

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE AND GORDON JJ

Matter No M27/2020

MINISTER FOR HOME AFFAIRS & ORS

APPELLANTS

AND

DMA18 AS LITIGATION GUARDIAN
FOR DLZ18 & ANOR

RESPONDENTS

Matter No M28/2020

MINISTER FOR HOME AFFAIRS & ANOR

APPELLANTS

AND

MARIE THERESA ARTHUR AS LITIGATION
REPRESENTATIVE FOR BXD18

RESPONDENT

Matter No M29/2020

MINISTER FOR HOME AFFAIRS & ANOR

APPELLANTS

AND

FRX17 AS LITIGATION REPRESENTATIVE
FOR FRM17

RESPONDENT

Matter No M30/2020

MINISTER FOR HOME AFFAIRS & ANOR

APPELLANTS

AND

DJA18 AS LITIGATION REPRESENTATIVE
FOR DIZ18

RESPONDENT

Minister for Home Affairs v DMA18 as litigation guardian for DLZ18
Minister for Home Affairs v Marie Theresa Arthur as litigation
representative for BXD18
Minister for Home Affairs v FRX17 as litigation representative for FRM17
Minister for Home Affairs v DJA18 as litigation representative for DIZ18
[2020] HCA 43
Date of Hearing: 1 September 2020
Date of Judgment: 2 December 2020
M27/2020, M28/2020, M29/2020 & M30/2020

ORDER

In each of Matter Nos M27/2020 and M29/2020:

1. *Appeal allowed.*
2. *Set aside paragraph 1 of the orders made by the Full Court of the Federal Court of Australia on 28 August 2019 and, in its place, order:*
 - "1. *The questions ordered to be separately answered be determined as follows:*

Questions:

- (a) *When the proceeding was commenced in the Federal Court of Australia, was the effect of s 494AB of the Migration Act 1958 (Cth) that it could not be instituted? and*
- (b) *Is the effect of s 494AB of the Migration Act 1958 (Cth) that the proceeding cannot be continued in the Federal Court of Australia?*

Answers:

- (a) *No, but the respondents, if so advised, could have sought, in an appropriate case, to plead that s 494AB applied to the proceeding; and*
- (b) *No, but the respondents, if so advised, may seek to plead that s 494AB applies to the proceeding and, if permitted to do so, may apply for an order that continuation of the proceedings as then framed be stayed. Whether amendment of pleadings should be allowed or a stay granted are matters to be determined."*

In each of Matter Nos M28/2020 and M30/2020:

- 1. *Appeal allowed.*
- 2. *Cross-appeal dismissed.*
- 3. *Set aside paragraph 1 of the orders made by the Full Court of the Federal Court of Australia on 28 August 2019 and, in its place, order:*

"1. The questions ordered to be separately answered be determined as follows:

Questions:

- (a) *When the proceeding was commenced in the Federal Court of Australia, was the effect of s 494AB of the Migration Act 1958 (Cth) that it could not be instituted? and*
- (b) *Is the effect of s 494AB of the Migration Act 1958 (Cth) that the proceeding cannot be continued in the Federal Court of Australia?*

Answers:

- (a) *No, but the respondents, if so advised, could have sought, in an appropriate case, to plead that s 494AB applied to the proceeding; and*

- (b) *No, but the respondents, if so advised, may seek to plead that s 494AB applies to the proceeding and, if permitted to do so, may apply for an order that continuation of the proceedings as then framed be stayed. Whether amendment of pleadings should be allowed or a stay granted are matters to be determined."*

On appeal from the Federal Court of Australia

Representation

S P Donaghue QC, Solicitor-General of the Commonwealth, with C J Tran and A P Yuile for the appellants in all matters (instructed by Australian Government Solicitor)

G M Watson SC with D H Tang for the respondents in M27/2020 (instructed by National Justice Project)

C J Horan QC and L G De Ferrari SC with J E Hartley and S Gold for the respondents in M28/2020 and M30/2020 (instructed by Maurice Blackburn Lawyers)

G M Watson SC with J P Wheelahan for the respondent in M29/2020 (instructed by National Justice Project)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Minister for Home Affairs v DMA18 as litigation guardian for DLZ18

Minister for Home Affairs v Marie Theresa Arthur as litigation representative for BXD18

Minister for Home Affairs v FRX17 as litigation representative for FRM17

Minister for Home Affairs v DJA18 as litigation representative for DIZ18

Immigration – Regional processing – Statutory bar on legal proceedings – Where s 494AB(1) of *Migration Act 1958* (Cth) provided that certain "proceedings against the Commonwealth may not be instituted or continued in any court" – Where those proceedings, listed in s 494AB(1)(a)-(d), were all "proceedings relating to" a particular subject matter – Where proceedings in s 494AB(1)(b) further defined by reference to time period – Where s 494AB(3) provided that nothing in section intended to affect jurisdiction of High Court under s 75(v) of *Constitution* – Where respondents, while in regional processing country, instituted proceedings in Federal Court of Australia alleging Commonwealth breached duty of care to provide adequate medical treatment on Nauru – Where Commonwealth alleged Federal Court did not have jurisdiction by reason of s 494AB(1)(a), (ca) or (d) – Whether s 494AB(1) limited jurisdiction or barred remedy – Whether respondents' proceedings in Federal Court engaged s 494AB(1).

Words and phrases – "bars the remedy", "duty of care", "instituted or continued", "jurisdiction", "medical treatment", "model litigant", "model litigant obligations", "Nauru", "negligence", "plead as a defence", "proceedings against the Commonwealth", "proceedings relating to", "regional processing", "removal", "transitory person", "under".

Constitution, ss 75, 77.

Migration Act 1958 (Cth), ss 198AB, 198AD, 198AH, 198AHA, 198B, 494AA, 494AB.

1 KIEFEL CJ, BELL, GAGELER, KEANE AND GORDON JJ. Each respondent, while in a country designated a regional processing country¹ under s 198AB(1) of the *Migration Act 1958* (Cth), instituted proceedings in the Federal Court of Australia alleging, in various ways, that the appellants, the Minister for Home Affairs and the Commonwealth of Australia ("the Commonwealth")², breached a duty of care to provide them with adequate medical treatment on Nauru. At least part of the relief sought was to compel the Commonwealth to provide adequate medical treatment. After the proceedings were instituted, each respondent was transferred to Australia for the temporary purpose of receiving medical treatment.

2 These appeals are not concerned with whether the respondents were owed the pleaded duty of care or whether that duty, if owed, was breached. The issue in each appeal is the proper construction and application of s 494AB of the *Migration Act*, headed "Bar on certain legal proceedings relating to transitory persons". There was no dispute that each respondent was and is a transitory person³.

3 Section 494AB provides that:

"(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;

1 *Migration Act 1958* (Cth), s 5(1) definition of "regional processing country".

2 In the FRM17 proceeding in the Federal Court, the named respondents were the Minister for Immigration and Border Protection, the Commonwealth of Australia and the Secretary of the Department of Immigration and Border Protection. The Secretary is not an appellant in this Court. In the DLZ18 matter, the Secretary of the Department of Home Affairs was a named respondent in the Federal Court and is also an appellant in this Court.

3 A "transitory person" includes a person who was taken to a regional processing country under s 198AD of the *Migration Act*, or the child of such a person if the child was born in a regional processing country to which the parent was taken and the child was not an Australian citizen at the time of birth: *Migration Act*, s 5(1) paras (aa) and (d) of the definition of "transitory person".

<i>Kiefel</i>	<i>CJ</i>
<i>Bell</i>	<i>J</i>
<i>Gageler</i>	<i>J</i>
<i>Keane</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>

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- (b) proceedings relating to the status of a transitory person as an unlawful non-citizen during any part of the ineligibility period;
 - (c) proceedings relating to the detention of a transitory person who is brought to Australia under section 198B, being a detention based on the status of the person as an unlawful non-citizen;
 - (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.
- (2) This section has effect despite anything else in this Act or any other law.
 - (3) Nothing in this section is intended to affect the jurisdiction of the High Court under section 75 of the Constitution.
 - (4) In this section:

Commonwealth includes:

- (a) an officer of the Commonwealth; and
- (b) any other person acting on behalf of the Commonwealth.

ineligibility period means the period from the time when the transitory person was brought to Australia under section 198B until the time when the person next ceases to be an unlawful non-citizen."

