made orders concerning the appellant's immigration detention pending his removal to a regional processing country (the **detention arrangement orders**) in the following terms:

> 3. From no later than 1.00 pm [AWST] on 27 October 2021:
>
> (a) the Secretary is to cause any detention of the applicant in immigration detention pending performance of the duty described in Order 2 to occur at the address set out in the affidavit of Anette Hermann filed on 8 September 2021; and
>
> (b) the applicant be detained at that address by being in the company of and restrained by one or more "officers" as defined under the Act, or by another

1 (2020) 279 FCR 549.
2 [2021] HCA 21, 95 ALJR 567 (***AJL20***).
3 Federal Court of Australia proceeding number VID89/2021: see Core Appeal Book (**CAB**) **10**.
4 Federal Circuit Court of Australia proceeding number MLG2102/2021, which became Federal Court of Australia Proceeding number VID503/2021: **CAB 5, 9**. This was done to avoid a potential jurisdictional argument that may have arisen had an application been made to amend the habeas proceeding to claim that relief: see *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 416 (appeal allowed: [2020] FCAFC 223).

person or persons directed by the Secretary or Australian Border Force Commissioner to accompany and restrain the applicant.

4. The parties and Anette and Miguel Hermann are to participate in mediation before a Registrar of the Court, on a date and at a time and place to be fixed by the Registrar after consultation with the participants, to reach agreement upon arrangements for the immigration detention described in Order 3.

5. The parties and Anette and Miguel Hermann each have liberty to apply in respect of Orders 3 and 4.

8. Shortly after the primary judge's orders had been made, the Minister made a determination under s 198AE(1) of the Act that s 198AD(2) did not apply to the appellant.[5] The Republic of Nauru also communicated to Australia that it would not accept the appellant. There no longer being any duty of the kind referred to in Order 2 or 3(a), the order in the nature of mandamus was overtaken and there was no basis for the detention arrangement orders to be carried into effect.

9. On 10 November 2021, the respondents filed notices of appeal in each proceeding, which amongst other things sought costs of the appeals and orders setting aside the costs orders made below.[6]

10. On 15 November 2021, the appellant commenced a fresh proceeding in the Federal Circuit and Family Court of Australia, which was again transferred to the Federal Court.[7] In that proceeding, the appellant seeks orders for mandamus to compel the Secretary to comply with the duty in s 198 of the Act (the **s 198 mandamus proceeding**). Further, the appellant again seeks orders that are in substance the same as the detention arrangement orders. On 16 December 2021, the primary judge ordered that the s 198 mandamus proceeding be adjourned pending the appeals.[8]

11. The appeals to the Full Court were heard together on 8 February 2022. During the hearing, the Full Court raised with the respondents whether – having regard to the matters of

5 Appellant's Book of Further Materials (**ABFM) 142**.

6 Following submissions made by the parties made in accordance with Order 8 of the 13 October 2021 orders, on 10 December 2021 the primary judge ordered that the respondents pay the appellants' costs in the mandamus proceeding, but reserved the costs in the habeas proceeding because it could not "confidently be predicted that the outcome in relation to the remaining issues in that proceeding will have no influence upon the appropriate order as to costs in the respect of the habeas corpus application": *AZC20 v Minister for Home Affairs (No 2)* [2021] FCA 1544 at [18] (Rangiah J). Those orders were apparently intended to supersede the costs orders in Order 8.

7 Upon transfer becoming Federal Court of Australia Proceeding number VID695/2021: **ABFM 218-221.**

8 **ABFM 223**.

general principle raised by the appeals – they would agree not to seek to disturb the costs orders made below and to pay the appellant's costs of the appeals.[9] Some weeks later, on 25 March 2022, the respondents filed amended notices of appeal acceding to that suggestion: **CAB 66-67, 72-73**. On 5 April 2022, the Full Court made (identical) orders in each appeal granting leave to appeal and allowing the appeals: **CAB 108-112**. The appeals presently before this Court concern those orders.

C. Rangiah J's decision at first instance

12. In the habeas proceeding, the parties joined issue as to whether the removal provision applicable to the appellant's circumstances as a unauthorised maritime arrival (**UMA**) who had made a protection visa application was the duty in s 198AD(2) to remove a UMA to a regional processing country, or instead the general duty of removal in s 198. The primary judge accepted the appellant's submission that s 198AD applied (**J [97]: CAB 38**), and further found that the Secretary had failed to act in accordance with s 198AD at the time of the proceeding (by reason of the Secretary having "wrongly" taken the view that it was the duty in s 198 that applied (**J [117]-[118]**: **CAB 44**). That failure was found to warrant an order in the nature of mandamus compelling the Secretary to comply with s 198AD (**J [108]**: **CAB 41**).

13. The primary judge then turned to consider whether "any conditions can and should be placed upon the appellant's detention pending the Secretary carrying out the duty under s 198AD(2)" (**J [124]**: **CAB 45**). The respondents contended that the Court had no power to require an officer under the Act to detain the appellant at any particular place, as this would be inconsistent with the definition of "immigration detention" in s 5 of the Act. The primary judge rejected that submission. His Honour considered that the Act established "three forms of 'immigration detention'" (**J [134]**: **CAB 48**). The "first form" is defined in paragraph (a) of the definition of "immigration detention" in s 5 of the Act: "being in the company of, and restrained by: (i) an officer; or (ii) in relation to a particular detainee — another person directed by the Secretary or Australian Border Force Commissioner to accompany and restrain the detainee". The primary judge considered that this form of immigration detention was consistent with an order by the Court directing confinement to occur at a particular location (**J [136]-[137]**: **CAB 48-49**), and

9 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AZC20* (2022) 290 FCR 149 (**FC**) at [19]-[20].

that the Court had power under s 23 of the FCA Act to so order (**J [142]**: **CAB 50**). In the exercise of that power, the primary judge was satisfied that the "interests of justice" made it appropriate to order that the appellant be detained in the private home of persons known to him in the community (**J [172]**: **CAB 57**). That conclusion was embodied in the detention arrangement orders.

