HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY **NO M 27 OF 2020**

BETWEEN: **MINISTER FOR HOME AFFAIRS**

First Appellant

COMMONWEALTH OF AUSTRALIA

Second Appellant

SECRETARY OF THE DEPARTMENT OF HOME AFFAIRS

Third Appellant

AND: **DMA18 AS LITIGATION GUARDIAN FOR DLZ18**

First Respondent

FZR18

Second Respondent

SUBMISSIONS OF THE APPELLANTS IN REPLY

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Date of this document: 26 June 2020

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PART I FORM OF SUBMISSIONS

1. This reply is in a form suitable for publication on the internet.

PART II REPLY TO THE SUBMISSIONS OF THE RESPONDENTS

2. This reply addresses the arguments presented by DLZ18 and FRX17. Matters specific to FRX17 are addressed in the reply submissions in that proceeding.

CHARACTERISING THESE PROCEEDINGS

3. Critical to the respondents' arguments is that their claims derive "from what the appellant did, not the legislation" [**RS [5(a)]**, that they did not "allege that a duty of care arose '*because*' the claimants were taken to Nauru; that was merely a background fact" [**RS [6(a)**], and that "in no sense, did the claims invoke, rely or depend upon the *Migration Act*. The *Migration Act* was only background to the claims" [**RS [12]**; see also **RS [30], [36], [37], [40]**]. The court documents in *DLZ18* (and those in *FRX17* also) show that the respondents materially misstate the nature of their proceedings against the appellants.

4. The originating application in this proceeding identified three matters as the basis for an alleged duty of care "in exercise of its powers under s 198AHA of the *Migration Act 1958* and/or s61 of the Constitution".[1] The first matter referred expressly to being taken to Nauru under s 198AD. The second and third referred to activities which would be authorised by s 198AHA. The originating application identifying these matters cannot be ignored on the basis that a statement of claim was later filed [cf **RS [36(b)]**], because s 494AB must be assessed at "institution", as well as subsequently.[2] Further, the respondents' apparent invitation to the Court to ignore this material because the originating application need only identify the parties and the relief sought is untenable.

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1 **BFM 198**.

2 Whether an amendment could be made *nunc pro tunc* to avoid the operation of s 494AB does not arise for determination, because no such amendment has been sought and in each case, the appellants contend that the proceedings as ultimately amended also engage s 494AB. Whether such an amendment is permissible depends on interpretation of s 494AB. See and compare *Emanuele v Australian Securities Commission* (1997) 188 CLR 114.

The respondents were entitled to notice, somewhere, of the basis for the claimed relief. That notice was provided by the "Details of claim" section in the originating application.

5. Turning then to the statement of claim, that the respondents' family were taken to Nauru under s 198AD is expressly pleaded.[3] So too is the entry into contractual arrangements under s198AHA,[4] and the things which those contractors allegedly did in contributing to the "Conditions on Nauru".[5] From "when the [respondents] were transferred from Christmas Island to Nauru", it is then alleged that the appellants owed them a duty to take reasonable care,[6] and this and other duties is said to have been breached.[7] As a matter of both form and substance, it is necessarily the case that what underpins the alleged duty of care from the moment that the respondents were taken to Nauru are: (a) the fact they were brought there in compliance with the duty in s 198AD; and (b) the things done with authority under s 198AHA to set up regional processing. One might ask rhetorically: What else had been done? The description in **RS [36(c)-(d)]** ignores this part of their own claim. These pleadings cannot be described as mere "background". They could never have that status, for it cannot have been a breach of a common law duty of care to take the respondents to Nauru given that s 198AD created a statutory duty to take them there, and any assessment of the reasonableness of what followed must take account of the fact that the respondents were people whom the Parliament had mandated must not be allowed to remain in Australia, but must instead be transferred to a regional processing country.

6. The respondents cite passages from *Sutherland Shire Council v Heyman*[8] that recognise that a duty of care might arise at common law when a public authority acts in a way that causes another to rely upon that public authority or where it has created or increased a risk of injury occurring. If that is how the respondents propose to put their case at trial, as is suggested on the pleadings, then that confirms that this is a proceeding relating to the performance or exercise of functions, duties or powers under Subdivision B. The

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3 Statement of claim at [21] [**BFM 216**].

4 Statement of claim at [34] [**BFM 217**].

5 Statement of claim at [35]-[37] [**BFM 217**].

6 Statement of claim at [74] [**BFM 232-233**].

7 Statement of claim at [79] [**BFM 233-234**].

8 (1985) 157 CLR 424 at 461 (Mason J), 479 (Brennan J).

respondents' case seems to be that, the appellants having performed the duty in s 198AD and taken the respondents to Nauru (being a duty unaffected by the knowledge of officers about Nauru or the characteristics of the persons transferred to Nauru), and having made contracts for the setting up and facilitation of regional processing activities, the appellants came under a duty of care.