4

The question of construction which arises is the legal effect and reach of s 494AB. Section 494AB applies to the institution or continuation of some proceedings in federal jurisdiction conferred on federal courts under s 77(i) of the *Constitution*, and invested in State courts under s 77(iii), by a law of the Commonwealth. As these reasons will explain, s 494AB is not a law that takes away the jurisdiction of those courts (or that of this Court) to hear and determine proceedings of the kinds described in s 494AB(1). It does not limit the authority

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of those courts (or the High Court of Australia⁴) to decide those specific claims but provides the Commonwealth with an available answer to those claims if they are made in a court other than the High Court. In practical terms, it creates a defence which the Commonwealth may, but need not, plead to specific claims in all courts, except the High Court⁵. If no practical benefit is to be gained by raising s 494AB, the Commonwealth acting as a model litigant need not and, it may be expected, would not raise it⁶. In the terms used in relation to statutes of limitations, s 494AB potentially bars the remedy, not the right⁷.

- 5 Section 494AB applies only to proceedings against the Commonwealth where one of the issues raised in the proceedings relates to one or more of the subject matters identified in s 494AB(1). Consequently, it is not limited to proceedings in the nature of judicial review but, on the other hand, it is not so wide that it applies to all claims relating to regional processing or a regional processing country. It is a provision which the Commonwealth may plead as a defence where one of the identified subject matters in s 494AB(1) is an issue in that proceeding. Whether one or more of the identified subject matters is raised as an issue in the proceeding will depend on the pleadings viewed in light of the relief claimed or, if there are no pleadings, the application and other documents filed in the proceeding.

Migration Act – regional processing regime

- 6 Section 494AB must be understood and applied in light of the legislative history relating to Australia's regional processing regime. That history shows how and to what extent the legislature has sought to limit the institution and

4 The provision does not apply to the institution or continuation of proceedings in the jurisdiction of the High Court under s 75 of the *Constitution: Migration Act*, s 494AB(3).

5 See *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 405-406, 425-426, 456, 473-474, 486-487; *The Commonwealth v Mewett* (1997) 191 CLR 471 at 534-535.

6 *Judiciary Act 1903* (Cth), Pt VIIIC; *Legal Services Directions 2017* (Cth), App B. See also *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 342.

7 See, eg, *Verwayen* (1990) 170 CLR 394 at 405, 426-427, 456, 473-474, 486-487; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 562; *Mewett* (1997) 191 CLR 471 at 507, 508-509, 511, 516, 534.

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continuation of proceedings relating to regional processing, and informs the conclusion that the scope of s 494AB is limited in the manner described.

7 In September 2001, following the events concerning the MV *Tampa*, the Australian government introduced a regional processing regime⁸. The combined effect of the Acts⁹ implementing the regime was that, from late 2001, persons without a visa arriving by boat on Christmas Island (or other excised offshore places) would be detained, unable to validly apply for a visa in Australia while in an excised offshore place¹⁰, and subject to removal to a location outside Australia. It is necessary to refer to only one of the Acts passed in 2001.

8 The *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth) ("the 2001 Act") was said to be intended to provide "the necessary powers for dealing with an unlawful non-citizen who entered Australia at an 'excised offshore place' after the relevant 'excision time'^[11] without a visa"¹².

9 The 2001 Act relevantly inserted s 494AA into Pt 9 of the *Migration Act* (a Part headed "Miscellaneous") to "ensure that court proceedings are not used by an 'offshore entry person'^[13] to frustrate the resolution of his or her immigration

8 See *Ruddock v Vadarlis* (2001) 110 FCR 491 at 522-527 [131]-[146].

9 *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth).

10 *Migration Amendment (Excision from Migration Zone) Act*, Sch 1, item 1. See also *Migration Act*, s 5(1) definition of "excised offshore place".

11 *Migration Amendment (Excision from Migration Zone) Act*, Sch 1, item 2. See also *Migration Act*, s 5(1) definition of "excision time".

12 Australia, House of Representatives, *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001*, Explanatory Memorandum at 2 [5].

13 *Migration Amendment (Excision from Migration Zone) Act*, Sch 1, item 3. Following the *Migration Amendment (Unauthorised Maritime Arrivals and Other*

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status, movement to a 'declared country' or to obtain desirable migration outcomes"¹⁴.

10 Under s 494AA(1) (as enacted), four types of proceedings against the Commonwealth were not to be instituted or continued in any court:

- "(a) proceedings relating to an offshore entry by an offshore entry person;
- (b) proceedings relating to the status of an offshore entry person as an unlawful non-citizen during any part of the ineligibility period;
- (c) proceedings relating to the lawfulness of the detention of an offshore entry person during the ineligibility period, being a detention based on the status of the person as an unlawful non-citizen;
- (d) proceedings relating to the exercise of powers under section 198A".

Section 494AA had effect "despite anything else in this Act or any other law"¹⁵ and provided that "[n]othing in this section [was] intended to affect the jurisdiction of the High Court under section 75 of the Constitution"¹⁶. "Commonwealth" was defined for the purposes of the section to include "an officer of the Commonwealth" and "any other person acting on behalf of the Commonwealth"¹⁷. The "ineligibility period" referred to in s 494AA(1)(b) was defined as "the period from the time of the offshore entry until the time when the person next ceases to

Measures) Act 2013 (Cth), the *Migration Act* now refers to "unauthorised maritime arrivals" instead of "offshore entry persons".

14 Australia, House of Representatives, *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001*, Explanatory Memorandum at 7 [29]-[30].

15 *Migration Act*, s 494AA(2).

16 *Migration Act*, s 494AA(3).

17 *Migration Act*, s 494AA(4).

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be an unlawful non-citizen"¹⁸. As will be apparent, s 494AB, which was enacted in the following year, was in substantially similar form.

11 By 2002, persons without a visa attempting to enter Australia by boat were being taken to Nauru or Papua New Guinea for their protection claims to be assessed¹⁹. But there was concern over "a small number of exceptional situations where it may be necessary to bring one of these people removed to another country ('transitory persons') to Australia" for medical treatment or other reasons²⁰. In such situations, it was considered "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"²¹. To this end, the *Migration Legislation Amendment (Transitional Movement) Act 2002* (Cth) ("the 2002 Act") was passed. The 2002 Act permitted transitory persons to be brought to Australia without a visa for a temporary purpose²². The provisions introduced by the 2002 Act stated that while in Australia, transitory persons were not able to make valid visa applications²³. And they provided for the removal of a transitory person from Australia as soon as reasonably practicable after the person's temporary purpose for being in Australia was spent²⁴.

18 *Migration Act*, s 494AA(4). See also *Migration Act*, s 14 definition of "unlawful non-citizen".

19 Australia, Senate, *Migration Legislation Amendment (Transitional Movement) Bill 2002*, Revised Explanatory Memorandum at 2 [4].

20 Australia, Senate, *Migration Legislation Amendment (Transitional Movement) Bill 2002*, Revised Explanatory Memorandum at 2 [5].

21 Australia, Senate, *Migration Legislation Amendment (Transitional Movement) Bill 2002*, Revised Explanatory Memorandum at 2 [6].

22 *Migration Legislation Amendment (Transitional Movement) Act 2002* (Cth), Sch 1, items 2 and 5. See also *Migration Act*, ss 42(2A)(ca) and 198B.

23 *Migration Legislation Amendment (Transitional Movement) Act*, Sch 1, item 3. See also *Migration Act*, s 46B(1).

24 *Migration Legislation Amendment (Transitional Movement) Act*, Sch 1, item 4. See also *Migration Act*, s 198(1A).

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12 The 2002 Act also inserted s 494AB into Pt 9²⁵. Section 494AB substantially mirrored s 494AA but applied to transitory persons instead of offshore entry persons. The provision was said to be intended to "stop legal proceedings being taken in relation to the 'transitory person's' presence in Australia"²⁶.