D. The decision of the Full Court of the Federal Court

14. There were four areas of contest before the Full Court. The **first** was whether the Full Court should hear and determine the appeals in circumstances where the primary judge's orders had no continuing effect (that issue being analysed as a discretionary question, rather than one concerning jurisdiction). The **second** was whether leave to appeal the (interlocutory) detention arrangement orders should be granted. The **third** was whether s 198AD applied to the appellant. The **fourth** was whether s 23 of the FCA Act conferred power on the primary judge to make the detention arrangement orders.

15. As to the first issue, the Full Court found that the determination of the appeals had utility, both in resolving issues that remain in controversy between the parties (particularly in the s 198 mandamus proceeding) (**FC [36]**: **CAB 89**) and because of its ramifications for other proceedings raising similar issues (**FC [37]-[38]**: **CAB 89-90**).

16. As to the second issue, the Full Court accepted that the detention arrangement orders were interlocutory and that leave to appeal was required. However, the Full Court granted leave, noting the issues of "wider importance" that were raised concerning the "interpretation, application and operation of the Migration Act" (**FC [44]: CAB 91**).

17. As to the third issue, the Full Court found that s 198AD(2) does not apply to a person the subject of a favourable decision under s 46A(2) of the Act, and that such a person is instead subject to the removal powers in s 198 of the Act (once the conditions in that section are satisfied) (**FC [46]-[77]: CAB 91-97**). That conclusion is not challenged in these appeals.

18. As to the fourth issue, the Full Court held that the primary judge erred in characterising the detention arrangement orders as falling within para (a) of the definition of "immigration detention" in s 5. The Full Court accepted that, in substance, the primary judge had determined a "place" of detention within para (b) of the definition of "immigration detention" (**FC [82]**: **CAB 98**). It so held because what was being proposed

by the detention arrangement orders was a "longer-term living arrangement" that could not be characterised as "being in the company of, and restrained by" officers (**FC [98]**: **CAB 102-103**). The Full Court further found that s 23 of the FCA Act did not confer power to make the detention arrangement orders, which were not reasonably required to make the mandamus order effective, and which were not ancillary to the mandamus order (**FC [103]-[104]**: **CAB 104**).

PART V ARGUMENT

A. Ground 1(i): "matter"

19. The first part of ground 1 contends that the Full Court erred by "hearing and determining the respondents' applications and appeals in circumstances where there was no 'matter' within the meaning of Ch III of the *Constitution*".

20. The requirement for a "matter" is concerned with two elements.[10] The *first* is the subject matter element, which directs attention to the heads of jurisdiction in ss 75 and 76. The *second* is the requirement that "the concrete or adequate adversarial nature of the dispute [be] sufficient to give rise to a justiciable controversy".[11] As to that second element (being the element in issue in these appeals), the "established position" is that "there can be no matter … unless there is some immediate right, duty or liability to be established by the determination of the Court".[12] That reflects this Court's concern not to entertain "an abstract question of law not involving the right or duty of anybody or person" and not to make "a declaration of law divorced or disassociated from any attempt to administer it".[13]

21. The appeals to the Full Court in this case involved a "matter" for four separate reasons, any one of which is sufficient to answer ground 1(i).

(i) Appellate jurisdiction and the "matter" requirement

22. Section 73 of the Constitution, which concerns the appellate jurisdiction of this Court,

10 *Hobart International Airport Pty Ltd v Clarence City Council* [2022] HCA 5; 96 ALJR 234 (***Tasmanian Airports***) at [26] (Kiefel CJ, Keane and Gordon JJ).

11 *Tasmanian Airports* [2022] HCA 5; 96 ALJR 234 at [26] (Kiefel CJ, Keane and Gordon JJ).

12 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265, 266-267 (***Re Judiciary***). See also *Tasmanian Airports* [2022] HCA 5; 96 ALJR 234 at [29] (Kiefel CJ, Keane and Gordon JJ).

13 *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 (***Mellifont***) at 303 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ).

refers to "judgments, decrees, orders and sentences" rather than "matters".[14] By contrast, the appellate jurisdiction of the Federal Court of Australia depends upon the conferral of such jurisdiction pursuant to s 77(i) of the Constitution, which permits the conferral of jurisdiction only "with respect to any of the *matters* mentioned in the last two sections" (ie the "matters" in ss 75 and 76 of the *Constitution*). Authority establishes that this limitation in s 77(i) applies to the conferral of both original and appellate jurisdiction.[15]

23. In practice, the requirement that the appellate jurisdiction of the Federal Court relate to "matters" is not a significant constraint with respect to appeals *within* the Federal Court,[16] because all proceedings before a primary judge in that Court must necessarily involve a "matter".[17] In those circumstances, appeals from a primary judge will likewise involve a "matter", because the orders of a superior court determine the rights and obligations of the parties unless and until they are set aside.[18] They can be set aside only if the primary judge is shown to have erred in one or more of the ways identified in the grounds of appeal.[19] As such, an appeal under s 24(1)(a) of the FCA Act necessarily concerns whether the rights, duties or liabilities of the parties were correctly determined by the orders made by the Court at first instance.[20] That involves a "matter" even if

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14 *Cockle v Isaksen* (1957) 99 CLR 155 at 163 (Dixon CJ, McTiernan and Kitto JJ). That said, the Court sometimes seeks to match "judgments, decrees, orders and sentences" with the "matter" requirement: see Stellios, *The Federal Judicature Chapter III of the Constitution* (LexisNexis, 2nd ed, 2020) p 667 [11.17], discussing *Mellifont* (1991) 173 CLR 289 at 305 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ).

