HIGH COURT OF AUSTRALIA

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File Number:	M28/2020
File Title:	Minister for Home Affairs & Anor v. Marie Theresa Arthur as
Registry:	Melbourne
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellants
Date filed:	26 Jun 2020

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY **NO M 28 OF 2020**

BETWEEN: **MINISTER FOR HOME AFFAIRS**

First Applicant

COMMONWEALTH OF AUSTRALIA

Second Applicant

AND: **MARIE THERESA ARTHUR AS LITIGATION REPRESENTATIVE FOR BXD18**

Respondent

SUBMISSIONS OF THE APPELLANTS IN REPLY

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PART I FORM OF SUBMISSIONS

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

PART II REPLY TO THE SUBMISSIONS OF THE RESPONDENT

2. This reply addresses the arguments presented by BXD18 and DIZ18. Matters specific to DIZ18 are addressed in the reply submissions in that proceeding.

INTERPRETATION OF SECTION 494AB

3. The respondents' argument for "a narrow approach" to the phrase "relating to" [**RS [16]-[38], [74]**] should be rejected.

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4. *First*, it is insufficient simply to observe that s 494AB operates by excluding categories of proceeding (**RS [16]-[17]**) without noticing the breadth of those categories. Each relates to an aspect of regional processing that is likely to give rise to litigation in respect of transitory persons: bringing them to Australia; their status and detention in Australia; their removal from Australia; and the performance or exercise of functions, duties or powers under Subdivision B. The terms of these categories support a broad purpose of preventing litigation in relation to regional processing in the cases of transitory persons.

5. *Second*, s 494AB must also be understood in the context of s 494AA, which operates to prevent categories of proceedings being brought by unauthorised maritime arrivals (**UMAs**). Because a transitory person will typically first be a UMA, s 494AA operates to prevent categories of litigation that might be brought by arrivals in Australia from the time of their arrival through to their removal to a regional processing country under s 198AD (to which s 494AA(1)(e) applies). Section 494AB then applies to litigation which that person (who will by then be a transitory person) might commence in accordance with the categories in s 494AB(1). Sections 494AA and 494AB together reveal an intention to prevent litigation in relation to the implementation of regional processing, manifested in the performance of functions, duties and powers under Subdivision B in respect of both UMAs and transitory persons. While s 494AA was introduced before s 494AB (**RS [19]**), this reflects only the timing of the later introduction of the concept of transitory persons. That s 494AA has done much of the work in pursuit of a shared purpose (**RS [26]**) does not gainsay that s 494AB is directed to the same

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purpose. To the contrary, it demonstrates the Parliament's intention to make comprehensive the legislative policy of those sections.

6. *Third*, the respondents understate the change effected by the 2012 amendments that added ss 494AA(1)(e) and 494AB(1)(ca). They expanded the subject matters excluded by ss 494AA and 494AB at the same time as inserting Subdivision B, which provides more comprehensively for the regional processing regime. The previous focus of s 494AB on proceedings that might be brought in Australia expanded (cf **RS [27]**). Although Subdivision B did not include s 198AHA as enacted in 2012 (cf **RS [23]**), s 494AB(1)(ca) did seek comprehensively to prevent litigation in respect of actions that the Commonwealth might undertake as part of regional processing. And of course, by retrospective effect, Subdivision B is taken to have included s 198AHA from 2012. It is the objective intention of the Act, not the subjective minds of legislators, which matters.

7. Section 198AHA gave authority (retrospectively) to additional actions and functions being taken by the Commonwealth in regional processing countries. Consistently with the purpose of s 494AB(1)(ca) as at 2012, the prevention of litigation in respect of regional processing functions under the Act was thus expanded alongside the exercise of a broader range of functions, duties and powers. This history does not support a narrow or restrictive reading of s 494AB. To the contrary, and especially taking into account the breadth of the phrase "in relation to" and the limitation in the chapeau to proceedings "against the Commonwealth", the history supports a broad and expanding understanding of s 494AB, consistent with preventing, to the extent constitutionally possible, litigation concerning all aspects of the Commonwealth's involvement in regional processing.

8. *Fourth*, that the Parliament might have achieved that same purpose using different language (cf **RS [18]**) does not detract from the appellants' construction. That construction is supported by the text that was enacted and the purpose which it reveals.

EXAMPLES OF CONSEQUENCES OF THE APPELLANTS' ARGUMENT

9. **RS [36]-[37]** posit supposedly absurd results of the appellants' construction. Those examples do not undermine that construction and are in any case unhelpful, as they lack sufficient detail to allow any meaningful conclusion to be drawn in relation to the operation of s 494AB. As to **RS [36(a)]**, for example, the mere fact that a transitory person may have used goods or services is plainly insufficient to mean a contractual dispute

between the Commonwealth and a contractor about those goods and services falls within s 494AB(1)(ca), for the dispute will likely have nothing to do with the performance or exercise of any function, duty or power "in relation to a transitory person". The example is not analogous to this case, where a transitory person brings the proceeding, and does so to complain about actions and omissions in respect of the transitory person, in circumstances where the capacity to take those actions arose from Subdivision B.

