HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **MINISTER FOR HOME AFFAIRS**
First Appellant

COMMONWEALTH OF AUSTRALIA
Second Appellant

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and

MARIE THERESA ARTHUR as litigation representative for BXD18
Respondent

RESPONDENT'S SUBMISSIONS

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Part I. Form of submissions

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

Part II. Issues presented by the appeal

2. In their submissions in this proceeding,[1] the Appellants adopt their submissions in proceeding M29 of 2020, *Minister for Home Affairs v FRX17 as litigation representative for FRM17*.[2] The statement of issues (**FRM AS [4]–[6]**) contains an accurate statement of issues, but goes further and includes contentious assumptions.

3. So in relation to the *first* issue (**FRM AS [4]**), the Appellants' submissions assume that Subdivision B of Division 8 of Part 2 (in particular, ss 198AD and 198AHA) of the *Migration Act 1958* (Cth) (the "**Act**") is significant in the Respondent's negligence claim. The Respondent does not accept that characterisation. In particular, neither the alleged duty of care nor the alleged breach of that duty depends on the Respondent having been taken to Nauru *pursuant to s 198AD* or on the Appellants taking or failing to take actions in Nauru *under s 198AHA*. Absent that assumption, the issue is as follows:

> "[D]id s 494AB(1)(ca) apply to this proceeding at the time it was instituted and/or at the time of the Full Court's decision."

4. Further, it is not right to say that the Full Court held that s 494AB(1)(ca) "does not apply to actions in negligence" (*cf.* **FRM AS [4]**). The Full Court held that the section does not apply to the four negligence actions before it (**CAB 77 [208]**). That is demonstrated by the detailed analysis of the pleadings undertaken by the Full Court in order to determine whether s 494AB was engaged in each of the four proceedings.

5. In relation to the *second* issue (**FRM AS [5]**), the Appellants' framing asserts that "the claim and relief sought … implicitly required the appellants to exercise the power conferred by s 198B to bring the respondent to Australia for treatment". This is based on the submission that "[t]he urgent medical care that [the respondent] sought could only as a matter of substance be obtained in Australia in the time frame sought" (**AS [30]**). There is no finding by the Full Court to that effect, nor any evidence that could support it. Further, as the Full Court found (and the Appellants accepted below), the power in s 198B is not the only power pursuant to which a transitory person may be brought to Australia from a place outside Australia (**CAB 97 [289]**). Similarly, in respect of duty and breach (again, **AS [30]**), there is no mention of Australia in the Respondent's pleadings relied

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1 Dated 8 May 2020. References will take the form **AS [X]** or "**BXD Submissions**".

2 References will take the form **FRM AS [X]**, or "**FRM Submissions**".

upon by the Appellants; s 198B of the Act is a power limited to bringing a transitory person to Australia; and the Appellants have taken such persons to countries other than Australia. The real issue arising is as follows:

> "[D]id s 494AB(1)(a) apply to this proceeding at the time it was instituted and/or at the time of the Full Court's decision."

6. The same is true in relation to the *third* issue (**FRM AS [6]**). The Appellants assume that, at institution, the Respondent's "claim and relief … implicitly required the appellants not to remove the respondent from Australia". The Respondent's pleadings at institution cannot be characterised as so requiring (**ABFM 88 [15.2(b)]**). Nor does the decision in *FRX17* on the interlocutory injunction (**FRM AS [58]**, fn 62) support the submission (**AS [33]**) that the "relief sought [at the time of institution] would have required the respondent to be kept in Australia and not returned to a regional processing country". As to the position at the time of the Full Court's decision, it is the subject of the Respondent's cross-appeal. The real issue is this:

> "[D]id s 494AB(1)(d) apply to this proceeding at the time it was instituted and/or at the time of the Full Court's decision."

7. In the Respondent's submission, each of these questions would be answered, "no."

Part III. Section 78B notice

8. It is not necessary to give notice under section 78B of the *Judiciary Act 1903* (Cth).

Part IV. Contested material facts set out in Appellants' narrative or chronology

A. The case as "instituted"

9. As to **AS [6]**, the Respondent also sought damages. The Respondent sought an order requiring the Appellants to "cease to fail to discharge" an identified duty of care (**ABFM 75**). There is no reference to "psychotic symptoms" in the Respondent's Interlocutory Application (**ABFM 80 [3(c)]**). In other respects, the summary at **AS [6]–[8]** is basically accurate, albeit selective.

B. The case the Respondent sought to "continue" as at the Full Court hearing

10. As to **AS [10]**, the Respondent pleaded two duties: to take reasonable care to prevent her from suffering psychiatric injury, and from suffering physical, emotional and/or child abuse; and, to ensure that service providers exercised such care (**ABFM 101**). As to **AS [14]**, the Appellants by rejoinder relied on s 61 of the *Constitution* (**ABFM 133 [2]**).

11. Otherwise, again the summary at **AS [9]–[14]** is basically accurate, but selective.

C. The Full Court's decision

12. **AS [15]** incorporates **FRM AS [18]–[20]**. As to **FRM AS [18]**, the Full Court held that s 494AB(1)(ca) is not engaged in an action founded, "as in the case here for each of the four proceedings," upon an alleged common law duty, "merely because some of the facts said to give rise to a duty are claimed to be authorised by s 198AB or 198AD" (**CAB 76 [208]**). It said further that the rights or duties sought to be determined "in these four proceedings" arise from the common law, "unconnected with the performance or exercise of any statutory function, duty or power" (**CAB 76 [209]**). Responding to how the Appellants put their case below (**CAB 74 [203]**), the Full Court correctly analysed the pleadings in light of this Court's authorities (**CAB 74–77 [204]–[213]**), and held that s 494AB(1)(ca) was not deprived of meaningful operation even if proceedings such as these are not caught by it (**CAB 78 [216]**). Reference by either party in their pleadings to s 494AB(1)(ca) could not distract from analysis as a matter of substance.