15 *Ah Yick v Lehmert* (1905) 2 CLR 593 at 602-604 (Griffith CJ); *Cockle v Isaksen* (1957) 99 CLR 155 at 163 (Dixon CJ, McTiernan and Kitto JJ); *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 541 (Dixon CJ, McTiernan, Williams, Webb, Fullagar and Kitto JJ) and 562 (Taylor J).

16 Cf *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 542 (Dixon CJ, McTiernan, Williams, Webb, Fullagar and Kitto JJ), where the provision held to be invalid purported to confer appellate jurisdiction on a Ch III Court from state courts exercising *state* jurisdiction. The provision was invalid because, while it defined "the jurisdiction by reference to what arises in the original proceeding", it did not limit the right of appeal to those proceedings in the State court that involved a federal "matter". See also *Cockle v Isaksen* (1957) 99 CLR 155 at 163-164 (Dixon CJ, McTiernan and Kitto JJ), where the relevant appeal provisions were *not* defined by reference to whether the decision of the court below involved a "matter". By contrast, in *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at [65]-[67] (Hayne J, Gleeson CJ and Gummow J agreeing at [1] and [9]), the Attorney-General's interest in setting aside orders made by the Full Court meant there was a "matter" despite the settlement of the underlying commercial dispute.

17 *Re Wakim* (1999) 198 CLR 511.

18 *Cameron v Cole* (1944) 68 CLR 571 at 590 (Rich J); *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at [20] (Gleeson CJ); [216] (Gummow J); [328]-[329] (Hayne and Callinan JJ).

19 *Allesch v Maunz* (2000) 203 CLR 172 at [22]-[23]. Those conclusions were said to apply equally to an appeal under s 24 of the FCA Act in *Western Australia v Ward* (2002) 213 CLR 1 at [70] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

20 See, eg, *Bankstown Handicapped Children's Centre Association v Hillman* (2010) 182 FCR 483 at [13], where the Full Court said that "if the proceedings in the Industrial Court concerned a matter arising under the

circumstances have changed since the orders were made. As Gleeson CJ and McHugh J said in *Abebe*, "it is clear that proceedings may involve a 'matter' even when they are not determinative of the rights of the parties, *provided the proceedings concern the determination of what their rights were if the law had been properly applied*".[21]

24. The above submission is supported by *Mellifont v Attorney-General (Qld)*.[22] That case concerned an application for special leave to appeal against a decision of the Queensland Court of Appeal, which had decided a point of law pursuant to a provision of the *Criminal Code* (Qld) that allowed a question of law to be referred to that Court in circumstances where the accused person had been acquitted or discharged. Such a reference could "not affect the trial of nor the acquittal of the person". Nevertheless, this Court held that the opinion of the Court of Criminal Appeal in determining a reference "was made with respect to a 'matter' which was the subject-matter of the legal proceedings at first instance and was not divorced from the ordinary administration of the law".[23] The Court held that it was sufficient that "the reference and the decision on the reference *arise out of* the proceedings on the indictment and are a statutory extension of those proceedings".[24]

25. In *Mellifont*, the Court distinguished *Re Judiciary* – which it had earlier discussed in terms that emphasised the difference between original and appellate jurisdiction[25] – on the basis that the reference procedure was not "unrelated to any actual controversy between the parties".[26] Instead, it concerned the correctness of an actual ruling made in the course of resolving such a controversy. The decision on a reference sought to obtain "a review of the trial judge's ruling … to secure a correct statement of the law so that it would be applied correctly in future cases".[27] Thus, an appeal that seeks to correct an error made by the primary judge is for that reason "with respect to a matter" within s 77(i), even if the orders made on appeal will not alter the rights of the parties.

[Workplace Relations] Act there would be little reason to doubt … that an appeal would similarly be such a matter".

21 *Abebe v Commonwealth* (1999) 197 CLR 510 at [25] (emphasis added), referring to *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232.

22 (1991) 173 CLR 289.

23 (1991) 173 CLR 289 at 305 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ).

24 (1991) 173 CLR 289 at 304 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ) (original emphasis).

25 (1991) 173 CLR 289 at 302, 305 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ).

26 (1991) 173 CLR 289 at 305 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ).

27 (1991) 173 CLR 289 at 305 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ).

26. Contrary to **AS [26],** there is no special exception in a case involving the constitutional validity of a law:[28] such an exception would sit uncomfortably with the principle as stated in *Re Judiciary* itself.[29] Rather, in *Attorney-General (Cth) v Alinta Ltd,* the Attorney-General's interest in setting aside orders made by the Full Court meant there was a "matter" despite settlement of the underlying dispute.[30] As for the appellant's reliance on United States authorities (**AS [30]**), and putting to one side the correctness of the analysis,[31] this Court has emphasised that the language of the United States Constitution (which uses the term "cases and controversies") is materially different to the term "matter".[32]

27. Consistently with the above submissions, changes of circumstances that deprive an appeal of utility are routinely and correctly analysed in the authorities as raising a question as to whether the appellate court should stay the appeal as a matter of *discretion*,[33] rather than as depriving the appellate court of *jurisdiction*. That is sufficient to resolve ground 1(i).

28. Further or alternatively, the appeals also involved a "matter" on three additional bases involving their capacity to affect the rights, duties and liabilities of the parties.

