HIGH COURT OF AUSTRALIA

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Details of Filing

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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

10 Third Appellant

AND **DMA18 as litigation guardian for DLZ18**

First Respondent

FZR18

Second Respondent

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RESPONDENTS' SUBMISSIONS

PART I: FORM OF SUBMISSIONS

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

PART II: ISSUES

2. This appeal concerns the proper interpretation and application of s494AB(1) of the *Migration Act 1958 (Cth)* which bars certain specified legal proceedings from being instituted or continued in any court except the High Court. The appellants rely upon s494AB(1)(a), (ca) and (d) to bar proceedings instituted and continued by the respondents in the Federal Court:

> ***494AB Bar on certain legal proceedings relating to transitory persons***
>
> *(1) The following proceedings against the Commonwealth may not be instituted or continued in any court:*
>
> *(a) proceedings relating to the exercise of powers under section 198B;*
>
> *...*
>
> *(ca) proceedings relating to the performance or exercise of a function, duty or power under Subdivision B of Division 8 of Part 2 in relation to a transitory person.*
>
> *(d) proceedings relating to the removal of a transitory person from Australia under this Act.*

3. There are four appeals – two taken from a Melbourne cohort and two taken from a Sydney cohort. These submissions deal with the Sydney cohort, and include *all* of the substantive matters affecting both of the Sydney cohort appeals.

4. As background – the Sydney cohort respondents have brought common law negligence claims against the appellants in the Federal Court. The only remedy now sought is damages. The respondents allege that the appellants owed them a duty of care based upon the relationship existing between them as a result of the appellants' conduct while the respondents were in Nauru.

5. In those circumstances the Sydney cohort respondents propose three issues for determination, captured by these questions:

   (a) What is the proper characterisation of the respondents' proceedings? In particular, what significance should be given to the appellants' assertion that conduct was authorised by the *Migration Act*, where the claims raised by the respondents derives from what the appellants did, not the legislation;

(b) What breadth should be given to the words "*relating to*" in s494AB(1)? This is a point relied upon heavily by the appellants; and

(c) What is the proper construction of the subject matter of the prohibition in s494AB(1)(ca) of "*the performance or exercise of a function, duty or power under Subdivision B of Division 8 of Part 2 in relation to a transitory person*"?

6. The respondents do not agree with the way in which the appellants have characterised the issues in the appeals. In particular:

(a) The respondents dispute that the "*context*" which the appellants give to the appeals {FRX17 [3]} accurately describes the circumstances giving rise to the claim. None of the claims made by the Sydney cohort allege that a duty of care arose "*because*" the claimants were taken to Nauru; that was merely a background fact. The claims regarding ongoing medical treatment have been abandoned;

(b) The three issues the appellants say arise {FRX17 [4]-[6]} are not an apt way of describing the issues at all. The Full Court did *not* hold that s494AB(1)(ca) could not apply to actions in negligence – the Full Court only decided that the subsection did not apply to *these* claims in negligence. The references to claims and relief "*implicitly*" sought by the Sydney cohort is also inapt; the Sydney cohort explicitly stated their claims, and none of them depended upon an exercise of the statutory powers as asserted by the appellants.

PART III: SECTION 78B NOTICE

7. Notice is not required under s78B of the *Judiciary Act 1903 (Cth)*.

PART IV: FACTS

8. While the Sydney cohort does not have a major dispute with those facts which the appellants have mentioned, those facts need to be supplemented.

9. At a general level, all of the claims brought by the members of the Sydney cohort bear the following critical characteristics:

(a) None of the claims makes any complaint about matters which occurred *before* the respondents arrived on Nauru; the only complaints made are in respect of events which occurred *after* the respondents arrived on Nauru;

(b) Even before the respondents arrived on Nauru, the appellants *knew* that the conditions on Nauru created a risk of psychological harm to those persons detained on Nauru. The appellants also *knew* that children and those persons who were coming from a difficult background were especially vulnerable;

(c) The appellants then became aware that each of the respondents had begun to suffer symptoms of psychological harm and, over time, also knew that those symptoms were worsening;

(d) It was in those circumstances that the appellants provided the respondents with *some* medical treatment – but the appellants knew that the treatment was not working and they also knew that the condition of each of the respondents was becoming worse and dangerously so;

(e) The appellants were aware that the only means of stemming and correcting the damage to the respondents required medical treatment of a kind not available on Nauru;

(f) Despite this, the appellants left the respondents on Nauru, and allowed the respondents' medical conditions to deteriorate until the situations became desperate.