13. As to **FRM AS [19]**, plainly the paragraph in large part relates only to FRM17. It is, though, worth noting (*cf.* the second sentence) that the Respondent did not seek to be brought to Australia, and that while the Full Court was prepared to infer that no visa was granted and that s 198B was the power in fact used to bring her to Australia (**CAB 87–88 [255]**), it did not find that "s 198B was the only power available in the circumstances to achieve that result"; it found the exact opposite—that, "the power in s 198B is not the only power pursuant to which the [Appellants] might bring a transitory person to Australia from a place outside Australia" (**CAB 97 [289]**), noting that the Appellants had not even contended that s 198B was the sole source of power. The reference in the last sentence of **FRM AS [19]** to "the only practicable means" glosses the Full Court's reasons at **CAB 89–90 [262]**, and assumes (contrary to the fact) that the Appellants had shown that s 198B was the only "practicable" power.

14. **FRM AS [20]** likewise mis-describes the Full Court's reasons at **CAB 90 [263]–[264]**, if only because (in addition to other aspects of the Court's reasoning) it held that *FRM17* did not relate to removal because, "no issue of removal ha[d] arisen," and no permanent injunction against removal had been sought (**CAB 90 [264]**).

15. We return to **AS [16]–[18]**. As to the last sentence of **AS [16]**, again the Full Court did not hold that, "a cause of action in negligence did not engage s 494AB(1)(ca)," whether at **CAB 82 [232]–[233]** or elsewhere; rather, it held that the particular causes of action pleaded by the four Respondents did not engage s 494AB(1)(ca) (as to which see [12] above). **AS [17]–[18]** are accurate. So is the chronology.

Part V. Argument on appeal

A. The statutory scheme and its legislative history

16. Section 494AB of the Act bars the institution or continuation of five categories of proceeding, against the Commonwealth,[3] in any court except this Court (s 494AB(3)).

17. To express the scope of the section in this way reveals why the Court would not accept the submission at **FRM AS [23]**, that the purpose of s 494AB was to "limit legal proceedings concerning all aspects of regional processing … subject to the inevitable concession to this Court's jurisdiction under s 75 of the Constitution"; nor the similar submission at **FRM AS [25]**, that its purpose was to, "prevent litigation 'relating to' anything done in relation to regional processing to the full extent that this was constitutionally permissible." Textually, the section manifestly does not seek to limit litigation in this way. In particular, the following matters would be noted:

(a) The provision only bars suits against the Commonwealth (within the extended meaning of that word). Any other suit which "'relate[s] to' anything done in relation to regional processing" (*cf.* **FRM AS [25]**), even one which collaterally challenges some aspect of the legislative framework, is untouched.

(b) It was within legislative capacity to limit or eliminate liability in tort entirely,[4] but this was not done.

(c) As the Full Court observed (**CAB 67 [184], 77–78 [213]–[214]**), the paragraphs of s 494AB(1) do not read, "proceedings related to … section 198B" and "proceedings relating to … Subdivision B of Division 8 of Part 2." (Nor do they bar proceedings, for example, "in relation to regional processing," or "raising an issue in connection with regional processing", or some other such formulation).[5] The proceeding, as the Court emphasised, must relate to the "exercise" or the "performance or exercise" of relevant powers, functions, or duties.

18. In short, if the objective was (as the Appellants submit) to limit proceedings in relation to regional processing to the extent constitutionally permissible, the provision would have been drafted very differently. The Full Court was right to conclude (**CAB 64 [177]**) that

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3 Which has a special meaning, given in s 494AB(4).

4 See, *e.g.*, *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105; *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575; *Capital & Counties plc; Digital Equipment Co Ltd v Hampshire County Council* [1997] QB 1004 at 1045.

5 Compare *DBE17 v Commonwealth of Australia* (2019) 94 ALJR 41 at [26] (Nettle J), observing that "the descriptor 'proceedings relating to' [in s 494AA] is also narrower than 'proceedings ... that raise an issue in connection with' as it appears in s 486B" (emphasis added).

the purpose was to divert certain categories of proceeding into this Court, and was not the broader purpose asserted by the Appellants. Characterising the scope of each of those categories is assisted by legislative history. Relevantly, that includes the following.

19. *First*, s 494AA existed before s 494AB. Section 494AA was enacted in September 2001, and barred proceedings (again, except in this Court) concerning "offshore entry persons" (**CAB 58 [159]**); specifically, "proceedings relating to the entry, status and detention of a noncitizen … and the exercise of powers under new section 198A."[6]

20. *Second*, in 2002 the *Migration Legislation Amendment (Transitional Movement) Act 2002* (Cth) ("***Transitional Movement Act***"): (a) inserted the definition of "transitory person";[7] (b) enacted s 198B—empowering an officer, for a temporary purpose, to bring a transitory person to Australia from a country or place outside Australia;[8] and (c) enacted s 494AB, though without s 494AB(1)(ca).[9]

21. The Explanatory Memorandum, dealing with what would become s 494AB, noted that since September 2001 persons had been taken to Nauru or Papua New Guinea.[10] However, "[t]here [were] 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."[11] The purpose of s 494AB was to limit only "certain legal proceedings" with the object of "stop[ping] legal proceedings being taken in relation to the 'transitory person's' presence in Australia",[12] preventing delays in removal from Australia.[13]

22. *Third*, in 2012 the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) ("***Regional Processing Act***"): (a) repealed s 198A and replaced it with Subdiv B of Div 8 of Pt 2 ("**Subdiv B**")—but without s 198AHA; (b) created Subdiv C of Div 8 of Pt 2, in which s 198B was thereafter located; and (c) inserted s 494AB(1)(ca), which addressed "proceedings relating to the performance or exercise of a function, duty or power under [Subdiv B] in relation to a transitory person."