7. That the duty of care has its source in the common law cannot be determinative for several reasons [cf **RS [30]**, **[33]**]. *First*, there is no basis to read s 494AB as limited to proceedings where the source of the cause of action or liability is itself Subdivision B. The question for the Court is not whether the asserted duty of care arose directly from the statute. The question is whether the proceedings "related to" relevant parts of the statute. That is a broader question than the source of any putative duty of care. *Second*, such a limitation could not account for applying s 494AB(1)(ca) to bar claims for misfeasance in public office. *Third*, the respondents understate the importance of the statutory framework in any action in negligence against a statutory repository of power, including because consideration must be given to whether or not the "statute excludes the duty".[9] In response to **RS [50]**, as submitted in chief, whether the appellants' non-colourable claim of inconsistency should be accepted or rejected is not the criterion upon which s 494AB(1)(ca) depends. The non-colourable allegation having been made, the proceeding "relates to" that matter (by analogy with the way that a non-colourable allegation in a defence may shift a matter from non-federal to federal jurisdiction[10]).

8. The respondents' attempt to distinguish *Stuart v Kirkland Veenstra* on the basis that it involved an allegation that officers had to exercise a specified statutory power in a particular way is unconvincing for two reasons [**RS [40]**].[11] *First*, it should not be forgotten that the respondents did allege that the appellants were obliged "[t]o remove the [first respondent] from Nauru to a place with appropriate medical facilities" as they "were

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9 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 479 (Brennan J); see also at 459 (Mason J).

10 See, eg, *Troy v Wrigglesworth* (1919) 26 CLR 305 at 310-311 (Barton , Isaacs and Rich JJ); *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 476 (Stephen, Mason, Aickin and Wilson JJ); *Felton v Mulligan* (1971) 124 CLR 367 at 373-374 (Barwick CJ).

11 (2009) 237 CLR 215.

not available on Nauru".[12] That is relevant to the argument about s 494AB(1)(a). *Second*, the respondents ignore the larger point the appellants seek to make. This Court has recognised more than once that whether the Commonwealth can owe a duty of care within the context of a particular statutory regime depends on an analysis of that regime. For that reason, what the respondents call statutory "background" is well capable of stamping the proceeding with the requisite character so as to engage s 494AB(1)(ca). That is because there is no meaningful distinction between "the facts" that occurred and the statutory "background" in which they occurred. Those matters are intertwined. The statute cannot simply be put aside or ignored when ascertaining whether a duty of care exists, and if it does when ascertaining what reasonable care required and whether it was provided.

9. Contrary to **RS [6(b)] and [28]**, the Full Court did conclude that s 494AB(1)(ca) cannot apply to negligence proceedings generally. The Full Court said that s 494AB(1)(ca) is "not engaged in the context of a negligence action founded, as is the case here for each of the four proceedings, upon an alleged common law duty merely because some of the facts said to give rise to a duty are claimed to be authorised by ss 198AB or 198AD" [**CAB 76 [208]**]. That passage states a general proposition not limited to the four proceedings now before this Court. For the reasons given above and in chief, excluding negligence claims from s 494AB is erroneous.

10. Each of the actions or omissions that was relied on was an action (or omission) carried out by officers of or contractors to the Commonwealth in the exercise of functions, powers or duties for which authorisation was provided by s 198AHA. That statutory authority was pleaded by the appellants and does not appear to be seriously contested (if at all) by the respondents. But for that conferral or authority, the capacity of the Commonwealth lawfully to carry out those actions might have been open to doubt. Assessed against the text of s 494AB, the action in negligence therefore "related to" the exercise of functions, duties or powers under Subdivision B.

INTERPRETATION OF SECTION 494AB

11. There is ultimately no dispute that the Court must characterise these proceedings to determine if they are of a kind that engages a paragraph of s 494AB(1). But it is important

[12] Statement of claim at [77.1] [**BFM 233**].

to recall that this question does not arise in the abstract; what matters is the character of the proceedings for the purposes of s 494AB(1). The statutory language and the relevant categories contained in s 494AB(1) inform, or provide the framework for, determining the relationship that must exist beween the proceedings and the identified categories in s 494AB(1).

12. With that in mind, the breadth of the categories in s 494AB, and s 494AB(1)(ca) in particular, assume importance. This brings the analysis back to the appellants' submissions about the plain text — especially the phrase "relating to" — and the purposes of the legislation. It is only when those matters are properly appreciated that one can begin to characterise the particular proceedings.

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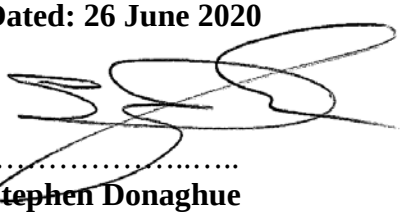
13. In response to the respondents' submissions on purpose [**RS [17]**], the appellants refer to their submissions in reply in the *BXD18* proceeding at [4]-[5]. And in response to the respondents' submissions on legislative history [**RS [19]-[26]**], the appellants rely on their submissions in reply in the *BXD18* proceeding at [6]-[7]. Ultimately, and contrary to **RS [26]**, the appellants' interpretation is the only approach that gives proper operation to the broad words of s 494AB. On its face, "relating to" is as "general or far-reaching"[13] a phrase as the Parliament could have used. It requires no more than a direct or indirect relationship between the subject matters[14] described in s 494AB(1).

20 **Dated: 26 June 2020**



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[13] *Commissioners of Inland Revenue v Maple & Co (Paris) Ltd* [1908] AC 22 at 26 (Lord Macnaghten), which has been cited on many occasions in Australia. See, eg, *Oceanic Life Ltd v Chief Commissioner of Stamp Duties* (1999) 168 ALR 211 at 224-225 [56].

[14] *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 at 374 (McHugh J).