10. At this point there is a difference between the two cases[1]:

(a) In the FRX17 proceedings an application was made for a mandatory injunction to bring one of the respondents to a place to receive the treatment necessary to repair her damage and to stem further damage. The claim was contested. As can be seen from the judgment granting that injunction, that remedy was sought on the basis of the breach of a common law duty of care. The interlocutory relief sought, and ultimately granted, did not refer to or rely upon s198B of the *Migration Act*;

(b) In the DLZ18 proceedings an application for a mandatory injunction was filed, but no order was necessary – the appellants agreed to allow DLZ18 and FZR18 to leave Nauru, and then chose to make arrangements to bring them to Australia.

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[1] The four sets of claims reflected in the Melbourne cohort and the Sydney cohort were selected because there were slight differences between them, so that a range of factual and legal scenarios could be considered in what were regarded as test cases {CAB 14[1]}.

PART V: ARGUMENT

The interpretation of s494AB(1)

11. Section 494AB(1) prohibits "*proceedings*" that are "*relating to*" certain specified matters in each of the relevant sub-sections. One way to do this is to characterise the proceedings, and then to work out whether those proceedings relate to that thing which is prohibited. The Sydney cohort's principal argument is that a proper characterisation of their various claims means there is no intersection between their proceedings and those various things covered by the prohibitions. The proper characterisation of the claims brought by the Sydney cohort is that they are common law negligence claims. This was the finding of the Full Court {CAB 75 [205], 79 [218], 80 [225]}.

12. In characterising the proceedings it is important to note that, in no sense, did the claims invoke, rely or depend upon the *Migration Act*. The *Migration Act* was only background to the claims.

13. It now seems appropriate to deal with what appears to be the key component of the appellants' argument – the appellants rely heavily upon "*relating to*" and propose giving that phrase the widest possible application. Much is made of this, but it does not take the matter far: it is uncontroversial that "*relating to*" is a broad expression – the Full Court said so {CAB 66 [183]}.

14. The real issue to be resolved is the *degree* of connection imported by those words as between the "*proceedings*" and the matters identified in the subsections of s494AB(1). The Full Court correctly identified and applied the ordinary principles of statutory construction and interpreted the text having regard to context and purpose {CAB 56 [154]-[155]}. The Full Court then had particular regard to the degree of connection conveyed by "*relating to*" in the context in which it appears and the "*subject matter of the inquiry, the legislative history, and the facts of the case*"[2] {CAB 67 [183]}. There is no error in the approach.

15. The appellants' central complaint is one of emphasis or degree – that the Full Court erred in adopting "*an unjustifiably narrow reading to the words 'relating to'*" {FRX17 [44], also [23], [28]}. However, the appellants place too much emphasis on the breadth of connection created by the words "*relating to*". The appellants take that phrase –

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[2] Citing *Travelex Ltd v Commissioner of Taxation* (2010) 241 CLR 510 at [25].

"*relating to*" – and then isolate it and separate it from its context – which is whether the "*proceedings*" relates to something. The context means that the whole of the words need to be read – ie it requires asking whether A relates to B; it does not allow "*relates to*" to be read so widely that it makes a connection between two unconnected things. As a connecting phrase "*relates to*" should be the servant, not the master.

16. Moreover, the appellants' contention largely overlooks the legislative text, instead attributing to the section a legislative purpose that is not apparent from the text or the legislative history of the *Migration Act*.

17. In particular, and contrary to the appellants' submissions, there is nothing in the language of the *Migration Act* or its legislative history that reveals a purpose to "*limit legal proceedings concerning all aspects of regional processing (including in relation to the presence of transitory persons in Australia)*" {FRX17 [23]}. As the Full Court found, it is not possible to discern an overarching purpose, and much less the overarching purpose proposed by the appellants {CAB 64 [177]}.