23. At that time, Subdiv B contained few provisions, namely: (a) s 198AB (designation of a

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6 Explanatory Memorandum, Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001 (Cth), [7]; see also [31]–[41].

7 *Transitional Movement Act*, Sch 1, cl 1. The definition as inserted is set out at **CAB 59–60 [165]**.

8 *Transitional Movement Act*, Sch 1, cl 5.

9 *Transitional Movement Act*, Sch 1, cl 6, see also **CAB 60 [166(e)]**.

10 Revised Explanatory Memorandum, Migration Legislation Amendment (Transitional Movement) Bill 2002 (Cth) ("**2002 Explanatory Memorandum**"), [4].

11 2002 Explanatory Memorandum, [5].

12 2002 Explanatory Memorandum, [7]; see also [35]–[43].

13 2002 Explanatory Memorandum, [6].

country as a regional processing country ("**RPC**")); (b) s 198AD (taking "offshore entry persons" from Australia to an RPC); (c) s 198AE (determinations by the Minister to disapply the requirement to take an offshore entry person to an RPC under s 198AD); and (d) s 198AH (addressing when s 198AD applied to a transitory person brought to Australia under s 198B). It remained exclusively concerned with taking offshore entry persons or transitory persons from Australia to an RPC, rather than the activities of the Commonwealth in relation to a transitory person while in an RPC.

24. *Fourth*, and finally, on 30 June 2015 (though with effect from 18 August 2012), s 198AHA was inserted by the *Migration Amendment (Regional Processing Arrangements) Act 2015* (Cth) ("***RP Arrangements Act***"). The timing of the insertion of the provision is explained by the pendency of *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, the hearing of which commenced on 7 October 2015. Section 198AHA was inserted in Subdiv B.

25. From the foregoing points, the following matters appear:

26. *First*, when s 494AB was enacted in 2002, a good part of the limitation which the Appellants say that s 494AB was intended to effect was already effected by s 494AA.[14]

27. *Second*, at that time, the Appellants' submissions as to the purpose of s 494AB (see [17] above) would have been untenable. Section 494AB prevented suits only in relation to the exercise of powers under s 198B, to the status of a transitory person as an unlawful non-citizen, to the detention of persons under s 198B, and to proceedings relating to the removal of a transitory person from Australia. There would have been no basis for suggesting that a negligence suit based on actions on Nauru were covered by s 494AB—none of the limbs of s 494AB, as it then stood, in any way related to that kind of claim.

28. Rather, the evident purpose of the *Transitional Movement Act*—confirmed in the 2002 Explanatory Memorandum (see [21] above)—was to facilitate the transfer of transitory persons to Australia for limited reasons, but to limit proceedings relating to their presence in Australia, which might prevent removal. The submission that the *Transitional Movement Act* had, in addition, the objective of limiting to the extent constitutionally possible litigation concerning regional processing would plainly be untenable.

29. *Third*, *contra* **FRM AS [25]**, it remained after the *Regional Processing Act* that the purpose of s 494AB cannot have been to limit litigation "in relation to regional processing" to the fullest extent possible. The powers in Subdiv B, addressed by new

[14] Noting that most, if not all, "transitory persons" will also be "unauthorised maritime arrivals," or in the earlier language "offshore entry persons." See, in particular, s 494AA(1)(c) and (d).

s 494AB(1)(ca), were few in number (see [23] above). Most had systemic implications (*e.g.* designating a country as an RPC). Inserting Subdiv B and s 494AB(1)(ca) disclose that the purpose of relevant provisions, read as the legislature's combined will, was different after the *Regional Processing Act* than before. To the purpose outlined in [28] above was added a purpose of ensuring that challenges to systemic aspects of regional processing should be brought in the apex Court. It remained that s 494AB did not relate to powers, functions, duties, etc., actually exercised or utilised in an RPC (*e.g.*, in Nauru).

30. Thus, the Appellants' identification of purpose distils to a proposition that, by inserting s 198AHA *via* the *RP Arrangements Act* (without any further amendment to s 494AB, or s 494AB(1)(ca) in particular), the legislature's purpose became to limit litigation about regional processing to the extent constitutionally permissible. That was manifestly not the purpose of inserting s 198AHA. As the Full Court identified (**CAB 62–64 [170]–[176]**), the purpose was to "put beyond doubt" the capacity of the Commonwealth to take actions in relation to regional processing arrangements, without "purport[ing] to have any effect on the rights of [transitory persons]." There is nothing, textually or contextually, to indicate that by inserting s 198AHA (then to be picked up by s 494AB(1)(ca)), the legislature intended to convert the latter from addressing a narrow range of powers into a bar on litigation concerning "all aspects" of regional processing.[15]

31. Moreover, there is no "limitation" on litigation at all.[16] Rather, there is in s 494AB(1)-(3) a requirement that certain categories of proceeding be commenced in this Court, subject to the possibility of remitter. A broad construction of s 494AB would not achieve a limitation on litigation, but rather a recurring inconvenience to this Court.[17] Given that the effect of s 494AB is to funnel whatever matters it covers into this Court, its purpose must have been (if remitter is possible, notwithstanding the bar against continuing a

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15 Further, the extrinsic material in relation to the *RP Arrangements Act* confirms that the insertion of s 198AHA "[did] not purport to have any effect in itself on the rights of [unauthorised maritime arrivals who have been taken to regional processing countries]": Explanatory Memorandum at [15].