13 The third Act to which reference must be made in tracing the context in which s 494AB operates and must be applied, the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) ("the 2012 Act"), was enacted ten years later. The 2012 Act made²⁷ substantial amendments to the *Migration Act* in response to this Court's decision in *Plaintiff M70/2011 v Minister for Immigration and Citizenship (Malaysian Declaration Case)*²⁸ and key recommendations of the *Report of the Expert Panel on Asylum Seekers*²⁹.

14 The 2012 Act inserted Subdiv B, headed "Regional processing", into Div 8 of Pt 2 of the *Migration Act*. The reason for the Subdivision was stated, in part, to be that³⁰:

"offshore entry persons, including offshore entry persons in respect of whom Australia has or may have protection obligations under the Refugees

25 *Migration Legislation Amendment (Transitional Movement) Act*, Sch 1, item 6.

26 Australia, Senate, *Migration Legislation Amendment (Transitional Movement) Bill 2002*, Revised Explanatory Memorandum at 3 [7].

27 Australia, Senate, *Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012*, Revised Explanatory Memorandum at 2.

28 (2011) 244 CLR 144.

29 *Report of the Expert Panel on Asylum Seekers* (2012).

30 *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth), Sch 1, item 25. See also *Migration Act*, s 198AA(b).

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Convention as amended by the Refugees Protocol^[31], should be able to be taken to any country designated to be a regional processing country".

Subdivision B of Div 8 of Pt 2 then included, relevantly, ss 198AB, 198AD and 198AH.

15 Section 198AB(1) provided that "[t]he Minister may, by legislative instrument, designate that a country is a ***regional processing country***". Section 198AD applied to an offshore entry person who was detained under s 189³². Section 198AD(2) provided that "[a]n officer must, as soon as reasonably practicable, take an offshore entry person to whom this section applies from Australia to a regional processing country".

16 Section 198AH concerned the applicability of s 198AD to certain transitory persons brought to Australia for a temporary purpose and, following amendments in 2013³³ and 2014³⁴, relevantly provided:

"(1) Section 198AD applies, subject to sections 198AE, 198AF and 198AG, to a transitory person if, and only if, the person is covered by subsection (1A) or (1B).

(1A) A transitory person is covered by this subsection if:

(a) the person is an unauthorised maritime arrival who is brought to Australia from a regional processing country under section 198B for a temporary purpose; and

31 Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as modified by the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

32 *Migration Act*, s 198AD(1). Section 198AD(1) was subject to ss 198AE, 198AF and 198AG, which are not presently relevant.

33 *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act*, Sch 1, items 43-47. The amendments included substituting "offshore entry person" with "unauthorised maritime arrival".

34 *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), Sch 6, item 9.

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- (b) the person is detained under section 189; and
 - (c) the person no longer needs to be in Australia for the temporary purpose (whether or not the purpose has been achieved).
- (1B) A transitory person (a ***transitory child***) is covered by this subsection if:
- (a) a transitory person covered by subsection (1A) gives birth to the transitory child while in Australia; and
 - (b) the transitory child is detained under section 189; and
 - (c) the transitory child is a transitory person because of paragraph (e) of the definition of ***transitory person*** in subsection 5(1).
- (2) Subsection (1) of this section applies whether or not the transitory person has been assessed to be covered by the definition of ***refugee*** in Article 1A of the Refugees Convention as amended by the Refugees Protocol."

17

The 2012 Act also inserted ss 494AA(1)(e) and 494AB(1)(ca) into the *Migration Act*, which, in substantially identical terms, expanded the kinds of proceedings dealt with by ss 494AA and 494AB respectively to include "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 an offshore entry person (s 494AA(1)(e)) or a transitory person (s 494AB(1)(ca)). The effect of these amendments, when read with the new Subdiv B, was said to be that proceedings against the Commonwealth relating to any performance or exercise of a function, duty or power under Subdiv B, in relation to an offshore entry person or a transitory person, could not be instituted or continued in any court³⁵. The Revised

35 Australia, Senate, *Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012*, Revised Explanatory Memorandum at 34 [251], 35 [257].

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Explanatory Memorandum went on to record that the amendment did not affect the jurisdiction of the High Court under s 75 of the *Constitution*³⁶.

18 Three years later, in 2015, shortly before the hearing of *Plaintiff M68/2015 v Minister for Immigration and Border Protection*³⁷ in this Court, the *Migration Act* was further amended by the *Migration Amendment (Regional Processing Arrangements) Act 2015* (Cth) ("the 2015 Act") "to provide statutory authority ... where the Commonwealth has entered into an arrangement with another country with respect to the regional processing functions of that country"³⁸. The 2015 Act inserted s 198AHA into Subdiv B of Div 8 of Pt 2³⁹. Section 198AHA provided as follows:

- "(1) This section applies if the Commonwealth enters into an arrangement with a person or body in relation to the regional processing functions of a country.
- (2) The Commonwealth may do all or any of the following:
 - (a) take, or cause to be taken, any action in relation to the arrangement or the regional processing functions of the country;
 - (b) make payments, or cause payments to be made, in relation to the arrangement or the regional processing functions of the country;
 - (c) do anything else that is incidental or conducive to the taking of such action or the making of such payments.

36 Australia, Senate, *Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012*, Revised Explanatory Memorandum at 34-35 [251], 35 [257].

37 (2016) 257 CLR 42.

38 Australia, House of Representatives, *Migration Amendment (Regional Processing Arrangements) Bill 2015*, Explanatory Memorandum at 2.

39 Section 198AHA was inserted with retrospective effect from 18 August 2012: *Migration Amendment (Regional Processing Arrangements) Act 2015* (Cth), s 2(1).

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- (3) To avoid doubt, subsection (2) is intended to ensure that the Commonwealth has capacity and authority to take action, without otherwise affecting the lawfulness of that action.
- (4) Nothing in this section limits the executive power of the Commonwealth.
- (5) In this section:

action includes:

- (a) exercising restraint over the liberty of a person; and
- (b) action in a regional processing country or another country.

arrangement includes an arrangement, agreement, understanding, promise or undertaking, whether or not it is legally binding.

regional processing functions includes the implementation of any law or policy, or the taking of any action, by a country in connection with the role of the country as a regional processing country, whether the implementation or the taking of action occurs in that country or another country."

The 2015 Act did not amend s 494AA or s 494AB or any other provision in Subdiv B. But, as is self-evident, because s 198AHA was in Subdiv B, it became relevant when considering the application of s 494AB(1)(ca).

Full Court of the Federal Court

- 19 In the present matters, the Full Court of the Federal Court (Kenny, Robertson and Griffiths JJ) determined what was described as the jurisdictional issue as separate questions before any other question in the proceedings. The questions were whether the effect of one or more of s 494AB(1)(a), (ca) and (d) was that each proceeding: (1) could not be instituted in the Federal Court; and (2) could not be continued in the Federal Court.

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20 In the cases of FRM17 and DLZ18, the Full Court answered both questions "No"⁴⁰. In the case of BXD18, the Full Court also answered the first question "No" but answered the second question "Yes" on the basis that para (d) applied to the proceeding as continued. In the fourth case, DIZ18, the Full Court answered "Yes" to both questions. In that case, the Full Court held that para (a) applied to the institution of the proceeding and para (d) applied to the continuation of the proceeding.

21 As noted above, argument in the Full Court proceeded on the basis that s 494AB was to be understood as limiting the jurisdiction of the Federal Court and, indeed, of all courts except the High Court. That is, argument in the Full Court treated s 494AB as defining the Federal Court's jurisdiction⁴¹ by limiting or withdrawing the Federal Court's authority to decide the respondents' claims.