18. The appellants rely upon the legislative history, and especially the progression of amendments made to the *Migration Act*. So does the Sydney cohort. That legislative history does nothing to support the appellants' argument. We will now set out that history.

19. Section 494AB was introduced in 2002, along with the concept of "*transitory person*"[3]. When introduced, s494AB did not include subs494AB(1)(ca) nor did the *Migration Act* contain any provisions concerning regional processing in its present form. The Revised Explanatory Memorandum for the 2002 Bill states that,

> *In order to maintain the integrity of Australia's border controls it is necessary to ensure that the transitory person's presence in Australia is as short as possible and that action cannot be taken to delay that person's removal from Australia.*[4]

and that the amendments proposed by the Bill would,

> *stop legal proceedings being taken in relation to the 'transitory person's' presence in Australia.*[5]

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3 *Migration Legislation Amendment (Transitional Movement) Act 2002 (Cth)*.
4 Revised Explanatory Memorandum, Migration Legislation Amendment (Transitional Movement) Bill 2002 (Cth) at 2 [6].
5 Revised Explanatory Memorandum, Migration Legislation Amendment (Transitional Movement) Bill 2002 (Cth) at 3 [7].

20. Consistent with those statements and the text of s494AB as it was when enacted, the Full Court correctly identified, "*the mischief to which it was directed was to ensure that a transitory person's presence in Australia was as short as possible and that, to that end, legal proceedings which could frustrate that objective should be barred apart from proceedings in the High Court under s75 of the Constitution*" {CAB 57 [157(b)]}. The appellants accept that s494AB as originally enacted was concerned with a transitory person's presence in Australia {FRX17 [24]}.

21. In 2012, Part 2 Div 8 Subdiv B was inserted along with s494AB(1)(ca)[6]. As observed by the Full Court, "*when it was originally enacted, [Subdiv B] contained relatively few provisions relating to regional processing*" {CAB 57 [157(c)]}. Subdivision B is described in the Revised Explanatory Memorandum as, "*a new framework for 'taking' offshore entry persons from Australia to a regional processing country*"[7]. It included:

    (a) The Minister's power to designate a country to be a "*regional processing country*" (ss198AB, 198AC); and

    (b) The duty of an officer to take an "*offshore entry person*" from Australia to a regional processing country (s198AD), when that duty may not apply (ss198AE, 198AF, 198AG), and when that duty applies to transitory persons (s198AH).

22. Significantly, as the Full Court observed, Subdiv B at that time did not include:

    (a) Any provisions concerning actions taken by the Commonwealth or its agents in relation to persons who had been taken to a regional processing country and were being detained there; nor

    (b) A statutory scheme for the Commonwealth or its agents to exercise powers, perform functions, or discharge duties in a regional processing country.

    {See, CAB 61 [168]-[169]}

23. In other words, the purpose of s494AB(1) was *not* altered by the introduction of Subdiv B and s494AB(1)(ca). Subdivision B remained concerned with limiting the presence of transitory persons in Australia and the *taking* of persons from Australia to a regional processing country. Contrary to what the appellants say, little or no assistance can be

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6 *Migration Legislation Amendment (Transitional Movement) Act 2002 (Cth)*.

7 Revised Explanatory Memorandum, Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012 (Cth) at 15 [94].

drawn from the Revised Explanatory Memorandum accompanying the introduction of s494AB(1)(ca) – the Revised Explanatory Memorandum simply repeats the words as they appear in s494AB(1)(ca)[8]. The Revised Explanatory Memorandum certainly does not support an argument that the purpose of s494AB(1)(ca) is to prevent litigation relating to anything done in relation to regional processing {cf FRX17 [25]}. Indeed, the amendment to s494AB(1) was not even highlighted in the Revised Explanatory Memorandum's summary of the particular effects of the 2012 Bill[9].