(ii) The appeals determined whether detention arrangement orders can be made

29. The appeals to the Full Court determined a live controversy between the parties concerning the power of the Court to make detention arrangements orders. That was a live controversy because the appellant was seeking substantially identical orders in the

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28 Contrary to **AS fn 20 and 22,** neither *Croome v Tasmania* (1997) 191 CLR 119 nor *Harrington v Rich* (2008) 166 FCR 440 support any such "special exception". As for *Croome,* the passage relied on at **AS fn 20** explains how in such cases, where the related requirements of standing are otherwise fulfilled, a "matter" arises by virtue of the fact that the challenge to the validity of a law involves the administration of the *Constitution* itself: (1997) 191 CLR 119, 125-126 (Brennan CJ, Dawson and Toohey JJ). As for *Harrington v Rich,* the Full Court proceeded on the basis there was a "matter" but refused relief on the basis that the appeal was moot: (2008) 166 FCR 440 at [18] (the Court).

29 See also *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 272 (Dixon J).

30 (2008) 233 CLR 542 at [62] (Hayne J, with whom Gleeson CJ at [1] and Gummow J at [9] agreed).

31 Noting that each of *United States v Munsingwear Inc* (1950) 340 US 36 and *US Bancorp Mortgage Co v Bonner Mall Partnership* (1994) 513 US 18 in fact concerned the remedy of *vacatur.*

32 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at [21] (Gleeson CJ and McHugh J), [42] (Gaudron J), [156] (Kirby J), [213] (Callinan J).

33 See, eg, *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 at [20]-[21] (Black CJ, Sundberg and Weinberg JJ); *Bonan v Hadgkiss* (2007) 160 FCR 29 at [8]-[13] (Tamberlin, Stone and Siopis JJ); *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CPJ16* (2020) 276 FCR 1 at [19] (the Court). In this Court, see also, by analogy, *Ruhani v Director of Police (No 2)* (2005) 22 CLR 580 at [18] (Gleeson CJ, Gummow, Hayne and Heydon JJ) and [81]-[83] (Kirby J).

pending s 198 mandamus proceeding. The Full Court referred to that fact, observing that determination of the appeals would therefore "clarify" some aspects of that proceeding (**FC [36]: CAB 89**). In fact, that rather understated the position. To the extent that the appeals to the Full Court concerned the power of the Court to make the detention arrangement orders, its judgment decided the justiciable controversy between the parties with respect to that issue. That this remained and remains a live controversy is evidenced by the fact that on these appeals the appellant submits that he "is primarily interested in the declaration" as to the validity of the detention arrangements orders, for which he "presses" *even if there is no matter* (**AS [73]**). How such a declaration could validly be made in those circumstances is not explained. Nevertheless, the submission pressing for that relief is powerfully illustrative of the reality of the ongoing controversy between the parties. Indeed, if it were true that the Full Court's decision was of academic interest only (**AS [31]-[32]**), it is very difficult to understand why the appellant would have chosen to commence these appeals. His actions belie his submission that no such controversy exists.

30. A "matter" is the "justiciable controversy" between the actors involved, comprised of the substratum of facts representing or amounting to the dispute or controversy between them.[34] A "matter" "is not co-extensive with a legal proceeding".[35] Instead, it is "identifiable independently of proceedings brought for its determination and encompasses all claims made within the scope of the controversy".[36] For that reason, it is not to the point that, at the time the appeals were determined, the detention arrangement orders were sought by the appellant in a different proceeding. That is demonstrated by *Re Wakim, Ex parte McNally*,[37] which concerned three separate proceedings commenced by the creditor of a bankrupt in the Federal Court of Australia. The proceeding commenced against the trustee in bankruptcy involved a "matter" arising under the *Bankruptcy Act 1966* (Cth), that being a matter of the kind identified in s 76(ii) of the Constitution. The other proceedings, against the trustee's solicitors and counsel respectively, were confined

34 *Fencott v Muller* (1983) 152 CLR 570 at 603-608; *Australian Securities and Investments Commission v Edensor Nominees Pty Limited* (2001) 204 CLR 559 at [50] (Gleeson CJ, Gaudron and Gummow JJ). See also *Re Wakim* (1999) 198 CLR 511 at [75] (McHugh J).

35 *Palmer v Ayres* (2017) 259 CLR 478 at [26] (Kiefel, Keane, Nettle and Gordon JJ).

36 *Palmer v Ayres* (2017) 259 CLR 478 at [26] (Kiefel, Keane, Nettle and Gordon JJ). See also *Fencott v Muller* (1983) 152 CLR 570 at 607 (Mason, Murphy, Brennan and Deane JJ) quoting with approval *South Australia v Victoria* (1911) 12 CLR 667 at 675 (Griffith CJ).

37 (1999) 198 CLR 511.

to negligence claims at common law. Nevertheless, this Court held that the Federal Court had jurisdiction to hear and determine the two proceedings that raised only negligence claims, because those claims formed part of the same "matter" as the Bankruptcy Act claim despite the fact that those claims were made against *different parties* in *different proceedings.* Justices Gummow and Hayne JJ (with whom Gleeson CJ[38] and Gaudron J[39] agreed) explained:[40]

> It must be taken to follow from the Court's decisions in *Philip Morris*, *Fencott* and *Stack*, however, that the identification of the justiciable controversy between parties is not determined only by the considerations of there being separate proceedings and different parties in the one court. And in some circumstances a single matter can proceed through more than one court. That follows from the Court's decision in *R v Murphy*. There, committal proceedings in one court and the trial of indictable offence in another court (there having been an order for committal and the presentation of an indictment) were held to be the curial process for determination of a single matter: the matter which the trial would ultimately determine.