10. The examples distract from proper focus on the issues raised by this proceeding, being negligence claims by a transitory person in relation to actions taken, or caused to be taken, or not taken, by Commonwealth officers in relation to the the "regional processing functions" of Nauru (that term being widely defined in s 198AHA(5)). It is far removed from disputes between third parties of the kind upon which the respondents invite focus. The submission that Subdivision B was "no more than the setting, or background circumstance", for the proceeding is wrong [**RS [39]**]. At institution, the statement of claim pleaded actions under ss 198AD[1] and 198AHA,[2] which together with other actions were said to have "cause[d] harm to [BXD18's] mental health".[3] Because of these actions, the Commonwealth was said to have had, and continued to have had, control over BXD18's treatment under s 198AHA of the Act or s 61 of the Constitution, and to have therefore assumed responsibility for her health and welfare.[4] The words "in relation to" are not capable of bearing a meaning so narrow that the proceeding did not relate to functions, duties and powers that were expressly pleaded.

11. By the time of the Full Court hearing, the respondent had pleaded by way of amended reply that s 198AHA did not apply to authorise action in relation to her [cf **RS [41]-[42], [44], [59]**].[5] She now suggests that this "was artificial and inconsequential" [**RS [59]**], but that characterisation of her own pleading should be rejected. Further, her amended statement of claim continued to allege duties of care that were dependent on (a) her having been taken to Nauru;[6] and (b) the Commonwealth having engaged in certain actions.[7] The

1 Statement of claim at [7.4], [8.3]-[8.4] [**BFM 85**].
2 Statement of claim at [8.6], [9]-[10].
3 Statement of claim at [13] [**BFM 88**].
4 Statement of claim at [18]-[19] [**BFM 89**].
5 Amended reply at [1A] [**BFM 129-130**]; Rejoinder at [1] [**BFM 132-133**].
6 Amended statement of claim at [7(d)] [**BFM 94**], [8(c)] [**BFM 94**]
7 Amended statement of claim at [9]-[10] [**BFM 95-96**], [12] [**BFM 100-101**].

former must be under s 198AD, while the latter is under at least s 198AHA. Both are "functions, duties or powers under Subdivision B". It would be absurd for the operation of s 494AB to turn upon whether a pleader is skilful enough to avoid referring to any such functions, duties or powers, while at the same time impugning actions that were actually taken in the exercise of those functions, duties or powers.

ADDITIONAL MATTERS

12. *First*, the Full Court did hold that s 494AB(1)(ca) does not apply to negligence proceedings (cf **RS [4]**): see the reply in *DLZ18* at [9]. **RS [39]-[40]** then pay insufficient regard to the importance of the statutory context in determining a claim in negligence against a repository of power. To say that "[a]ll material facts can be pleaded without reference to statute" [**RS [39]**] is not to say that the legal significance of those facts can be separated from the statutory context; here, that context is so significant as to imbue the proceedings with a character that engages s 494AB. For example, if s 198AD required Commonwealth officers to take the respondents to Nauru, it cannot have been a breach of a common law duty of care for the officers to comply with that duty. The duty is relevant, and the proceeding "relates" to its exercise, whether expressly mentioned or not.

13. *Second*, *PT Bayan Resources TBK v BCBC Singapore Pte Ltd*[8] is not relevant. The "general principle of statutory interpretation" was not relied on there to interpret the exclusion in s 10(1) narrowly, but to deny any further implied exclusion.

14. *Third*, in so far as "under" "naturally directs attention to a source of power" [**RS [52]**], the point does not assist the respondent. For example, it would be a surprising result if an exercise of power under s 61 of the Constitution did not "arise under" the Constitution, and thus fall within this Court's jurisdiction under s 76(i), simply because it involved that species of executive power that has been described as "a capacity which is neither a statutory nor a prerogative capacity".[9]

15. *Fourth*, as to **RS [13] and [62]**, the appellants accepted that a transitory person could enter Australia either through s 198B or by being granted a special purpose visa under s 33(2)(b). Section 198B was the only option that did not involve a substantive alteration

[8] (2015) 258 CLR 1 at 15 [29].

[9] *Davis* (1988) 166 CLR 79 at 108 (Brennan J) (emphasis added), quoted with approval in *Plaintiff M68* (2016) 257 CLR 42 at [132] (Gageler J), and also [135].

of the rights of the parties by granting a visa (the effect of which would have been to allow a transitory person to reside in the Australian community, contrary to the objects of the regional processing scheme). The respondents make no substantive response to the submissions at **AS [53]**, which demonstrate that s 198B was the power the Parliament intended to be used when necessary to bring transitory persons to Australia.

PART II THE NOTICE OF CONTENTION AND CROSS-APPEAL

16. The appellants' submissions on construction serve to dispose of the narrow construction for which the respondents contend. It is sufficient to note the following additional matters. *First*, s 494AB does not appear in Part 8 headed "Judicial review". *Second*, s 474AB is not drafted by reference to "migration decisions", which are defined very broadly once s 474(3) is taken into account and which would usually provide the textual hook for limiting a provision to direct challenges to validity. *Third*, s 494AB(3) refers to this Court's jurisdiction under s 75 of the Constitution generally, not just s 75(v), as would be expected had it been limited to challenges to validity: cf s 476(1).

17. Finally, by way of footnote [**RS fn 44**], the respondent invites this Court to conclude that the unanimous decision of this Court in *Plaintiff S156/2013 v Minister for Immigration and Border Protection*[10] was wrongly decided in holding that, notwithstanding s 494AA, this Court could remit a matter to the Federal Circuit Court. The invitation should be declined. The respondents' focus on s 44 of the *Judiciary Act 1903* overlooks s 476B(2) and (4) of the Act, which, as the Court recognised, prevented remittal to the Federal Circuit Court unless it had jurisdiction under s 476(1). It is implausible to suggest that the Court overlooked s 494AA(2) in relying upon s 494AA(3). It treated s 494AA(3) as the leading provision in any contest with sub-s (2).

Dated: 26 June 2020

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[10] (2014) 254 CLR 28 at [20].