24. Section 198AHA was only subsequently inserted into Subdiv B on 30 June 2015[10]. The Sydney cohort relies on the summary of the legislative history of s198AHA as set out by the Full Court {CAB 62-64 [170]-[176]}. Section 198AHA was introduced "*to put beyond doubt*" the Commonwealth's authority "*to take action in relation to regional processing arrangements or the regional processing functions of a country, and associated Commonwealth expenditure*"[11]. That does not support the appellants' submission {FRX17 [23]} that s494AB(1) was actually directed to the purpose of limiting legal proceedings concerning *all* aspects of regional processing. Indeed, the appellants' assertion that the bar applies to *all* legal proceedings surrounding regional processing goes much too far.

25. Further, as s494AB involves characterisation of the proceedings and because that process involves questions of evaluation and judgment, the Full Court was quite correct to apply the presumption of statutory construction which emerges from *Shergold v Tanner* (2002) 209 CLR 126 {CAB 64-65 [178]}. The Full Court only used *Shergold v Tanner* as a tool to assist in statutory construction – on the basis that it is a "*general proposition that a law of the Commonwealth is not to be interpreted as withdrawing or limiting a conferral of jurisdiction unless the implication appears clearly and unmistakeably*". That is an important presumption. The authorities cited by the appellants challenging the correctness of this approach[12] are inapt and do not

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8 Revised Explanatory Memorandum, Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012 (Cth) at 35 [257].

9 Revised Explanatory Memorandum, Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012 (Cth) at 3-5.

10 *Migration Amendment (Regional Processing Arrangements) Act 2015 (Cth)*.

11 Explanatory Memorandum, Migration Amendment (Reginal Processing Arrangements) Bill 2015 (Cth) at 4 [6].

12 In *ASIC v DB Management Pty Ltd* (2000) 199 CLR 321 at [43] the High Court was dealing with whether a statute permitting property to be acquired compulsorily could itself be subject to a general presumption that legislation not be construed to interfere investor proprietary rights. In *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at [314] Gageler and Keane JJ were dealing with whether legislation

concern the interpretation of provisions excluding or limiting the jurisdiction of courts {see FRX17 [28]}.

26. Accordingly, where the only discernible objective of s494AB is to bar certain proceedings – ie those that meet the description in the subsections – the focus must then be on the express language in those subsections to determine whether *the* particular proceedings are subject to the prohibition {CAB 67 [184]}. Instead of addressing each of the subsections, the appellants' submissions side-step the express language and emphasise a "*purpose*" – a purpose expressed in tendentious terms and one that is not apparent from the legislation.

10 ***Section 494AB(1)(ca) – "proceedings relating to the performance or exercise of a function, duty or power under Subdivision B of Division 8 of Part 2 in relation to a transitory person"***

27. For the reasons above, s494AB(1) does not impose some kind of general bar on proceedings, but instead requires a case by case consideration of particular proceedings. Determining whether a jurisdictional prohibition operates with respect to particular proceedings requires an examination of the pleadings and the nature of relief claimed[13]. It is a matter of substance, not form. That is the approach the Full Court adopted {CAB 39-50 [104]-[134], 56 [154], 66 [181]}.

28. That analysis by the Full Court was very detailed. The pleadings and the relief in each
20 of the separate claims was subjected to analysis. Conclusions were then drawn in respect of each of the particular claims, and those conclusions differed slightly, claim to claim. This explains the difference in the results between the claims brought by the Melbourne cohort from those brought by the Sydney cohort. Contrary to the appellants' (repeated) submission, the Full Court did not make a blanket finding that s494AB(1)(ca) excluded all negligence proceedings {FRX17 [18], [43]-[45]; DLZ18 [28]}. Rather, the Full Court only said that these negligence proceedings brought by these respondents were not caught by s494AB(1)(ca) – "*[t]he rights or duties sought to be determined* ***in these four proceedings*** *arise from the common law, unconnected*

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explicitly allowing for the examination of a person, was subject to the presumption against the abrogation or curtailment of certain rights and immunities. Both cases involve legislation where the language was explicit; neither related to the withdrawal or limitation of a conferral of jurisdiction.

13 *Re Wakim; ex parte McNally* (1999) 198 CLR 511 at [139]; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [6].

with the performance or exercise of any statutory function, duty or power" {CAB 76 [209] – emphasis added}.

The elements of the respondents' claims

29. Given the respondents have brought common law negligence claims against the appellants, to establish liability three things must be shown: the existence of a duty of care, a breach of that duty, and that the breach caused the injury.