For that reason, Gummow and Hayne JJ stated the fact that "those advising Mr Wakim chose to issue separate proceedings at different times does not mean that the scope of the controversy is limited to the matters raised in the first proceeding".[41]

31. The same is true in this case, where the various proceedings commenced by the appellant all arose out of an *identical* substratum of facts: the facts concerning the alleged failure of the respondents to comply with their duty to remove the appellant from Australia, the legality of his past detention and the circumstances in which he should be detained pending his removal (including the place at which he should be detained). The commonality of the facts is manifest. Indeed, in reliance on that very commonality, the appellant sought orders from the primary judge that evidence in the habeas proceeding be evidence in the s 198 mandamus proceeding, submitting that such orders were appropriate because "the factual foundation already exists from the previous [habeas] proceeding".[42] The appeals and the s 198 mandamus proceeding were aspects of the same matter, the power to make the detention arrangement orders being raised in both proceedings. On that basis alone, the Full Court's resolution of that issue involved a "matter".

38 (1999) 198 CLR 511 at [25].
39 (1999) 198 CLR 511 at [27].
40 (1999) 198 CLR 511 at [138].
41 (1999) 198 CLR 511 at [142].
42 Affidavit of Cameron Retallick affirmed 3 February 2022, Exhibit CR06 at T4.28-30: see **ABFM 277-292**.

(iii) The appeals determined other issues relevant to the s 198 mandamus proceeding

32. The resolution of the appeals by the Full Court also had significance for the resolution of the substance of the s 198 mandamus proceeding: namely, whether mandamus should issue. Whether mandamus should issue for the alleged non-compliance with s 198 depended, at least in part, on whether and when s 198AD had ever applied to the appellant (that being an issue the primary judge had decided, and the correctness of which was in issue in the appeals). If s 198AD had applied (as the appellant contended), then it followed that s 198 did not apply at any time prior to the Minister's personal decision under s 198AE to dis-apply s 198AD to the appellant.[43] That was relevant to the question of whether there was an unperformed public duty in relation to which mandamus should issue to compel,[44] given the appellant's reliance on delay as demonstrating non-performance (**J [48]: CAB 26**).

33. The conclusion that there was a "matter" to be determined by the Full Court is clearer in this case than it was in *Plaintiff M68/2015 v Minister for Immigration and Border Protection*.[45] There, the plaintiff had sought relief including declaratory relief on the basis that she was subject to constraints upon her liberty in Nauru, but before the hearing the Government of Nauru decided to permit asylum seekers freedom of movement within Nauru. As a result of that change, the respondents sought to argue that the declaratory relief would produce no foreseeable consequences, with the result that the plaintiff lacked standing. That argument failed, the plurality stating that the "question of standing cannot be detached from the notion of a 'matter'", before observing that the proceeding "[w]ould resolve the question as to the lawfulness of the Commonwealth's conduct with respect to the plaintiff's detention and whether such conduct was authorised under Commonwealth law".[46] This was not "a hypothetical question" because it would "determine the question whether the Commonwealth is at liberty to repeat that conduct if things change on Nauru and it is proposed, once again, to detain the plaintiff at the Centre".[47]

43 Act, s 198(11).
44 See *AFX17 v Minister for Home Affairs* [2020] FCA 807 at [59] (Flick J); *AQM18 v Minister for Immigration and Border Protection* (2019) 268 FCR 424 at [59] (Besanko and Thawley JJ).
45 (2016) 257 CLR 42.
46 (2016) 257 CLR 42 at [23] (French CJ, Kiefel and Nettle JJ).
47 (2016) 257 CLR 42 at [23] (French CJ, Kiefel and Nettle JJ); see also at [64] (Bell J), [236] (Keane J) and at [350] (Gordon J).

34. In this case, the appeals to the Full Court were ultimately concerned with the same issue as that with which this Court was confronted in *Plaintiff M68:* the lawfulness of the conduct of the respondents connected with detention and removal under the Act. The foreseeable consequences of the determination of the appeals would be to establish which removal duty applied to the appellant which would assume immediate significance in the context of the s 198 mandamus proceeding (which claim was in fact already in play by the time the appeals were heard by the Full Court, unlike the situation in *Plaintiff M68*).

(iv) The correctness of the costs orders made at first instance were in issue when the appeals were instituted and heard

10 35. The final reason why there was a "matter" before the Full Court relates to the costs orders made by the primary judge against the respondents. At the time when the appeals were commenced by the filing of the notices of appeal, and at the time of the oral hearing before the Full Court, the orders sought by the respondents included orders setting aside the costs orders made by the primary judge. For this reason alone, at the time the appeals were heard they plainly involved a matter (as the appellant concedes: **AS [32]**).[48]

36. That matter did not disappear when, in response to the urging of the Full Court, the respondents' counsel undertook to seek instructions on the issue of costs (**FC [19]: CAB 83**) or when, some weeks *after* the hearing of the appeals, the respondents filed amended notices of appeal abandoning their application to disturb the costs orders below (and
20 agreeing to pay the costs of the appeals).[49] The jurisdiction of the Federal Court is not so fragile. That is consistent with the "principled and longstanding approach"[50] that a federal court retains jurisdiction even if all claims or defences based on a Commonwealth law

48 *Leibler v Air New Zealand Ltd* [1998] 2 VR 525 at 529-530 (Phillips JA, Winneke P and Kenny JA agreeing); *Commissioner of Taxation v Industrial Equity Ltd* (2000) 98 FCR 573 at [13], [16] (Hill, Heerey and Hely JJ); *Hunter Development Corporation v Save Our Rail NSW Incorporated (No 2)* (2016) 93 NSWLR 704 at [38], [46] (Beazley P, MacFarlan and Meagher JJA agreeing); *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CPJ16* (2020) 276 FCR 1 at [19] (Flick, Perry and Thawley JJ).