16 Compare s 474. Compare, also, ss 476, 476A, 476B, 477, 477A, 484, 486A and 486K, requiring that proceedings be (i) initiated within specified time limits and (ii) funnelled to the FCC (from where a case can, however, be transferred to the Federal Court). See also: *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 662-663 [22]–[25] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Tang v Minister for Immigration and Citizenship* (2013) 217 FCR 55 at 58 [8]–[9]; *Fernando v Minister for Immigration and Citizenship* (2007) 165 FCR 471 at 476 [22] (Siopis J); *Plaintiff S99/2016 v Minister for Immigration and Border Protection* (2016) 243 FCR 17 at 126-7 [446] (Bromberg J). See further: *DBE17 v Commonwealth of Australia* (2019) 94 ALJR 41 at [26] (Nettle J).

17 In the sense that it would be called upon to hear and determine matters that, were it not for a broadly-constructed s 494AB, would plainly be appropriate for lower courts, including State courts.

proceeding, and the terms of s 494AB(2))[18] to allow this Court in the first instance, in limited cases, to determine whether it should consider the case, *e.g.*, because it is the first of its kind and raises a point of general importance.

32. *Contra* **FRM AS [26]**, s 198AA provides no support for the Appellants' posited purpose, either about s 494AB(1) or more specifically about s 494AB(1)(ca). It speaks to a desire to "address" people smuggling (s 198AA(a)), to ensure that unauthorised maritime arrivals should be taken to RPCs (s 189AA(b)), that the Minister and the Parliament should decide which countries are RPCs (s 198AA(c)), and that such designation need not be determined by reference to the laws of the prospective RPC (s 198AA(d)). It provides no reason for thinking that (*e.g.*) a contract claim for goods sold and delivered to a Commonwealth contractor on Nauru was intended to be limited to the extent constitutionally possible. The Appellants do not explain (beyond rhetorical assertion) how the enforcement of negligence claims by transitory persons in respect of conduct in an RPC could "prevent or impede the implementation of regional processing."

33. Returning to **FRM AS [22]–[23]**, so far as the Appellants rely on their putative purpose to allege error in the Full Court's treatment of the phrase "relating to," their submissions would be rejected. In any event, the Full Court did not "discount" the breadth of the expression; it construed the expression, as required, in its context to determine its breadth (**CAB 66–67 [183]).**[19] Moreover, the Appellants do not identify how the Full Court's approach to the phrase "relating to" led to error.

34. Moving to **FRM AS [28]**, the Full Court's approach to *Shergold*[20] was not inconsistent with either *DB Management*[21] or *Lee*.[22] Those latter cases warn about over-reliance on a presumption against what it is that the legislature has sought to do. But neither says it is

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18 If remitter is not possible, which the Respondent argues is in fact the true position, Parliament can hardly have intended to burden the High Court with an exclusive jurisdiction to hear and determine lengthy trial such as the four cases in question.

19 That this is the correct approach appears from *Travelex Ltd v Commissioner of Taxation* (2010) 241 CLR 510 at 519–520 [25] (French CJ and Hayne J). See also *PMT Partners Pty Ltd (In Liq) v Australian National Parks & Wildlife Service* (1995) 184 CLR 301 at 313 (Brennan CJ, Gaudron and McHugh JJ), 330–331 (Toohey and Gummow JJ). The approach of Toohey and Gummow JJ—to note the breadth of the expression and then to state that the sufficiency of nexus appears from statutory context—is more or less identical to the Full Court's approach at **CAB 66–67 [183]**. See also *Secretary, Department of Family and Community Services v Hayward* (2018) 98 NSWLR 599 at 618–619 [67] (Bathurst CJ, Beazley P, Basten, Gleeson and Payne JJA); *Woodside Energy Ltd v Commissioner of Taxation (No 2)* (2007) 69 ATR 465 at [270] (French J), concerning the phrase 'in relation to'; *Roe v Director General, Department of Environment and Conservation* (WA) (2011) 180 LGERA 38 at 60 [97] (Martin CJ, Murphy JA agreeing); *Workers' Compensation Board (Qld) v Technical Products Pty Ltd* (1988) 165 CLR 642.

20 *Shergold v Tanner* (2002) 209 CLR 126,

21 *Australian Securities and Investments Commission v DB Management Pty Ltd* (2000) 199 CLR 321 at 340 [43] (Gleeson CJ, Gaudron, Gummow, Hayne, Callinan JJ).

22 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 310–311 [314] (Gageler and Keane JJ).

impermissible to have regard to such a presumption, particularly where the very question of construction concerns what it is that the legislature sought to do. In *PT Bayan*,[23] the presumption against withdrawal of jurisdiction was cited as the "relevant general principle" in the construction of a provision which (like s 494AB) plainly intended at least some withdrawal.[24] There is no reason why the principle in *Shergold*, or a cognate principle, cannot be relevant to construing the scope of a withdrawal or restriction of jurisdiction (that is, the class of proceedings to which it applies). Finally, the Appellants do not identify how reference to *Shergold* led the Full Court into error, and it did not.

Inconvenient and improbable outcomes

35. It is relatively easy to see why Parliament intended that this Court should deal with proceedings having to do with validity of decisions under, *e.g.*, s 198AB. It is harder to see that the same outcome could have been intended where an injured person seeks relief for damage as a result of actions of the Commonwealth (or a private contractor engaged by the Commonwealth), which happen to have occurred in a regional processing context.