30. Here, each claim concerns what happened to the respondents while they were in Nauru and is based upon the relationship between the respondents and the appellants while they were in Nauru. The relationship between the parties here is similar to other relationships long-known to give rise to a duty of care: for example, the relationship of ward and guardian, prisoner and gaoler, patient and medical practitioner, pupil and teacher. Liability in each of those examples depends upon the relationship, not upon a statute – and, as the authorities disclose, that is so even if the relationship was one which was created by or arose out of a statute. While a statute may provide the relevant background to a common law action for negligence, that does not mean that the proceedings depend upon or even relate to the statutory framework. Even where a statutory authority is exercising a statutory power it can owe a common law duty of care independently and apart from the statute.

31. In *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 the question was whether the Council – a statutory authority – owed a duty of care to persons who had purchased a house with inadequate footings. Much of the case turned upon the statutory powers and duties of the Council, but another question arose as to whether a duty of care could arise concurrently and separately under the general law. In this respect Mason J (at 461) said this (citations omitted):

> *And then there are situations in which a public authority, not otherwise under a relevant duty, may place itself in such a position that others rely on it to take care for their safety so that the authority comes under a duty of care calling for positive action. Such a relationship has been held to arise where a person, by practice or past conduct upon which other persons come to rely, creates a self-imposed duty to take positive action to protect the safety or interests of another or at least to warn him that he or his interests are at risk.*

32. Brennan J (at 479) made a statement to similar effect in *Heyman* (emphasis added):

> *Thus a duty to act to prevent foreseeable injury to another may arise when a transaction - which may be no more than a single act – has been undertaken by the alleged wrongdoer and that transaction – or act – has created or increased the risk of that*

> *injury occurring. Such a case falls literally within Lord Atkin's principle in Donoghue v Stevenson. Where a person, whether a public authority or not, and* ***whether acting in exercise of a statutory power or not****, does something which creates or increases the risk of injury to another, he brings himself into such a relationship with the other that he is bound to do what is reasonable to prevent the occurrence of that injury unless statute excludes the duty. An omission to do what is reasonable in such a case is negligent whether or not the person who makes the omission is liable for any damage caused by the antecedent act which created or increased the risk of injury.*

33. A clear example of this kind of liability is found in *Birch v Central West County District Council* (1969) 119 CLR 652[14] where the respondent was a statutory authority supplying electricity. A customer received power of the wrong voltage, causing a fire which damaged his property. He sued in negligence and a jury found in his favour. The Court of Appeal was persuaded that the case depended upon whether the respondent sufficiently utilised its statutory powers, and overturned the verdict. A unanimous High Court restored the verdict. The principal judgment was delivered by Barwick CJ who said (at 658) that the case did not involve "*any question of the exercise of statutory powers or the performance of duty imposed by statute*" and concluded (at 659):

> *As I have indicated, there was, in my opinion, a duty at common law resting on the respondent, unconnected with its statutory authority, or any duty derived from its constating statute. That duty derived from the fact and circumstances of the supply and the nature of the substance supplied.*

34. The appellants point to the express references to the provisions of the *Migration Act* in the respondents' originating applications and statements of claim to support their contention that the proceedings "*relate to*" those provisions of the *Migration Act*. However such an analysis elevates form over substance, and ignores the question of what significance those provisions of the *Migration Act* has to the underlying cause of action, and relies upon the impermissibly broad interpretation of "*relating to*".

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[14] *Birch* was cited with approval in *Heyman* by Brennan J (at 485-486); see also the references *L Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225. The Full Court (at 75 [206]) referred to the decision in *Howard v Jarvis* (1958) 98 CLR 177 at 183 – a case which bears some factual similarities to the respondents' claims.