22 In relation to s 494AB(1)(ca), the Full Court found that there was no relevant intersection between ss 494AB(1)(ca) and 198AHA. It held that s 198AHA "confers a bare capacity that enables the Commonwealth to be conferred with powers or functions or duties under the laws of a regional processing country", and that "a capacity, by its very nature, is to be distinguished from a power". Thus, the Full Court held that because s 198AHA was limited to a "statutory capacity" or "bare authority" to engage in activities, and did not confer any function, duty or power, the exercise of that capacity did not engage s 494AB(1)(ca). The Full Court further held that even if the language of s 494AB(1)(ca) was wide enough to include a bare "statutory capacity", that would not create an intersection with s 198AHA because actions authorised by s 198AHA would not be performed "under" Subdiv B in the relevant sense. The Full Court concluded that, on its proper construction, s 494AB(1)(ca):

"requires more than that acts are pleaded which constitute, or are claimed to constitute, a valid exercise or performance of a relevant function, duty or power. The proposition that the pleaded acts were authorised should, at least, have some direct legal consequence in the case. Or, to put it another way, the rights and duties sought to be determined in the proceedings should arise from the conferral or imposition by the *Migration Act* of the relevant

40 The Full Court held that in the case of FRM17, none of paras (a), (ca) and (d) were engaged, while in the case of DLZ18, neither of paras (a) and (ca) were engaged and it was not necessary to consider para (d) as it was not pleaded.

41 *Constitution*, s 77(i).

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powers, functions or duties, through the medium of their exercise or performance."

23 Hence, the Full Court held that s 494AB(1)(ca) did not apply to any of the four proceedings because:

- (1) actions authorised by s 198AHA were not actions performed under Subdiv B;
- (2) the duty under s 198AD(2) to take an unauthorised maritime arrival to a regional processing country says nothing about any common law duty of care owed to such a person after they are so taken; and
- (3) there was no inconsistency between the pleaded duties of care and the purpose of Subdiv B as reflected in s 198AA.

24 The Full Court dealt with s 494AB(1)(a) and (d) together. At the outset, the Full Court observed that the respondents were all brought to Australia under s 198B of the Act. In relation to s 494AB(1)(a), the Full Court held that FRM17, DLZ18 and BXD18 did not in terms invoke the power in s 198B or seek that it be exercised, and did not obtain an order requiring the Commonwealth to exercise that power. The Full Court said that those respondents did not challenge any exercise of the power in s 198B or plead a case in negligence arising from a statutory duty conditioning the exercise of that power. By contrast, the Full Court found that DIZ18 had expressly sought an interlocutory order requiring the Commonwealth to transfer her and her mother to a location in Australia, reasoning that while s 198B was not the only power pursuant to which the Commonwealth might bring a transitory person to Australia from a place outside Australia, the statutory scheme contemplates that s 198B confers the power usually to be exercised in such a case. The Full Court therefore concluded that s 494AB(1)(a) applied to DIZ18's proceeding but did not apply to the proceedings of FRM17, DLZ18 and BXD18.

25 In relation to s 494AB(1)(d), the Full Court held that it did not apply to FRM17's proceeding because no issue of removal had arisen, the proceeding did not challenge any determination under s 198AH(1A)(c) that she no longer needs to be in Australia for a temporary purpose within the meaning of s 198B, and the claim for a permanent injunction was no longer pressed. For DLZ18, the Commonwealth's pleadings did not refer to or rely upon s 494AB(1)(d). Accordingly, the Full Court held that it was unnecessary to consider that provision in relation to her proceeding. For BXD18, the Full Court held that because an injunction against removal from Australia was sought in BXD18's amended

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pleadings, the proceeding related to her removal from Australia under the *Migration Act*. Similarly, for DIZ18, the Full Court held that because DIZ18 sought an injunction requiring the Commonwealth to take steps to ensure she received the required standard of care, this proceeding related to her removal from Australia under the *Migration Act*. The Full Court therefore concluded that the proceedings of BXD18 and DIZ18, as then continued, attracted the operation of s 494AB(1)(d).

Section 494AB is not jurisdictional

26 As foreshadowed earlier in these reasons, s 494AB does not limit the jurisdiction of any court.

27 That conclusion is grounded in the established principle 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 unmistakably"⁴².

28 Section 494AB(1) provides that certain "proceedings against the Commonwealth may not be instituted or continued in any court". Those proceedings, listed in s 494AB(1)(a)-(d), are all described as "proceedings relating to" a particular subject matter. In the case of s 494AB(1)(b), the proceedings are further identified by reference to a time period ("during any part of the ineligibility period"). But s 494AB(1) is not expressly framed as defining⁴³ or taking away jurisdiction. It does not say that identified courts other than the High Court have no jurisdiction in relation to the listed kinds of proceedings⁴⁴. Nor does it identify a single, broad subject matter such as "all claims relating to regional processing". To provide, as s 494AB does, that certain "proceedings against the Commonwealth may not be instituted or continued in any court" does not, in its terms, or by a clear and unmistakeable implication⁴⁵, take away jurisdiction otherwise conferred on federal courts or invested in State courts. It is not a law made in exercise of the powers given by either s 77(i) or (ii) of the *Constitution*.

42 *Shergold v Tanner* (2002) 209 CLR 126 at 136 [34].

43 *Constitution*, s 77(i) and (ii).

44 cf *Migration Act*, ss 476(2), 476A, 484.

45 See *Shergold* (2002) 209 CLR 126 at 136 [34].

29 Indeed, the word "jurisdiction" is used only in s 494AB(3), which states that "[n]othing in this section is intended to affect the jurisdiction of the High Court under section 75 of the Constitution". This sub-section is not to be read as implying that other provisions in s 494AB affect the jurisdiction of any court other than the High Court. Rather, by confirming that the High Court's s 75 jurisdiction is unaffected, s 494AB(3) promotes a constitutionally valid construction of s 494AB such that s 494AB does not impinge on the exercise of the High Court's jurisdiction under s 75, including its jurisdiction not only under s 75(v) but also under the other provisions of s 75.

30 It is significant, too, that the heading to s 494AB is "Bar on certain legal proceedings relating to transitory persons". The choice of the word "[b]ar" is consistent with the language of cases that contrast a bar to a remedy with the extinguishment of a cause of action⁴⁶. Its use suggests an intention that the provision have the features of a bar to a remedy.

31 And, as has long been established in relation to provisions fixing a limitation period on the bringing of a cause of action, a statutory bar does *not* extinguish a right or underlying cause of action or affect a court's jurisdiction⁴⁷. Adopting and adapting the words of Gummow and Kirby JJ in *The Commonwealth v Mewett*⁴⁸, citing *The Commonwealth v Verwayen*⁴⁹:

"a statutory bar ... does not go to the jurisdiction of the court to entertain the claim but to the remedy available and hence to the defences which may be pleaded. The cause of action has not been extinguished. Absent an appropriate plea, the matter of the statutory bar does not arise for the consideration of the court."

46 *Verwayen* (1990) 170 CLR 394 at 405, 456, 486; *Mewett* (1997) 191 CLR 471 at 507, 508-509, 511, 534.

47 See fn 7 above.

48 (1997) 191 CLR 471 at 534.

49 (1990) 170 CLR 394 at 473-474.

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The consequence of characterising a provision as a bar to a remedy, rather than a limitation on jurisdiction, is that it is for the defendant to raise the point by pleading the provision⁵⁰.

32 This is not to overlook that s 494AB(2) provides that the section "has effect despite anything else in this Act or any other law". But the meaning of s 494AB(2) depends upon determining what is the effect of the section. And that drives the inquiry back to construing sub-s (1).

33 Moreover, nothing in s 494AB affects this Court's jurisdiction. Thus, claims of the kinds identified in s 494AB(1) are able to be brought in this Court. Section 494AB provides no answer to such a claim. And, once it is accepted, as the Commonwealth did, that proceedings instituted in this Court in relation to the matters identified in s 494AB(1) could be (and ordinarily would be) remitted to another court⁵¹ for hearing and determination without s 494AB providing an answer to the claim, the better and more workable construction of s 494AB is that it does *not* limit the jurisdiction of federal courts or limit the federal jurisdiction invested in State courts.

34 So construing s 494AB as a statutory bar avoids the High Court being made a post box for the commencement of proceedings destined to be remitted to another court. It avoids diverting the High Court away from its central work as the apex court of the Australian judicial system. And, further, it avoids administrative inconveniences for the courts, the profession and litigants in circumstances where the Commonwealth could not identify any purpose or utility in requiring the proceedings to be filed in the High Court only for them to be remitted.

35 In the result, it is to be concluded that s 494AB provides for an answer (analogous to a time bar) which the Commonwealth may plead to a claim of a kind identified in s 494AB, when and if pleading the answer would be consistent with its model litigant obligations⁵². If, however, the only consequence of the plea were

50 See fn 5 above.

51 *Judiciary Act*, s 44. See also *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at 41-42 [20].