36. The broader the connection allowed by the words "relating to" in s 494AB(1)(a), (ca), and (d), the more anomalous and bizarre are the consequences of the interpretation. On the Appellants' interpretation, the following proceedings, among many others, would be barred in all courts save the High Court:

(a) a proceeding by a supplier of goods or services to the Commonwealth or its agent on Nauru, where such goods or services are used in relation to a transitory person, seeking damages for breach of contract;

(b) a negligence or statutory no-fault compensation proceeding for personal injury arising from (*e.g.*) a workplace accident or motor vehicle collision on Nauru, where the defendant is a servant or agent of the Commonwealth acting in the course of his or her functions or duties in relation to a transitory person;

(c) a claim under equal opportunity laws (*e.g.*, the *Sex Discrimination Act 1984* (Cth)) by a Commonwealth officer where the facts arise from that officer's presence on Nauru discharging a function (*e.g.*, supervising payments authorised by s 198AHA(2)(b)) in relation to a transitory person (*e.g.*, because the payments are being made to providers of services such as IHMS); and

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23 *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1.

24 *PT Bayan* (2015) 258 CLR 1 at 15–16 [29] (French CJ, Kiefel, Bell, Gageler and Gordon JJ). The terms of the provision there being construed appear at the top of CLR 16.

(d) potentially, a criminal proceeding in relation to an offence committed by a Commonwealth officer or contractor performing functions or duties in relation to a transitory person on Nauru.

37. Further, on the Appellants' approach, the "Commonwealth" (s 494AB(4)) could sue in any court of competent jurisdiction. However, given that a counterclaim is a separate proceeding,[25] a counterclaim would be unavailable except in this Court. A case where a non-Commonwealth plaintiff sues a non-Commonwealth defendant and the defendant makes a third-party claim against the "Commonwealth" is likewise vexed.

38. It is very difficult to discern any sensible reason why Parliament might have intended such outcomes. The Full Court did not err by rejecting a purpose and a construction that would lead to such results.

B. Construction and application of s 494AB(1)(ca)—Ground 1

39. The Respondent's central proposition is this: whether the Appellants' acts to which she refers in her pleading were done by the performance or exercise of a function, duty, or power under Subdiv B (noting that s 198AHA provides only for capacity) in relation to her is irrelevant to her claim. It is no more than the setting, or background circumstance. All material facts can be pleaded without reference to statute. None of the elements of her cause of action—duty, breach causing loss or damage[26]—depend on the statute.

40. The Respondent does not submit that statute is unimportant. She submitted below (**CAB 39 [102]**) and submits again that consistency of a duty with statute is relevant.[27] But that does not mean that her proceeding "relates" to the "performance or exercise of a function, duty or power under Subdiv B," as required by s 494AB(1)(ca). The need to consider the coherence of a duty with the Act as a whole does not involve any material relationship with any particular performance or exercise of a function, duty or power.

41. Even if s 198AHA provided capacity for the Commonwealth to undertake the acts pleaded by the Respondent, that would not suffice. Some corporations derive capacity to enter into contracts from s 124(1) of the *Corporations Act 2001* (Cth): a proceeding in which a fact in issue is whether s 124(1) provided capacity to enter into a particular contract might be "in relation to" s 124(1); but if the pleading is just that the corporation entered into a contract, that proceeding is not meaningfully "in relation to" s 124(1) (even if, ultimately, that is the source of capacity so to contract).

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25 *Homart Pharmaceuticals Pty Ltd v Careline Australia Pty Ltd* [2018] FCAFC 105 at [33].

26 *Wallace v Kam* (2013) 250 CLR 375 at 380 [7] (French CJ, Crennan, Kiefel, Gageler and Keane JJ).

27 *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649 at 676 [103(p)] (Allsop P).

42. It is the same here. No point is taken in the Respondent's proceeding about a want of capacity, or the scope of a capacity or authority. Nothing turns on whether actions taken by the Commonwealth fall within the description of the capacity in s 198AHA(2).

No intersection between s 198AHA and s 494AB(1)(ca)

43. By her Amended Statement of Claim, the Respondent did not allege that the Appellants' duty of care arose by reference to s 198AD or actions taken under s 198AHA. The pleading (**ABFM 91** *et seq*.) proceeds without reference to either section, and indeed the only statutory reference is to the designation of Nauru as an RPC under s 198AB (**ABFM 93 [4]**). The initial statement of claim is not relevant—the Appellants have not submitted that s 494AB prohibits amendment to address any possible want of jurisdiction.

44. As to the submission that the "capacity" to take particular actions was "critical to the foundation for the negligence action" (**FRM AS [29]**), that submission would not be accepted for reasons given at [40]–[42] above. The capacity for a corporation to enter into a contract is "foundational", in some sense, to a proceeding for breach of contract; but if no issue about capacity or the scope of the capacity-conferring provision arose, it could not be said that the proceeding "related" meaningfully to that provision. Notwithstanding the Appellants' acceptance that s 198AHA "confers a bare capacity or authority to act" (**FRM AS [31]**), they repeatedly attempt to equate s 198AHA(2) with statutory power—see, *e.g.*, the quote from *Kirkland-Veenstra* at **FRM AS [29]**, a case concerning power rather than bare capacity,[28] and the submissions at **FRM AS [35]**.

45. In relation to **FRM AS [32]**, it should be noted that the Full Court spent as long as it did on the difference between capacity and power because, before that Court, the Appellants contended that s 198AHA conferred power rather than mere capacity. They now adopt the Full Court's (and the Respondent's) interpretation, consistently with the Commonwealth's position in the other cases to which it refers.