35. It is now necessary to separate the two matters within the Sydney cohort – DLZ18; and FRX17.

36. In the DLZ18 proceedings:

(a) The claim made by DLZ18 was commenced with an originating application {ABFM 195-200}. No relief was sought in that originating application on behalf of FZR18. After arrangements had been made to bring both DLZ18 and FZR18 to Australia the claim was continued on behalf of both DLZ18 and FZR18;

(b) The appellants rely heavily upon the contents of the *original* originating application to assert that the proceedings related to matters prohibited from litigation. One problem with that is that FZR18 was not a party to that originating application. In any event, the purpose and role of an originating application in the Federal Court, pursuant to rules 8.01 and 8.03, is limited to identifying the parties and the relief sought. No doubt this is why it was amended {ABFM 206-210} – omitting all of the unnecessary material. But the form of the original originating application is not the issue; the substance of the matter – and the way in which this was litigated in the Full Court – is reflected in the statement of claim;

(c) The statement of claim {ABFM 211-236} pleads the following issues: both DLZ18 and FZR18 were vulnerable having left Iran after experiencing persecution {ABFM 214}; by the time of their arrival on Nauru, the appellants knew that the circumstances on Nauru exposed both DLZ18 and FZR18 to a risk of psychological harm {ABFM 221-222}; by 2013 DLZ18 was manifesting symptoms of a psychological condition, which was gradually worsening so that she ceased eating {ABFM 222-226}; FZR18 was also recognised to suffer from psychological problems as early as 2013, which worsened over time and she was not responding to treatment {ABFM 228}. It was further pleaded that the appellants were aware of these medical conditions and the fact that the treatment was not working;

(d) The duties of care owed to each of DLZ18 and FZR18 were then pleaded in terms that, given their actual knowledge of what was occurring, the appellants came under a duty to attempt to stem the damage and provide appropriate treatment {ABFM 232-234}.

37. In the FRX17 proceedings:

(a) FRX17 is the litigation representative for FRM17. The proceedings were commenced with an originating application {ABFM 4-10} accompanied by an interlocutory application {ABFM 12-15}. Again, the originating application provided more detail than the rules suggested that it should. The interlocutory application sought an order that FRM17 be removed to a location where she could receive specified treatment – it did not ask for removal to Australia;

(b) The claim was contested and, following a hearing before Murphy J, an order was made that FRM17 be removed to a place where the treatment could be provided: *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* (2018) 262 FCR 1. In complying with that order, the appellants made arrangements to bring the affected persons to Australia – that was their choice;

(c) Thereafter the matter proceeded by way of pleadings {ABFM 16-45}. Each of the following matters were the subject of pleadings: that FRM17 was a minor {ABFM 17} and, by 2014 had developed a psychological injury {ABFM 18}; that the appellants knew that FRM17 and her family had come from circumstances of persecution, leaving her vulnerable to psychological injury {ABFM 28-29} and that the conditions on Nauru made it a dangerous and unsafe place for vulnerable persons, especially those exhibiting signs of a psychological problem {ABFM 35-38}; that FRM17's condition continued to worsen, to the point where she attempted suicide {ABFM 40}; and that she needed urgent specialist medical assistance which was not available on Nauru {ABFM 40-42};

(d) The statement of claim specifically pleaded the content of the duty of care said to be owed {ABFM 27, 38} and how it was breached {ABFM 35-41}.

38. Each of the proceedings as pleaded resembles a conventional common law damages claim. The kind of relationship here has numerous conceptual analogues in the common law – mention was made earlier to the relationships of ward and guardian, etc. That is the basis of each pleaded claim. And even if it was necessary to go further

and establish a new or novel category of claim, each of the claims easily satisfies many or most of the "*salient features*" which determine whether such a relationship arises[15].

39. The pleadings also raise a claim which resembles the "*self-imposed duty*" recognised by Mason J in *Heyman* – ie the appellants took some measures, but those measures were insufficient. It is not relevant to the claim for FRM17 to establish how the appellants might have gone about carrying out their duty; even if the actions were authorised by the *Migration Act* that does not change the issues which are necessary to be resolved to determine the respondents' claims {CAB 75 [207], 76 [208]}.

40. In the end the *Migration Act* is merely background to the claim. Contrary to the appellants' submissions, the capacity conferred by s198AHA is not critical to the foundation of the respondents' action in negligence. For this purpose the appellants rely on a proposition stated in *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, however, that proposition was not a general statement of law in respect of common law negligence claims. It arose in the unique context where the plaintiff claimed that police officers owed a common law duty of care obliging them to exercise a specified statutory power[16]. There is no similarity between the subject of *Stuart v Kirkland-Veenstra* and the Sydney cohort proceedings. The respondents have never claimed that the appellants owed the respondents a duty to of care which obliged them to exercise any statutory powers; the respondents seek no relief requiring the appellants to exercise any statutory powers.