52 *Judiciary Act*, Pt VIIC; *Legal Services Directions 2017* (Cth), App B. See also *Melbourne Steamship* (1912) 15 CLR 333 at 342; *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345 at 406-407 [147]-[152].

to be that fresh proceedings would be instituted in this Court (and then remitted), then it seems improbable that pleading the section would be consistent with the obligations of a model litigant⁵³. Similarly, if a consequence of the plea were that fresh proceedings in this Court would be time barred, that would be a matter that would affect the Commonwealth's model litigant obligations in pleading s 494AB⁵⁴. The intervention of a time bar might also bear on whether, if leave to amend the Commonwealth's pleadings to plead s 494AB were needed, that leave should be granted, as well as the determination of any consequential application for a stay.

Reach of s 494AB(1)

36 The question of construction which then arises is the reach of s 494AB(1) and, in particular, the reach of s 494AB(1)(a), (ca) and (d).

Parties' submissions

37 The Commonwealth submitted that s 494AB(1)(ca) applied because each proceeding related to the performance of the duty to remove under s 198AD and the taking of actions under s 198AHA. In this respect, the Commonwealth argued that the Full Court made three errors. First, the Full Court erred in finding that there was no intersection between ss 198AHA and 494AB(1)(ca). Contrary to the Full Court's reasoning, it was contended that a proceeding can relate to a "function, duty or power" within the meaning of s 494AB(1)(ca) because it takes as its factual substratum various actions of the Commonwealth under s 198AHA, or because s 198AHA is a necessary ingredient of the validity of actions taken by the Commonwealth. The words "function, duty or power" are not intended to exclude other kinds of actions engaged in by the executive. Second, the Full Court erred in finding that actions are only "under" a provision of Subdiv B if that provision has the capacity to affect rights. Third, the Full Court erred in finding that s 494AB(1)(ca) did not apply to common law negligence claims, as that approach gave an unjustifiably narrow reading to the words "relating to" and was not plausible as a matter of policy.

38 In relation to s 494AB(1)(a), the Commonwealth submitted that it applied because each proceeding related to the exercise of the power in s 198B to bring a transitory person to Australia for a temporary purpose and that was sufficient for

53 See *Legal Services Directions 2017* (Cth), App B, paras 2(a), 2(d)-2(g).

54 See *Legal Services Directions 2017* (Cth), App B, para 2(a).

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the proceedings to engage s 494AB(1)(a). The Commonwealth further submitted that s 494AB(1)(d) applied because each proceeding expressly or impliedly sought orders which in substance would prevent the respondents' removal to Nauru under s 198AD, and relief which intercepts the duty under s 198AD is sufficient to engage s 494AB(1)(d).

39 The respondents split into two cohorts. DLZ18 and FRM17 submitted that the respondents' claims are properly characterised as common law negligence claims which do not invoke, rely upon or depend upon the *Migration Act* and thus there is no intersection between the respondents' proceedings and the specific subject matters in s 494AB(1).

40 BXD18 and DIZ18 made different submissions⁵⁵. They submitted that the Full Court erred in construing s 494AB(1)(a) and (d) as applying to proceedings beyond those that challenged the exercise of a relevant statutory power, or asserted a duty to exercise that statutory power, or sought to enforce the performance of a relevant duty. Thus, they contended that the Full Court erred in concluding that s 494AB(1)(a) applied to DIZ18's proceeding because it was "relating to the exercise of powers under s 198B" in circumstances where: DIZ18 did not invoke s 198B in her application; no order was made requiring DIZ18's transfer to Australia, whether invoking s 198B or otherwise; and s 198B was not the only power pursuant to which DIZ18 might have been brought to Australia. In relation to s 494AB(1)(d), they contended that the Full Court erred in concluding that for BXD18 and DIZ18 to seek, among other relief, an injunction against their removal from Australia which was not predicated on a challenge to an exercise or non-exercise of power, and did not seek to enforce the performance of a statutory duty, had the result that the proceedings were properly to be characterised as "relating to the removal of [the respondents] from Australia under this Act".

41 In relation to s 494AB(1)(ca), in addition to seeking to uphold the Full Court's findings, BXD18 and DIZ18 contended⁵⁶ that s 494AB(1)(ca) applied only

55 BXD18 filed a notice of contention seeking to challenge the Full Court's construction of s 494AB(1)(a) and a notice of cross-appeal seeking to challenge the Full Court's construction of s 494AB(1)(d). DIZ18 filed a notice of cross-appeal seeking to challenge the Full Court's construction of s 494AB(1)(a) and (d).

56 BXD18's notice of contention and DIZ18's notice of cross-appeal sought to challenge the Full Court's construction of s 494AB(1)(ca).

to proceedings that challenged the exercise of a relevant statutory power, asserted a duty to exercise that statutory power, or sought to enforce the performance of a relevant duty.

Application of s 494AB(1)

42 The stated purpose of s 494AB, as enacted, was to "stop legal proceedings being taken in relation to the 'transitory person's' presence in Australia"⁵⁷, to the extent constitutionally possible⁵⁸. The 2012 Act and the 2015 Act expanded the kinds of proceedings to which s 494AB applied⁵⁹ and restated that the purpose of s 494AB was that certain kinds of proceedings could not be instituted or continued in any court, except the High Court⁶⁰. The Commonwealth accepted, however, that s 494AB, whether in the form in which it was enacted, or as it now stands, did not achieve that stated purpose. But of course, although the text cannot be construed by reference to that stated purpose, s 494AB must still be given meaning and operation, consistent with the text and structure of the Act⁶¹.

43 Each paragraph of s 494AB(1) is directed to "proceedings relating to" an identified subject matter. The phrase "relating to", in each paragraph of s 494AB(1), directs attention to the connection between the "proceedings" and the subject matter of the paragraph. This Court has often said that the phrase "relating to" is one of wide import⁶². It can refer to a direct or indirect connection

57 Australia, Senate, *Migration Legislation Amendment (Transitional Movement) Bill 2002*, Revised Explanatory Memorandum at 3 [7]. See [11]-[12] above.

58 cf *DBE17 v The Commonwealth* (2018) 265 FCR 600 at 627 [128].

59 See [13]-[18] above.

60 Australia, Senate, *Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012*, Revised Explanatory Memorandum at 35 [255], [257].

61 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518.

62 *Tooheys Ltd v Commissioner of Stamp Duties (NSW)* (1961) 105 CLR 602 at 620-621; *Fountain v Alexander* (1982) 150 CLR 615 at 629; *Perlman v Perlman* (1984) 155 CLR 474 at 489; *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 at 365, 367, 374, 376; *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 330; *North Sydney Council v Ligon 302 Pty Ltd* (1996) 185 CLR 470 at 478-479;

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between two subject matters⁶³, and one subject matter can "relate to" another subject matter even though the first subject matter also relates to other things⁶⁴. The degree of connection required between two subject matters joined by the words "relating to" is ordinarily to be determined by reference to the text, context, legislative purpose and history of the provision, and, of course, the facts of the case⁶⁵.

44 Here, it is the text of s 494AB(1), read in its statutory context, that provides the surest guide⁶⁶. It is the need for a connection between a proceeding and one of the identified subject matters that imposes the limit on the operation of the provision. Subject to that, however, its operation is not restricted to identified kinds of claims or causes of action, or to claims for particular forms of relief. Thus, the section does not exclude all common law negligence cases against the Commonwealth.

45 For the same reason, s 494AB is not confined in its application to proceedings in the nature of judicial review⁶⁷. That conclusion follows from the text of the provision but is reinforced by the fact that s 494AB is concerned with

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 at 387 [87]; *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 219-220 [242]-[243]; *Kennon v Spry* (2008) 238 CLR 366 at 440 [217].

63 *O'Grady* (1990) 169 CLR 356 at 376-377; *Airservices Australia* (1999) 202 CLR 133 at 219-220 [243].

64 *Project Blue Sky* (1998) 194 CLR 355 at 387 [87].