49 The proposition that the abandoning of claims by amendment to a notice of appeal does not deprive the Federal Court of appellate jurisdiction is illustrated by *Ayan v Minister for Immigration and Multicultural & Indigenous Affairs* (2003) 126 FCR 152, where all grounds raised in a notice of appeal were abandoned, and the appellant instead sought to advance a new case that was inconsistent with that advanced at first instance: at [33]. All members of the Full Court accepted that there remained a "matter" within the appellate
30 jurisdiction of the Court: (2003) 126 FCR 152 at [14] (Sackville J), [50] (Allsop J, Jacobson J agreeing).

50 *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16; 96 ALJR 476 at [41] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

have been abandoned, struck out or summarily dismissed.[51]

B. Ground 1(ii): leave to appeal

37. Section 24(1A) of the FCA Act provides that leave to appeal is required in respect of interlocutory orders. The only orders made by the primary judge that were properly characterised as interlocutory orders were the detention arrangement orders (**FC [41]: CAB 90**). Accordingly, this aspect of ground 1 relates only to those orders.

38. Section 24(1A) is unfettered and unqualified in its terms.[52] In exercising that power, the Court has regard to what will best promote the overarching purpose identified in s 37M of the FCA Act, being the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.[53]

39. The appellant's argument that s 24(1A) is confined by a test of "substantial injustice" (**AS [36]-[39]**) finds no basis in the statutory text. Further, the same argument has been rejected in a series of Full Court decisions.[54] In *Decor,* for example, the Full Court made clear while the question of "substantial injustice" may be relevant, it is not a rigid rule and there "will continue to be cases raising special considerations".[55] As this Court has recognised, it would be "unwise to lay down rigid and exhaustive criteria".[56] In some cases, leave may be justified by reference to matters such as "the general importance [of the issues raised] beyond the concerns of the parties".[57]

40. In granting leave to appeal in this case, the Full Court concluded that the appeals raised "two issues of wider importance", which were likely to arise in other cases, and observed

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51 See, eg, *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 477; *Unilan Holdings Pty Ltd v Kerin* (1993) 44 FCR 481 at 481-482; *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564 at [88]; *Rana v Google Inc* (2017) 254 FCR 1 at [21].

52 *Decor Corp Pty Ltd v Dart Industries* (1991) 33 FCR 397 (***Decor***) at 399-400

53 *Nationwide News Pty Limited v Rush* [2018] FCAFC 70 at [2] (Lee J, Allsop CJ and Rares J generally agreeing); *Bellamy's Australia Limited v Basil* [2019] FCAFC 147; 372 ALR 638 at [6] (Murphy, Gleeson and Lee JJ).

54 *The Sentry Corporation v Peat Marwick Mitchell & Co (A Firm)* (1990) 24 FCR 463 at 488 (Lockhart J); *Decor* (1991) 33 FCR 397 at 399-400; *Seven Network Ltd v News Ltd* (2005) 144 FCR 379 at 380 [5] (Branson J); *Rickus v Motor Trades Association of Australia Superannuation Fund Pty* Ltd [2010] FCAFC 16; 265 ALR 112 at 134 [105]-[107] (Jacobson, Siopis and Foster JJ).

55 *Decor* (1991) 33 FCR 397 at 399.

56 *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 177 (Gibbs CJ, Aickin, Wilson and Brennan JJ).

57 Eg *Deputy Commissioner of Taxation v Miraki* [2022] FCAFC 96 at [5] (Perram, Moshinsky and Hespe JJ), quoting with approval *Australian Securities and Investments Commission v P Dawson Nominees Pty Ltd* (2008) 169 FCR 227 at [10] (Heerey, Moore and Tracey JJ).

that the most "efficient and cost effective way to deal with those issues is to hear and determine them on these appeals", "especially so given the [respondents'] position on costs" (**FC [44]: CAB 91**). That reasoning does not disclose error.

41. As to the balance of the **AS,** the reliance on a "concession" (allegedly) made by the Minister in one case is entirely beside the point: the Minister does not determine the meaning of a statute (**cf AS [39]**). The *in terrorem* claims of a threat to the rule of law (**AS [42]**) can similarly be disregarded: if a respondent has no interest in an appeal they can file a submitting appearance save as to costs. The reliance on *other* cases in which the discretion has been exercised *differently* (**AS [43]**) says nothing about whether there was *House* error in this case.[58] Nor do such cases constitute "compounding principles of judicial restraint" (**cf AS [43]**). They represent no more than particular instances of the exercise of discretion. The assertion that the grant of leave was given to "prophylactically resolve questions that *may*" arise ignores that the Full Court in fact found it was dealing with questions which *had already arisen* in the s 198 mandamus proceeding (**FC [36]: CAB 89**). Finally, the appellant's assertion (expressed in the alternative at **AS [44]**) of *House* error fails for the same reasons. A Court does not act on a "wrong principle" or fail to apply a material "criterion" by not applying a test that it was not bound to apply.

C. Ground 2(a)-(b): the meaning of "immigration detention"

42. The Full Court found that the detention arrangement orders — which it characterised as involving a "longer-term living arrangement" in which the relevant detaining officers lacked "direct and immediate control" over the appellant (**FC [98]-[99]: CAB 102-103**) — were inconsistent with detention of the type outlined in para (a) of the definition of "immigration detention" in s 5 of the Act. That paragraph refers to being "in the company of, and restrained by" an officer (**FC [81]-[82], [87]: CAB 98-100**). The Full Court reached that conclusion for two reasons, only one of which is attacked by ground 2.