41. Further, the appellants' submissions tend to overlook the words "*the performance or exercise*" of a "*function, duty or power*" in s494AB(1)(ca) {FRX17 [31], [33]}. The appellants accept that s198AHA is "*directed to nothing other than conferring statutory capacity or authority on the Executive Government to take action which is or might be beyond the executive power of the Commonwealth in the absence of statutory authority*" {FRX17 [32]}, but then contend that the exercise of the statutory *capacity* conferred by s198AHA is equivalent to the exercise of a statutory *power* for the purposes of s494AB(1)(ca) {FRX17 [35]}.

42. That should be rejected. The words in s494AB(1)(ca) are the "*exercise or performance*" of a "*function, duty or power*". The language in s494AB(1)(ca) does

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[15] The various "*salient features*" have been conveniently and comprehensively collected by Allsop P in *Caltex Refineries (Qld) Pty Limited v Stavar* (2009) 75 NSWLR 649 at [102]-[107].

[16] *Stuart v Kirkland Veenstra* at [69]-[70], [101].

not prohibit, for example, proceedings relating to the exercise of capacities, or the taking of action authorised by Subdiv B. This is of particular significance having regard to the legislative history and purpose of s198AHA as outlined earlier.

43. Moreover, there is a distinction between power and capacity as recognised in *Davis v Commonwealth* (1988) 166 CLR 79 and *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 – cited by the Full Court {CAB 68 [186]}. Whatever effect on legal rights that may arise from the exercise of a capacity is the result of the substantive law as it applies generally, and not as a result of the exercise of that capacity. This can be distinguished with the exercise of a statutory power, where the exercise of the power itself affects legal rights. The specific choice to identify the "*exercise*" of "*power*" in s494AB(1)(ca) cannot then be diminished in the way contended by the appellants.

44. Finally, contrary to the appellants' submissions, the collocation of the words "*function, duty or power*" does not lead to the conclusion that s494AB(1)(ca) is directed to referring to all things done in executing Subdivision B. If that was the case, then all that s494AB(1)(ca) would need to say is that a bar is imposed on proceedings "*relating to Subdivision B*" {CAB 77-78 [214]} – further qualification would be unnecessary. The appellants' construction of s494AB(1)(ca) needs to be re-drafted this way:

> *(ca) proceedings relating to ~~the performance or exercise of a function, duty or power under~~ Subdivision B of Division 8 of Part 2 ~~in relation to a transitory person~~.*

45. All words should be given some work to do.

"*Under*" s494AB(1)(ca)

46. The appellants even assert that the Full Court fell into error by giving a meaning to the word "*under*" where it appears in s494AB(1)(ca).

47. Some meaning needed to be given to the word "*under*" and, with respect, the Full Court was correct to apply *Griffith University v Tang* (2005) 221 CLR 99.

48. The Full Court understood the significance of the context in which the word "*under*" appeared in *Tang* and gave detailed consideration as to why it was analogous in the present context {CAB 72-73 [196]-[197]}. In particular, the text of s494AB(1) makes clear the subject matter of the prohibition is the "*proceedings*". The function of a set of proceedings is to resolve a dispute and, as such, entail "*at their core, an exercise of judicial power to resolve contested rights and liabilities*" {CAB 73 [197]}. Thus,

"*under*" as it appears in s494AB(1)(ca) must be understood as requiring the relevant exercise or performance of a function, duty or power under Subdiv B to affect the rights of the transitory person which are sought to be determined in the proceedings.

49. In the end, the appellants' approach to the construction of the relevant provisions side-steps the words and reverts to a claim that a particular outcome to a claimed "*purpose*" and "*policy*" {FRX17 [41]}.