65 *Tooheys* (1961) 105 CLR 602 at 620-621; *O'Grady* (1990) 169 CLR 356 at 376; *PMT Partners* (1995) 184 CLR 301 at 313, 330; *North Sydney Council* (1996) 185 CLR 470 at 478-479; *Project Blue Sky* (1998) 194 CLR 355 at 387 [87]; *Kennon* (2008) 238 CLR 366 at 440 [218]; *Travelex Ltd v Federal Commissioner of Taxation* (2010) 241 CLR 510 at 519-520 [25]. See also *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 662 [22].

66 *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 388-389 [23]-[24], citing, among others, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47].

67 cf *Migration Act*, Pt 8. See also *DBE17 v The Commonwealth* (2019) 266 CLR 156 at 167 [22], 170-171 [31].

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proceedings against the "Commonwealth". By s 494AB(4), "Commonwealth" is given an extended meaning and includes not only officers of the Commonwealth but also "any other person acting on behalf of the Commonwealth". It is also to be observed that s 494AB(3) acknowledges this Court's jurisdiction under s 75 of the *Constitution* generally, not just under s 75(v).

46 But s 494AB does not in its terms apply to any and every proceeding relating to regional processing. Nor is s 494AB confined to: proceedings which challenge the actual or threatened exercise of, or failure to exercise, power; proceedings which challenge the validity or scope of provisions of the *Migration Act*; or proceedings in which the *Migration Act* is expressly invoked or relied upon.

47 Where, however, the section applies by reference to actions taken under s 198B or Subdiv B of Div 8 of Pt 2 of the *Migration Act* (as in s 494AB(1)(a) and (ca), respectively), there is no textual basis for excluding from its reach some actions relating to that provision or Subdivision, but not others. Where Subdiv B authorises the Commonwealth to take certain actions – as in the case of s 198AHA – the taking of such actions will be "under" that Subdivision in the relevant sense. The legislative text and context do not require some further inquiry into whether the actions taken under Subdiv B also had the capacity to, or did, affect legal rights. To reason, as the Full Court did, that actions are only "under" a provision or subdivision if they have the capacity to affect rights would be to import a test formulated in the context of legislation conferring a right to judicial review⁶⁸, a very different statutory context.

48 For the reasons earlier explained, the application of s 494AB is to be determined by asking whether one of the identified subject matters in s 494AB(1) is raised as an issue for determination by a court. And as explained, whether one or more of the identified subject matters is an issue will depend on the pleadings viewed in light of the relief claimed or, if there are no pleadings, the application and other documents filed in the proceeding.

49 It remains to say something further about each of s 494AB(1)(a), (ca) and (d).

68 See *Griffith University v Tang* (2005) 221 CLR 99.

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Section 494AB(1)(a)

50 Where proceedings are brought in which the transfer of a transitory person to Australia under s 198B of the Act is raised as an issue between the parties, they will be "proceedings relating to" the exercise of powers under s 198B and attract the operation of s 494AB(1)(a). In deciding that there is an issue between the parties attracting s 494AB(1)(a), it will not always be necessary for s 198B to be expressly identified in the pleadings (or if there are no pleadings, the application and other filed documents). But the issue must be raised for determination by the court.

51 BXD18's argument that s 198B is not the only power under which a transitory person could be brought to Australia – there being a class of temporary visas to travel to, enter and remain in Australia, issued under s 33 of the *Migration Act* and known as special purpose visas – does not detract from the conclusion that the proceedings relate to the exercise of powers under s 198B. Rather, as the Commonwealth submitted, s 198B is the specific power enacted for the precise purpose of bringing a transitory person to Australia. Under s 33 of the *Migration Act*, a non-citizen is taken to have been granted a special purpose visa if that non-citizen has a prescribed status⁶⁹ or the Minister makes a written declaration that the non-citizen is taken to have been granted such a visa⁷⁰. There was nothing to suggest that s 33 was available or otherwise engaged in the circumstances of these matters.

52 The significance of there being an issue about the exercise of powers under s 198B is illustrated by the case of DLZ18. There, an interlocutory application⁷¹ sought an order that DLZ18, a transitory person, be immediately transferred "to a location where [the Commonwealth] can obtain for [her] urgent paediatric physical and psychiatric care". DLZ18 was brought to Australia without the application being determined. The Commonwealth could have raised s 494AB(1)(a) by way

69 *Migration Act*, s 33(2)(a) read with *Migration Regulations 1994* (Cth), reg 2.40.

70 *Migration Act*, s 33(2)(b).

71 DLZ18 also filed an originating application seeking orders, among others, that the Commonwealth obtain for her urgent paediatric physical and psychiatric care, where that care is not provided to her on Nauru or in any other offshore environment.

of defence but did not. Thereupon there ceased to be an issue in the proceeding that related to the exercise of powers under s 198B.

Section 494AB(1)(d)

53 Similarly, where proceedings are brought in which the removal of a transitory person from Australia other than in the manner ordinarily contemplated under the *Migration Act*⁷² is an issue, they will be "proceedings relating to" the removal of a transitory person under the Act for the purposes of s 494AB(1)(d). For example, BXD18's amended originating application and statement of claim sought, among other relief, an injunction preventing the removal of her and her family from Australia until they could be resettled in a country that is a signatory to the Refugees Convention. The relief was sought on grounds which included that BXD18 suffered injury, loss and damage because of the Commonwealth's failure to remove BXD18 from Nauru or the Commonwealth's decision to continue to keep BXD18 and her family on Nauru. Her claim, if made out, would preclude her removal from Australia in the manner ordinarily contemplated under the *Migration Act*. That proceeding attracts s 494AB(1)(d).

Section 494AB(1)(ca)

54 Finally, it is necessary to say something about s 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". It is unnecessary to attempt to mark the metes and bounds of s 494AB(1)(ca). It is desirable, however, to say something about s 198AD (read with s 198AH) and s 198AHA, both in Subdiv B of Div 8 of Pt 2.

55 Where, for example, the power of the Commonwealth to remove a transitory person to a regional processing country, or the fact that the transitory person has been removed, is not an issue, then, without more, s 494AB(1)(ca) will not apply. But where proceedings are brought in which the possible removal of a transitory person to a regional processing country under s 198AD is sought to be prevented, they will be "proceedings relating to" the performance or exercise of a function, duty or power under Subdiv B of Div 8 of Pt 2 for the purposes of s 494AB(1)(ca). It does not matter that the proceedings might also relate to other matters or plead a cause of action in the common law of negligence relating to something other than the possible removal of the transitory person. An issue on the pleadings, viewed in light of the relief sought (preventing removal), relates to the

72 Removal to a regional processing country under ss 198AD and 198AH.

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performance or exercise of the power to remove the transitory person under s 198AD.

56 The same would apply to an issue involving the interaction between ss 198AHA and 494AB(1)(ca). Where the Commonwealth has entered into an arrangement with a person or body in relation to the regional processing functions of a country, and there is an issue raised between the parties about the performance or exercise by the Commonwealth of one or more of the actions listed in s 198AHA(2), then s 494AB(1)(ca) would apply to that proceeding. As the Full Court pointed out, s 198AHA may support acts done by the Commonwealth by providing that the Commonwealth has the "capacity" to take those actions.

57 But, contrary to the Full Court's conclusion, an action need not affect rights to be "under" a provision for the purposes of s 494AB(1)(ca). So, for example, proceedings seeking to challenge the authority of the Commonwealth to make payments, or anything incidental or conducive to the making of those payments, pursuant to such an arrangement would attract the operation of s 494AB(1)(ca) read with one or both of s 198AHA(2)(b) and (c)⁷³.

58 Against that background, it is necessary to deal separately with each matter and, in particular, to say in what respects the proceedings related to the subject matters identified in s 494AB.

FRM17

59 In December 2017, FRM17 commenced negligence proceedings against the Commonwealth in the Federal Court. The originating application alleged, among other things, that the Commonwealth, in exercise of its powers under one or both of s 198AHA of the *Migration Act* and s 61 of the *Constitution*, owed FRM17 a duty of care. It alleged that the duty arose because the Commonwealth had transferred her to Nauru under ss 198AD and 198AHA and maintained significant involvement in the day-to-day operation of regional processing activities on Nauru and her day-to-day health care and welfare. It further alleged that the Commonwealth breached this duty by "fail[ing] to provide [FRM17] with access to safe and appropriate medical facilities and treatment", and that, as a result of that breach, she was "suffering significant harm" and "at immediate risk".