46. **FRM AS [33]** addresses the Full Court's conclusion that the exercise of a "capacity" conferred by s 198AHA does not constitute the "performance or exercise of a function, duty or power under [Subdiv B]." The Appellants seek to demonstrate error by an illustration: where "legal consequences follow from a failure … to exercise a statutory capacity with reasonable care, that proceeding 'relates to' the exercise of the statutory

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[28] See *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 at 259–260 [130] (Crennan and Kiefel JJ): "*In a case where a general duty of care is alleged, it is said that the statute cannot itself be regarded as the source of the duty; rather it is the foundation or setting for it. The duty of care is said to rise independently of the statute. The existence of statutory powers is necessary, but not sufficient, to give rise to a duty of care*." (Emphasis added, footnotes omitted.)

capacity in question." But that illustration is inapt, for reasons that align with the two reasons the Full Court gave for its conclusion.

47. The *first* reason is that s 494AB(1)(ca) does not use the illustration's language, "relates to the exercise of a statutory capacity." This was the Full Court's point at **CAB 71–72 [195]**—the language of s 494AB(1)(ca) is "function, duty or power," and a capacity is none of those things. The Appellants' response to this point (**FRM AS [36]**)—in effect, that the words "function, duty or power" were not used in s 494AB(1)(ca) with "taxonomical exactness", and the phrase should be read broadly—would not be accepted, for two reasons. *First*, it relies upon the Court accepting that the purpose of s 494AB was to "compendiously … limit litigation relating to regional processing." As outlined above, that overstates what s 494AB does, and what its purpose may be seen to be. *Second*, Parliament was concerned with taxonomical exactness, as shown by s 191AHA(3)-(4) which are concerned precisely with the nature of the authority conferred by the section.

48. The *second* reason why the Appellants' illustration in **FRM AS [33]** is inapt is because it omits the word "under," which was significant in the Full Court's reasoning.

49. **FRM AS [34]–[35]** press the proposition that capacity affects lawfulness, and therefore may affect rights. The Full Court was of the same view (**CAB 69–70 [190]**). The Appellants seem to assume that the Full Court found that s 198AHA and s 494AB(1)(ca) can never interact, but it did not. It found that "the capacity or authority conferred by s 198AHA(2) does not intersect with s 494AB(1)(ca) in any manner relevant to the present proceedings" (**CAB 73–73 [201]**). Again at (**CAB 72–73 [197]**), its analysis was directed to the source of the power to affect the rights of the transitory person which are sought to be determined in the proceeding.

50. In different proceedings, the presence or absence of capacity may be the issue upon which a transitory person's right turns (*e.g.*, false imprisonment (**CAB 69–70 [190]**)). But here, capacity to (for instance) procure the provision of health services to the Respondent *via* IHMS was not in issue, need not be determined, and has nothing to do with whether the Respondent would ultimately prevail. Capacity has no effect on the relevant rights, being those which are sought to be determined in the proceeding.

The meaning of "under" in s 494AB(1)(ca)

51. **FRM AS [38]–[42]** pick up the same point. **FRM AS [39]** makes the same erroneous assumption addressed at [49]–[50]. Challenging a payment "in relation to a transitory person" (note—not "transitory persons"), the capacity for which payment putatively came from s 198AHA could not, on the Full Court's approach, be done consistently with

s 494AB(1)(ca). That is because, in such a proceeding, the right in issue would turn on the presence or otherwise of capacity.

52. **FRM AS [40]** seeks to distinguish *Tang*[29] on the basis that the language there in issue—"a decision under an enactment"—is removed from "function, duty or power under [Subdiv B]." But *Tang* is not the only case holding that the word "under" naturally directs attention to a source of power. It is well-established, for example, that a matter "arises under a law made by the Parliament" where "the right or duty in question in the matter owes its existence to federal law or depends upon federal law for its enforcement."[30]

53. At **FRM AS [41]** the Appellants return to the submission that, because "the purpose of s 494AB is to limit litigation in relation to regional processing," the Parliament would not have "intended to exclude action taken pursuant to authority conferred by s 198AHA from the coverage of s 494AB(1)(ca)." The submission as to purpose would not be accepted, for reasons give above. And the Full Court's construction does not exclude all action taken pursuant to authority conferred by s 198AHA (see [49]–[51] above). It excludes proceedings where presence or absence of capacity under s 198AHA has no substantial connection with rights in issue in the proceeding. This is re-iterated at **CAB 75–76 [207]**.

Negligence proceedings

54. **FRM AS [43]–[45]** mischaracterise the Full Court's judgment. It never held that a negligence proceeding could not be caught by s 494AB. As outlined at [12] above, it held only that s 494AB did not apply to "each of the four proceedings" (**CAB 76 [208]**), or "in these four proceedings" (**CAB 76 [209]**), because the rights or duties in issue in these proceedings arise from the common law, "unconnected with the performance or exercise of any statutory function, duty or power" (**CAB 76 [209]**).