Alleged inconsistency with Subdiv B

50. The appellants allege inconsistency between the respondents' pleaded common law duty of care and Subdiv B and, in this way, submit the proceedings "*relate to*" Subdiv B {FRX17 [48]; DLZ18 [27]}. The existence of a common law duty of care will be denied if there is a "*statutory obligation*" that is "*irreconcilable*" or gives rise to "*inconsistent obligations*"[17]. The appellants have not articulated the "*inconsistent obligation*" between Subdiv B and the imposition of a common law duty of care. As detailed above, the factual basis for the alleged duty of care is conduct that occurred in Nauru. Subdivision B does not impose any "*statutory obligations*" on the appellants in respect of conduct in Nauru. Consideration of the pleadings, and particularly for this purpose, the defence, is a question of substance, not form. The Full Court was therefore correct to conclude that there was no incompatibility with Subdiv B {CAB 79 [220], [221], 81 [226], [227]}.

Section 494AB(1)(a) – proceedings relating to the exercise of powers under s198B

51. The exercise of powers under s198B are irrelevant to the respondents' claims. There are no allegations of negligence or any wrong-doing asserted by the respondents with respect to the exercise of powers under s198B. The only remedy sought by the respondents is damages.

52. Nonetheless, the appellants allege that by s494AB(1)(a), the proceedings could not have been instituted because of the relief initially sought by the respondents in the originating application and the interlocutory application. On a proper analysis, it is clear that the respondents did not, in substance or in form, seek an order requiring the exercise of power under s198B to bring them to Australia {cf FRX17 [55]; DLZ18 [32]}. The relief sought by the respondents was that they be taken to a place where

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[17] *Sullivan v Moody* (2001) 207 CLR 562 at [60].

they could receive appropriate medical treatment – that did not need to be Australia, and it was not suggested that it could only be Australia. That is what the Full Court found, and no real basis for challenging that conclusion has been proffered {CAB 89 [261], 92 [271]}.

53. At no time since the proceedings were instituted has s198B been invoked or implicated.

Section 494AB(1)(d) – proceedings relating to the removal of a transitory person from Australia

54. The respondents have not at any time in the proceedings made any complaint in respect of their removal from Australia. As outlined above, the respondents' claims relate only to what happened to them on Nauru.

55. The appellants assert that the relief sought in the originating application and interlocutory application would have required the respondents to be kept in Australia and not returned to a regional processing country, and therefore engaged s494AB(1)(d) when the proceedings were instituted. This argument was not raised before the Full Court in the DLZ18 proceedings and the Full Court accordingly did not consider s494AB(1)(d) in relation to those claims {CAB 92 [271]}. In the FRX17 proceedings the Full Court rejected the idea that s494AB(1)(d) had been invoked; and then went on to note that the contentious prayer for relief had been abandoned {CAB 90 [263]-[264]}. It was a non-issue.

56. In any event, as with s494AB(1)(a), the respondents did not require or even ask that the appellants bring them to Australia for treatment. Given that the respondents did not ask to be brought to Australia, they could hardly be said to have been implicitly seeking an order that they not be removed from Australia.

57. Section 494AB(1)(d) did not prevent the proceedings from being instituted.

Conclusion

58. Both appeals involving the Sydney cohort should be dismissed with costs.

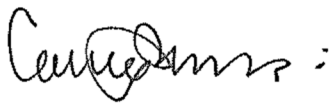
PART VI: NOTICE OF CONTENTION

59. Not applicable.

PART VII: ESTIMATE OF HOURS

60. The respondents estimate 1.25 hours may be required for the presentation of the oral argument in both Sydney cohort appeals.

Dated: 5 June 2020



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ANNEXURE

A LIST OF STATUTES AND PROVISIONS REFERRED TO IN THE RESPONDENTS' SUBMISSIONS

Migration Act 1958 (Cth) ss33, 42, 189, Part 2 Div 8 Subdiv B (ss198AA-198AJ), 198B, 494AA, 494AB (Complilation No 137)

Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cth) (as enacted)

Migration Amendment (Regional Processing Arrangements Act 2015 (Cth) (as enacted)

10 *Migration Legislation Amendment (Regional Processing and Other Measurres) Act 2012 (Cth)* (as enacted)

Migration Legislation Amendment (Transitional Movement) Act 2002 (Cth) Sched 1 Item 6 (as enacted)