73 cf *Williams v The Commonwealth* (2012) 248 CLR 156; *Williams v The Commonwealth [No 2]* (2014) 252 CLR 416.

60 FRM17 sought interlocutory orders restraining the Commonwealth from detaining her "on Nauru or at any other off-shore processing centre not within Australia" and from "[n]ot permitting [FRM17] from travelling to another country for the purpose of obtaining urgent psychiatric medical attention". By way of final relief, FRM17 sought orders for ongoing medical care as recommended by treating medical practitioners.

61 By an interlocutory application also filed in December 2017, FRM17 sought an order that she be transferred immediately to a location where she could receive medical treatment. The Federal Court ordered that, until trial or further order, the Commonwealth place FRM17 in a tertiary level specialist child mental health facility in accordance with medical advice. On 24 December 2017, FRM17 was transferred to Australia with her mother and sister and they remain in Australia.

62 Subsequently, FRM17 filed amended pleadings. The alleged duty of care and the alleged breach were put in substantially similar terms to those in the originating application. FRM17 sought damages and an injunction that the Commonwealth "cease to fail to discharge the responsibility that [it has] assumed to procure specialist child psychiatric health treatment".

63 The Commonwealth filed an amended defence which alleged that the Federal Court did not have jurisdiction by reason of:

- (1) s 494AB(1)(a), because FRM17 "sought interlocutory relief which, in effect, required her transfer to Australia for a medical purpose";
- (2) s 494AB(1)(ca), because "an important element of the alleged assumption of responsibility, the alleged duty of care and the alleged standard of care is that [FRM17] was removed to Nauru pursuant to s 198AD of the Act" and "the various actions and omissions which the [Commonwealth] is said to have taken in the statement of claim were taken (or omitted to be taken) in the exercise of statutory power under provisions of the Act ... including s 198AHA of the Act"; and
- (3) s 494AB(1)(d), because "[t]he relief which [FRM17] seeks, in effect, prevents her removal from Australia".

At times in argument, these paragraphs of the Commonwealth's defence were treated as if they were a general answer to the claims made. The better view, however, is that what was put in the defence was directed to the single concluding

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plea that the Federal Court had no jurisdiction and that the proceeding should be dismissed or permanently stayed.

64 The Full Court held that s 494AB(1)(a) did not bar FRM17's proceeding because she did not seek or obtain an order requiring the exercise of s 198B; the interlocutory order obtained merely required that she be placed in a specialist child mental health facility meeting particular conditions. The Full Court further held that s 494AB(1)(d) did not bar FRM17's proceeding because no issue of removal had arisen while medical care was being provided. That characterisation of the issues in the case was incomplete.

65 As explained above, s 494AB does not alter or limit the Federal Court's jurisdiction. Hence, orders already made in this proceeding were and remain validly made. As the claim for relief now stands, it is a claim for relief preventing removal to Nauru (there being no tertiary level specialist child mental health facilities available on Nauru). Thus, one of the issues in the proceeding relates to the removal of FRM17 from Australia within the meaning of s 494AB(1)(d). It is not to the point that the Commonwealth's duty to remove FRM17 under ss 198AD(2) and 198AH(1A) has not yet arisen. It is enough that the relief sought would in substance prevent removal in accordance with those provisions were that duty to arise. It is unnecessary to decide whether s 494AB(1)(a) and (ca) were engaged. Whether the Commonwealth will seek to rely on s 494AB in answer to the further prosecution of these claims (which are within the jurisdiction of the Federal Court) is yet to be seen.

DLZ18

66 In July 2018, DLZ18 commenced negligence proceedings against the Commonwealth in the Federal Court. The pleadings in DLZ18's and FRM17's proceedings are substantially the same and it was common ground that none of the differences between the pleadings was material to answering the separate questions. After DLZ18 had filed an originating application and an interlocutory application seeking an order that she be immediately transferred "to a location where the [Commonwealth] can obtain for [DLZ18] urgent paediatric physical and psychiatric care", DLZ18 and her mother and father were brought to Australia.

67 After DLZ18 filed an amended originating application and statement of claim seeking damages (but not an injunction), the Commonwealth filed a defence to the same effect as that filed in FRM17's proceeding alleging that the Federal Court did not have jurisdiction by reason of:

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- (1) s 494AB(1)(a), because "the Statement of Claim include[s] ... an allegation that the [Commonwealth] ought to have transferred [DLZ18 and her mother⁷⁴ and father] from Nauru to Australia"; and
- (2) s 494AB(1)(ca), because "an element of the genesis of the alleged duties of care is that [DLZ18 and her mother] were taken to Nauru under s 198AD and certain actions were allegedly taken by the Commonwealth under s 198AHA of the Act".

68 While the Commonwealth did not allege in its defence that the Federal Court did not have jurisdiction by reason of s 494AB(1)(d), the Commonwealth contended in its written submissions to this Court that "jurisdictional issues must be determined by the [Federal] Court in the exercise of its first duty to be assured of its own jurisdiction. That was so whether or not the point was taken by the [Commonwealth]." That submission was not pressed at the hearing. As s 494AB is procedural, not jurisdictional, and the Commonwealth had not pleaded s 494AB(1)(d), its application to these proceedings does not arise.

69 The Full Court held that s 494AB(1)(a) did not bar DLZ18's proceeding because DLZ18 did not seek or obtain an order requiring the exercise of s 198B, and no interlocutory orders were made. Again, that characterisation of the issues in the case was incomplete.

70 As in FRM17, orders already made in the proceeding were and remain validly made. The Federal Court had jurisdiction to make those orders. Section 494AB(1)(a) applied to the proceeding because one of the issues was and remains whether the Commonwealth ought to have transferred DLZ18, her mother and her father from Nauru to Australia, an issue within the meaning of s 494AB(1)(a)⁷⁵. DLZ18 was transferred to Australia pursuant to s 198B, the power identified in s 494AB(1)(a). DLZ18's submission that despite the availability and suitability of s 198B, the Commonwealth could have engaged in negotiations with other countries, within a short period of time, to determine whether there was an alternative location to which DLZ18 could be transferred, may be put to one side. It is apparent, on the face of the pleadings, that whether the Commonwealth ought to have transferred DLZ18, her mother and her father from

74 DLZ18's mother, FZR18, is the second respondent in this appeal.

75 See [52] above.

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Nauru to Australia was an issue. It is unnecessary to decide whether s 494AB(1)(ca) was engaged.

71 Whether the Commonwealth will seek to rely on s 494AB in answer to the further prosecution of these claims (which are within the jurisdiction of the Federal Court) is yet to be seen.

BXD18

72 In April 2018, BXD18 commenced negligence proceedings against the Commonwealth in the Federal Court. The originating application sought an injunction "requiring the Commonwealth to take all steps within its power to ensure that [BXD18] receives treatment in a specialist child mental health treatment facility with comprehensive tertiary level child psychiatric assessment", or alternatively injunctive or declaratory relief that the Commonwealth cease breaching a duty of care owed to BXD18 by failing to take those steps. The application also sought damages. An interlocutory application filed at the same time sought an order that BXD18 be immediately transferred to a location where she could receive "immediate comprehensive psychiatric assessment by a qualified specialist in child psychiatry" and "treatment in an inpatient child mental health facility".