43. **Ground 2(a).** The appellant contends that the Full Court erred by construing para (a) as being subject to an "uncertain temporal element and/or purposive element". That mis-reads the Full Court's reasons. As the Full Court explained, the "textual distinctions between paras (a) and (b) of that definition are critical" (**FC [84]: CAB 99**). The phrase "being in the company of" in para (a) reveals that this paragraph "looks to the *presence*

58 *Norbis v Norbis* (1986) 161 CLR 513 at 519-520 (Mason and Deane JJ).

of a detainer", rather than to the "*place* where a person is detained" (**FC [85]: CAB 99**, original emphasis). By contrast, para (b) uses the phrase "held by or on behalf of" which – together with sub-paras (i) to (iv) – "focus on the *location* at which a person is to be kept" (**FC [87]: CAB 99-100**, original emphasis). To recognise those textual differences – and to identify the different functions to which those differences point – is not to introduce some new element into the statutory text (**cf AS [47]-[48]**). To the contrary, it is to identify the distinction between the two types of detention envisaged by the definition.

44. Ground 2 does not engage with the Full Court's finding that the Act confers "decisional freedom" on the Minister and individual officers, rather than the Court, to determine the appropriate form of detention (**FC [93]: CAB 101**). The Full Court correctly held that the detention arrangement orders sought to achieve detention at a particular *place* (the purview of para (b)) through the guise of requiring detention in the *company of officers* (the purview of para (a)). That was significant, because a court cannot make orders compelling a form of immigration detention under para (b).[59] Yet the Full Court correctly held that this is what the primary judge had purported to do (**FC [87]: CAB 99-100**). Those orders removed the "decisional freedom" that is contemplated by "both para (a) and para (b)" for detainers to decide the form of detention that is appropriate at any given time, "contrary to Parliament's intention about the flexibility likely to be required within a system of mandatory detention" (**FC [93]: CAB 101**). In this sense, the detention arrangement orders are inconsistent with the fact that the Act allows "flexibility in the selection of a mode and place of detention … does not, by implication, restrict the Minister's choice in a particular case, or impose any statutory duty to consider alternative modes of detention"[60] (**cf AS [49]**).

45. **Ground 2(b)**. In the alternative, the appellant also complains that the Full Court was incorrect to characterise the primary judge's orders as a "longer-term living arrangement"

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59 **FC [91]**: **CAB 100**, discussing *Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Mastipour* (2004) 259 FCR 576 at [139]-[144] (Lander J, Finn and Selway JJ agreeing). The primary judge in fact accepted this limitation: **J [140]: CAB 49-50**.

60 *VLAH v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1554 at [10]. See also *SBEG v Secretary, Department of* Immigration *and Citizenship* (2012) 208 FCR 235 at [49]; *Graham v Minister for Immigration and Border Protection* (2018) 265 FCR 634 at [107] (Tracey J); *Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2019] FCA 1520 at [136] (not disturbed on appeal: *Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 276 FCR 75).

and not to recognise that the detention arrangement orders had the requisite temporal quality to fall within para (a). That submission cannot overcome the fact that the primary judge accepted that removal might take "weeks, or months or longer" (**FC [82]: CAB 98**). The appellant cannot get around this finding by recasting it as if it were only directed to what might occur "if and only if" the respondents failed to comply with s 198AD, for that is not what the primary judge said (**cf AS [61]**).

46. In any case, the two aspects of ground 2 addressed above do not engage with the entirety of the Full Court's reasons for holding the detention arrangement orders to be based on "a misunderstanding or misapprehension about the proper construction of para (a)" (**FC [100]**: **CAB 103**). Specifically, ground 2 does not allege error in the Full Court's conclusion that, even if the appellant would have been "in the company of" the relevant officers, he would not have been "*restrained by*" those officers as para (a) requires (**FC [94], [98]: CAB 101, 103**). The Full Court so held in part because "[n]either the officers nor their superiors have any control over the premises or property, and they would at least in some respects be subject to long-term direction by the [owners], it being their private residence" (**FC [98]; see also [94]: CAB 102-103, 101**). The officers would have lacked "direct and immediate control over the detained individual" (**FC [99]: CAB 103**).

47. The aspect of the Full Court's reasoning summarised in the previous paragraph is unchallenged. That reasoning was itself sufficient to demonstrate that the detention arrangement orders were based on a misconstruction of para (a). In those circumstances, ground 2 cannot provide any basis for setting aside the Full Court's orders with respect to the detention arrangement orders.

D. Ground 2(c): ss 22 and 23 of the *Federal Court of Australia Act*

48. In one sense, ground 2(c) is dependent on the outcome of the first two aspects of ground 2. That follows because, if this Court accepts that para (a) of the definition of immigration detention does not include arrangements of the kind contemplated by the detention arrangement orders, then neither ss 22 nor 23 of the FCA Act could confer power to make those orders (for those sections obviously do not authorise the Court to make orders that would require officers to act contrary to their duties under the Act).

49. Contrary to what is said at **AS [65],** it is *not* the case that the Federal Court has "previously utilised s 23 of the FCA Act to make orders with respect to the conditions or location of immigration detention". In *MZYYR v Secretary, Department of Immigration and Citizenship,* Gordon J in fact indicated an acceptance of the Minister's submission that it was not possible to make an order that the detainee be placed in an alternative form of detention of a particular kind, because the "Act requires a determination by the Minister in relation to … such a form of detention".[61] In *BNL20 v Minister for Home Affairs,* Murphy J granted injunctive relief *restraining* the Minister from detaining a person in a particular place to avoid a risk of harm; his Honour did not purport to make detention arrangements inconsistently with the scheme of the Act.[62] Contrary to what is said at **AS [67]**, there is nothing in the *obiter* comments in *WAIS v Minister for Immigration & Multicultural & Indigenous Affairs*[63] which suggest that French J had "in mind a form of detention other than detention at an immigration detention centre" (**FC [112]: CAB 106**). Nor is it correct to suggest Whitlam J in *Daniel v Minister for Immigration and Multicultural and Indigenous Affairs*[64] endorsed the making of orders in the nature of the detention arrangements (**AS [71**]). Rather, it is plain from the context that his Honour was in fact endorsing the doubt which French J expressed in *WAIS* regarding the correctness of the decision in *Al Masri*.[65]