The Full Court's application of s 494AB(1)(ca) to this proceeding

55. At this point these submissions return to consideration of the BXD Submissions, and in particular **AS [19]–[28]**.

56. At **AS [21]–[23]**, the Full Court is said to have erred by failing to find that the Respondent's case as instituted was caught by s 494AB(1)(ca), because then (unlike in the Amended Statement of Claim) her pleading referred to s 198AHA as a source of

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

30 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 154 (Latham CJ); *CGU Insurance Limited v Blakeley* (2016) 259 CLR 339 at 351 [28] (French CJ, Kiefel, Bell and Keane JJ)

authority for certain actions by the Appellants.[31] But the fact that it was possible to amend the pleading of the cause of action so that there was no reference to s 198AHA shows that s 198AHA was only ever background or context, and that it had no substantial or material connection with the matters in issue with the proceeding. It need not have been pleaded. To find that a proceeding was without a Court's jurisdiction because it unnecessarily, perhaps irrelevantly, referred to a section, when nothing about that reference gave rise to an issue requiring determination in the proceeding, would (*cf.* **AS [22]**) very much involve prioritising form over substance.

57. At **AS [24]–[25]**, in addition to constructional points already addressed, the Appellants say that the Full Court erred because actions pleaded by the Respondent "were engaged in within the context of the regional processing regime," because any duty "had to be consistent with that regime," and therefore that "the proceeding 'related to' [Subdiv B]" (**AS [25]**). With the last line, the Appellants expressly makes the mistake that the Full Court said they impliedly made, at **CAB 77–78 [214]**. The question is not whether the proceeding "relates to Subdiv B" or raises issues "within the context of the regional processing regime"; it is whether it "relates to the performance or exercise of a function, duty or power under Subdiv B … in relation to the transitory person." For reasons the Full Court gave, it did not.

58. **AS [26]** submits that the Full Court erred at **CAB 82 [232]** by determining that there was no inconsistency between the Respondent's pleaded duty and Subdiv B. In that paragraph, the Full Court considered only the statutory duty in s 198AD(2) of the Act. Whether or not the Full Court should have decided this issue of inconsistency does not detract from its earlier analysis (**CAB 75–78 [205]–[214]**), and that is so even if the Appellants had put the compatibility of the pleaded common law duty of care with the Act in issue in a way that was "non-colourable" (**FRM AS [48]**). In so far as the Appellants rely on a so-called "regional processing regime in Subdiv B as a whole" (**FRM AS [48]**), it is inapt to treat Subdiv B (even with s 198AHA) as a comprehensive statutory regime governing all conduct in a RPC.[32]

59. **AS [27]** relies upon the fact that the parties had joined issue, in pleadings, about whether s 198AHA could authorise actions to be taken in relation to the Respondent, given that

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31 See in particular **ABFM 85–86 [9]**.

32 Further, contrary to the Appellants' submissions (**FRM AS [50]**), the statutory scheme did not require the Respondent to be taken to or to remain in Nauru—the statutory duty under s 198AD is not absolute and is not confined to any particular RPC—and in any event the Respondent does not challenge or impugn the action of the Appellants in taking her to Nauru.

she had been determined to be a refugee.[33] But this joinder was artificial and inconsequential. The Respondent did not mention s 198AHA in her amended pleading; she had pleaded merely the taking of actions by the Appellants and their legal consequences, without identifying (which it was unnecessary, probably irrelevant, to do) the source of power or capacity to have taken those actions (**ABFM 95 [9]**). The Appellants, in their defence, pleaded that actions they took were taken using s 198AHA (**ABFM 117–121 [9]–[9A]**). This pleading was of no consequence to the proceeding. It would not have required determination. It seems to have been pleaded solely for the purpose of seeking to attract s 494AB(1)(ca). The Full Court did not err by considering this pleading exchange not to be significant.

C. Construction and application of s 494AB(1)(a)—Ground 2

60. The Appellants' substantial argument is in the FRM Submissions. They identify their submission as having been that "s 494AB(1)(a) is engaged where a party seeks orders that would require an officer to exercise [the] power [in s 198B], whether those orders are sought expressly or as a matter of substance." In cases (such as the present) where an order under s 198B was not expressly sought, the Appellants' submission proceeds that, in substance, the Respondent sought transfer to Australia under s 198B because: *first*, the urgent medical care that she sought could only as a matter of substance be obtained in Australia in the time frame sought (**AS [30]**); *second*, s 198B was the only power available for transfer to Australia (***FRM* AS [53]**). Neither step should be accepted.

61. As to the first, whether or not medical care of the kind required was only available in Australia is a matter of evidence. There was none below, and no finding to that effect. The Court could not take judicial notice that appropriate medical care could not quickly have been made available elsewhere (*e.g.*, Japan, Taiwan, Singapore, New Zealand).[34]

62. As to the second, it is directly inconsistent with the Full Court's finding (from which there has been no appeal) that, "the power in s 198B is not the only power pursuant to which the [Appellants] might bring a transitory person to Australia from a place outside Australia" (**CAB 97 [289]**);[35] and it is inconsistent with the way that the Appellants

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33 See *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 71–72 [46] (French CJ, Kiefel and Nettle JJ).

34 Travel for medical purposes to Taiwan, Singapore, and New Zealand in similar contexts is considered in, *e.g.*, *CCA19 v Minister for Home Affairs* [2019] FCA 939 at [25]; *BKP19 v Minister for Immigration, Citizenship and Multicultural Affairs (No 2)* [2019] FCA 761; *EMK18 v Minister for Home Affairs* [2018] FCA 1357 at [5]; *DRB18 v Minister for Home Affairs* [2018] FCA 1163 at [31]–[32], and *Plaintiff S99* (2016) 243 FCR 17 at [390], [399]. See Respondents' Further Book of Materials, page 19, lines 15–41.

35 Other mechanisms available to procure transfer to Australia include (but may not be limited to) the grant of a special purpose visa under s 33, or the grant of a visa under s 65 (subject to valid application).

advanced their case below.