73 The Commonwealth agreed to transfer BXD18 to Australia. No interlocutory orders were made. After BXD18 had been transferred, she filed an amended originating application and statement of claim. The amended claim alleged that the Commonwealth owed BXD18 a duty of care because it relevantly designated Nauru as a "regional processing country" under s 198AB(1), entered into a memorandum of understanding and administrative arrangements relating to regional processing on Nauru⁷⁶, and maintained significant involvement in regional processing activities on Nauru. It alleged that the Commonwealth breached this duty by failing to remove BXD18 from Nauru. The claimed relief included an injunction requiring the Commonwealth to resettle BXD18 and each member of her family in a country that is a signatory to the Refugees Convention "and, until this is done, requiring the [Commonwealth] not to take any steps to remove [BXD18] and her family from Australia". Alternatively, BXD18 sought an injunction requiring the Commonwealth not to take any steps to remove her to any "regional processing country" where she would be at risk of suffering the same harm she suffered on Nauru, or alternatively an injunction requiring the

76 See *Plaintiff M68* (2016) 257 CLR 42 at 61 [3], 77-78 [68]-[69], 116-117 [201]-[206], 135-142 [282]-[307].

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Commonwealth not to take any steps to remove BXD18 from Australia "until she has reached maximum medical improvement".

74 The Commonwealth filed a defence to the same effect as that filed in FRM17's proceeding which included an allegation that the Federal Court did not have jurisdiction by reason of:

- (1) s 494AB(1)(a), because BXD18 "sought interlocutory relief which effectively required her transfer to Australia for a medical purpose";
- (2) s 494AB(1)(ca), because "an important element of the alleged assumption of responsibility, the alleged duty of care and the alleged standard of care is that [BXD18] was removed to Nauru pursuant to s 198AD of the Act" and "the various actions and omissions which the [Commonwealth] is said to have taken in the statement of claim were taken (or omitted to be taken) in the exercise of power under provisions of the Act ... including s 198AHA"; and
- (3) s 494AB(1)(d), because BXD18 "seeks relief preventing her removal from Australia".

75 The Full Court held that s 494AB(1)(d) did not bar BXD18's proceeding as instituted, but that BXD18's amended originating application and statement of claim engaged s 494AB(1)(d). The Full Court was right. Section 494AB(1)(d) was engaged because orders preventing removal from Australia are sought.

76 As with the claims of FRM17 and DLZ18, orders already made in this proceeding were validly made and continue to operate. Further, as instituted, s 494AB(1)(a) applied to BXD18's proceeding because an interlocutory application filed at the time the proceeding was instituted sought an order that BXD18 be immediately transferred to a location where she could receive "immediate comprehensive psychiatric assessment by a qualified specialist in child psychiatry" and "treatment in an inpatient child mental health facility". This was an order which effectively required her transfer to Australia: an issue within the meaning of s 494AB(1)(a). BXD18 was transferred to Australia pursuant to s 198B, the power identified in the statutory scheme.

77 Section 494AB(1)(d) applies because BXD18 seeks an order preventing her removal from Australia in the manner contemplated under ss 198AD and 198AH

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of the *Migration Act*⁷⁷. Whether the Commonwealth will seek to rely on s 494AB in answer to the further prosecution of these claims (which are within the jurisdiction of the Federal Court) is yet to be seen.

78 Although it is unnecessary to decide whether s 494AB(1)(ca) was engaged, BXD18's contention that, in respect of each of BXD18, her father and her brother, the power in s 198AHA ceased to be available on 25 March 2015 (the date they were found to be refugees), is misconceived. There was no dispute that each of BXD18, her father and her brother were at all relevant times transitory persons. Section 494AB applies to legal proceedings relating to transitory persons, a status which does not depend on whether a person has or has not been determined to be a refugee⁷⁸.

DIZ18

79 In June 2018, DIZ18 commenced negligence proceedings against the Commonwealth in the Federal Court. The originating application sought an injunction requiring the Commonwealth to take all steps within its power to ensure that DIZ18 was transferred from Papua New Guinea to "a location in Australia where [DIZ18] receives an MRI head scan and specialist paediatric treatment, care and follow up". Alternatively, the application sought injunctive or declaratory relief that the Commonwealth cease breaching a duty of care owed to DIZ18 by failing to take those steps. An interlocutory application filed at the same time sought an order in similar terms, namely that DIZ18 be transferred "to a location in Australia" to receive an "MRI head scan" and "[a]ssessment, long term care and follow up by a paediatric neurologist and multi disciplinary specialist paediatric team". A statement of claim also filed at the same time sought an injunction "prohibiting the Commonwealth from taking steps to transfer [DIZ18] back to Nauru". In July 2018, orders were made requiring that, as soon as reasonably practicable, DIZ18 be brought to Australia. She was brought to Australia the next day.

80 In March 2019, DIZ18 filed an amended statement of claim seeking an injunction "requiring the [Commonwealth] to take and to continue to take all steps within [its] power to ensure that [DIZ18] receives treatment, including long-term

77 See [53] above. The Commonwealth did not press the ground relating to s 494AB(1)(d) in respect of BXD18 in oral submissions but it was put in issue by BXD18's cross-appeal.

78 *Migration Act*, s 5(1) definition of "transitory person".

care and follow-up, in a location with access to quality, multi-disciplinary specialist paediatric care".

81 The Commonwealth filed a defence to the same effect as that filed in FRM17's proceeding which alleged that the Federal Court did not have jurisdiction by reason of:

- (1) s 494AB(1)(a), because DIZ18 "sought interlocutory relief which required her transfer to Australia for a medical purpose";
- (2) s 494AB(1)(ca), because "an important element of the alleged assumption of responsibility, the alleged duty of care and the alleged standard of care is that [DIZ18's] parents were removed to Nauru pursuant to s 198AD and that [DIZ18] was as a result born on Nauru" and "the various actions and omissions which the [Commonwealth] is said to have taken in the statement of claim, including the alleged actions and omissions relating to [DIZ18's] transfer from Nauru to [Papua New Guinea], were taken or would have been taken had they not been omitted to be taken in the exercise of power under provisions of the Act ... including s 198AHA"; and
- (3) s 494AB(1)(d), because by reason of the combination of a paragraph of her amended statement of claim and a paragraph of the prayer for relief, DIZ18 in effect seeks relief preventing her removal from Australia.

82 The Full Court held that s 494AB(1)(a) barred DIZ18's proceeding because she sought transfer to Australia for medical treatment and s 494AB(1)(d) also barred DIZ18's proceeding because she sought an injunction preventing her removal from Australia.

83 As with the other claims, orders made in DIZ18's proceeding were validly made and continue to operate. As the proceeding was instituted, s 494AB(1)(a) applied because DIZ18 expressly sought transfer to Australia for medical treatment, an issue within the meaning of s 494AB(1)(a), and DIZ18 was transferred to Australia pursuant to s 198B. As the proceeding is now framed, s 494AB(1)(d) applies because DIZ18 seeks an order preventing her removal from Australia. It is not to the point that the Commonwealth's duty to remove DIZ18 under ss 198AD(2) and 198AH(1A)(c) has not yet arisen. It is enough that the relief sought would, in substance, prevent removal in accordance with those provisions were that duty to arise. It is unnecessary to decide whether s 494AB(1)(ca) was engaged. Again, whether the Commonwealth will seek to rely on s 494AB in answer to the further prosecution of these claims (which are within the jurisdiction of the Federal Court) is yet to be seen.

Kiefel CJ
Bell J
Gageler J
Keane J
Gordon J

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Orders

84 For those reasons, each appeal should be allowed and the cross-appeals should be dismissed. In each proceeding, paragraph 1 of the orders made by the Full Court of the Federal Court of Australia on 28 August 2019 should be set aside and, in its place, order:

- "1. The questions ordered to be separately answered be determined as follows:

Questions:

- (a) When the proceeding was commenced in the Federal Court of Australia, was the effect of s 494AB of the *Migration Act 1958* (Cth) that it could not be instituted? and
- (b) Is the effect of s 494AB of the *Migration Act 1958* (Cth) that the proceeding cannot be continued in the Federal Court of Australia?

Answers:

- (a) No, but the respondents, if so advised, could have sought, in an appropriate case, to plead that s 494AB applied to the proceeding; and
- (b) No, but the respondents, if so advised, may seek to plead that s 494AB applies to the proceeding and, if permitted to do so, may apply for an order that continuation of the proceedings as then framed be stayed. Whether amendment of pleadings should be allowed or a stay granted are matters to be determined."

85 Although each appeal should be allowed and the cross-appeals dismissed, the answers given to the separate questions are not the answers the Commonwealth sought. In these circumstances, each party should bear their own costs of their proceeding in this Court and the order for costs made by the Full Court should not be disturbed.