50. In any event, as the Full Court noted, while s 23 is a wide power that ensures the Court can make such orders as are necessary to ensure the effective determination of a matter, or orders that are reasonably required or legally ancillary to ensuring the Court's order is effective according to its tenor (**FC [102]: CAB 103)**,[66] it does not follow that the detention arrangement orders were reasonably required to ensure that the Court's order in the nature of mandamus was effective. Plainly it was not. Those orders neither facilitated removal, nor advanced nor supported the performance of the removal duty (**FC [103]-[104]: CAB 104**). As the Full Court put it, the detention arrangement orders were a "remedy without any connection to the mandamus order" (**FC [105]: CAB 104**). On

61 [2012] FCA 694; 292 ALR 659 at [52].
62 [2020] FCA 1180.
63 [2002] FCA 1625.
64 (2003) 196 ALR 52 at [15]-[16], [36].
65 (2003) 126 FCR 54.
66 Citing *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 at [109] (Keane, Nettle and Gordon JJ) and *Deputy Commissioner of Taxation v Huang* [2021] HCA 43; 96 ALJR 43 at [16] (Gageler, Keane, Gordon and Gleeson JJ).

that basis, the Full Court would have allowed the appeals against the detention arrangement orders, even if there had been no misconstruction of para (a) of the definition of "immigration detention" (**FC [105]: CAB 104**).

51. At **AS [68]** the appellant asserts an entirely new basis for the making of the orders; namely, that "logic, experience and authority" would dictate a "sufficiently poor mental state makes taking a person from Australia not 'reasonably practicable'" and that the detention arrangement orders were, for this reason, connected to the mandamus order. No factual finding was made by the primary judge, nor by the Full Court, that the appellant's mental state was such that he might be incapable of being removed from Australia. The factual premise for the submission therefore cannot be established.

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52. The separate reliance on s 22 of the FCA Act at **AS [70]** is misplaced. Section 22 is concerned with the object of avoiding a multiplicity of proceedings and, especially, ensuring the Court can deal with claims at law and in equity.[67] Nothing in its language suggests that it confers powers on the Court wider than s 23 of the FCA Act. In *Wotton v Queensland (No 5)* (on which the appellant places reliance at **AS [72]**), Mortimer J accepted that the wide discretionary power in s 22 has "functional limits, requiring sufficient connection with the jurisdiction to be exercised".[68]

53. The general principle which informs the exercise of the power to grant interlocutory relief

20 is that the court may make such orders "as are needed to ensure the effective exercise of the jurisdiction invoked".[69] As the Full Court concluded, "[m]aking an order about detaining the respondent at the Hermanns' house was not reasonably required to make the mandamus order effective" (**FC [103]: CAB 104**). The appellant's attempt to untether ss 22 and 23 of the FCA Act from that purpose should be rejected (cf **AS [72]**).

E. Disposition and costs

54. The appeals should be dismissed with costs.

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30 67 *Thomson Australian Holdings Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 161; *Colin R Price & Associates Pty Ltd v Four Oaks Pty Ltd* (2017) 251 FCR 404 at [110]-[112] (Rares, Murphy and Davies JJ).

68 [2016] FCA 1457 at [1786].

69 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at [35] (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ).

55. Even if the appellant is successful on ground 1(ii) or ground 2, no declaration as proposed in **AS [74(c)]** should be made. As for ground 1(ii), that follows because the appellant cannot on one hand claim that leave to appeal the detention arrangement orders should not have been granted, but then have this Court determine whether such orders were validly made. As to ground 2, success on that ground would not mean that the detention arrangement orders were within power, because ground 2 does not challenge the Full Court's reasoning in a necessary respect: see paragraph 46 above.

56. Finally, if the appeals are dismissed, costs should follow the event. The Full Court did not make "unusual costs orders" for any reason other than that the respondents undertook to pay the appellant's costs (**cf AS [76]**). If the appellant has only a "modest and passing interest" in the appeals it is unclear why he chose to commence them (**AS [76]**). In any event, that submission sits uncomfortably with his claim in the preceding paragraph that the appeals would have a "foreseeable" consequence for him (**AS [75]**). Finally, it would be erroneous to decline to make a costs order because of a perception it might be "futile" to do so.[70]

PART VI ESTIMATE OF HOURS

57. The respondents estimate that up to 2.5 hours will be required for oral argument.

Dated: 9 February 2023

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70 *Northern Territory v Sangare* (2019) 265 CLR 164 at [34]-[35] (Kiefel CJ, Bell, Gageler, Keane and Nettle JJ).

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **NO M84 & M85 OF 2022**

BETWEEN: **AZC20**
Appellant

AND: **MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS**
First Respondent

COMMONWEALTH OF AUSTRALIA
Second Respondent

SECRETARY, DEPARTMENT OF HOME AFFAIRS
Third Respondent

ANNEXURE TO THE SUBMISSIONS OF THE RESPONDENTS

Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019*, the Respondents set out below a list of the particular constitutional provisions and statutes referred to in the submissions.

Commonwealth		Provision(s)	Version
1.	*Commonwealth Constitution*	ss 73, 75, 76, 77	Current
2.	*Federal Court of Australia Act 1976* (Cth)	ss 22, 23, 24, 37M	Compilation No. 55, 1 September 2021 – 17 February 2022
3.	*Migration Act 1958* (Cth)	ss 5, 46A, 198, 198AD, 198AE	Current (Compilation No. 152, 1 September 2021 – present)