D. Construction and application of s 494AB(1)(d)—Ground 3

63. The Full Court found that, because the Respondent sought (after amendment) an injunction restraining removal from Australia, the proceeding fell within s 494AB(1)(d) at the time of its decision. At institution, however, she did not seek such relief, and so it did not so fall. The Appellants submit (**AS [33]**) that this elevates form over substance, because at institution, "the relief sought would have required the respondent to be kept in Australia and not returned to a regional processing country under s 198AD." This submission should not be accepted, for *two* reasons.

64. *First* (as outlined above), at institution the Respondent had not sought to be brought to Australia, so she cannot have sought to prevent her removal from Australia. If she had been taken (for example) to New Zealand for treatment, s 198AD and s 494AB(d) would be irrelevant. *Second*, in any event paragraph 15.2 of her Statement of Claim (**ABFM 88**) does not have the effect for which the Appellants contend. It pleads that Nauru is not "currently" an appropriate environment for the Respondent. This does not prevent removal to another RPC, nor to Nauru if it were to become an "appropriate environment."

Part VI. Argument on notice of contention and cross-appeal

65. The notice of contention and cross-appeal involve the Respondent advancing again the construction of s 494AB(1)(a), (ca), and (d) which she pressed below, and which the Full Court rejected at **CAB 67–68 [185]**. That construction is that the provisions are directed to proceedings the reality and substance of which[36] is a challenge to:

(a) actual or threatened exercise of (or failure to exercise) the power conferred by s 198B (para (a));

(b) the actual or threatened performance or exercise (or failure to perform or exercise) a function, duty or power located in Subdiv B, in relation to a transitory person (para (ca))[37];

(c) actual or threatened removal of (or failure to remove) a transitory person from Australia under the Act, through one of the powers by which officers (as defined in s 5(1) of the Act) may effect that removal (para (d)).

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36 *SZQGA v Minister for Immigration and Citizenship* (2012) 204 FCR 557 at 579 [96] (Barker J)

37 It is significant that s 494AB(1)(ca) has the limiting words 'in relation to a transitory person'. They are consistent with the provision being directed to a challenge to the exercise of powers in a specific case of an individual, rather than, as the Respondents would have it, more general matters such as entering into agreements with various providers, who might have provided services to many transitory persons.

A. Construction

66. The inclusion of the words "relating to" in each paragraph of s 494AB(1) gives rise to constructional choices.[38] Regard is to be had to context, purpose, and the "subject matter of the inquiry, the legislative history and the facts of the case,"[39] to determine the nature and degree of the intended relationship or connection.

67. The Respondent has addressed legislative history and purpose, and the consequences of construction,[40] above (see [16]–[38]). None of these supports a broad reading of the words "relating to" in the paragraphs of s 494AB(1).

68. Having set out legislative history (**CAB 57–64 [157]–[176]**), the Full Court rightly concluded that it was not possible to discern one overarching purpose of s 494AB(1) other than that, so far as constitutionally possible, certain proceedings are not to be instituted or continued except in this Court (**CAB 64 [177]**). It also rightly concluded that the withdrawal of jurisdiction from every court in the country other than this Court (including the general jurisdiction of State Supreme Courts) was relevant to construction (as to which see [34] above) (**CAB 64–65 [178]**).

69. The Full Court emphasised (**CAB 67 [184]**) particular words—in s 494AB(1)(a), "to the exercise of powers"; in s 494AB(1)(ca), "to the performance or exercise of a function, duty or power"; in s 494AB(1)(d), "to the removal of a transitory person from Australia under the Act". It was right so to emphasise, though in the case of s 494AB(1)(d), the Respondent would also emphasise the words "under the Act." The Respondent's construction outlined at [65] above gives these words some work to do.[41]

70. A reason why the Full Court was correct to emphasise these words is that words of that kind do not appear in all of the paragraphs of s 494AB(1). Section 494AB(1)(c), for example, might have been drafted to read, "proceedings relating to the exercise of the power under ss 189 and 196 to detain a transitory person". In that case, the focus (as in s 494AB(1)(a)) would have been on the power; as it is, the focus of s 494AB(1)(c) is simply on a status. In the same way, s 494AB(1)(a) might have been drafted, "relating to the bringing of a transitory person to Australia from a country or place outside Australia," rather than as referring specifically to use of a power. In short, the reference in some (but not all) of the paragraphs of s 494AB(1) to "performance" or "exercise" of a power,

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38 *DBE17 v Commonwealth* (2018) 361 ALR 423 at 429 [28] (Mortimer J).

39 *Tang* (2013) 217 FCR 55 at 57 [5]; see also cases cited at ft 19 above.

40 *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* (1981) 147 CLR 297.

41 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71] (McHugh, Gummow, Kirby and Hayne JJ).

function or duty indicates that the fact of performance or exercise should be of some moment in the proceeding, rather than merely existing as a background circumstance.

71. The Full Court said (at **CAB 67–68 [185]**) that, "[a]s will be seen, [it] did not proceed" on the basis of the Respondent's submission that "the scope of the three relevant paragraphs of s 494AB(1) may be limited to proceedings challenging the exercise of the relevant statutory power or powers, or the assertion of a duty to exercise that statutory power or powers, or a proceeding to enforce the performance of a relevant duty." That is because, so the Court said, "it approached the issue without construing the provisions to contain unexpressed limitations" (**CAB 67–68 [185]**).

72. Thereafter, the Full Court's attention was primarily on construction of s 494AB(1)(ca). Its reasoning focussed first upon the (now agreed) fact that s 198AHA conferred a capacity (**CAB 68–71 [186]–[194]**), then upon the significance of the phrase "function, duty or power" (**CAB 71–72 [195]**), and finally upon the word "under" (**CAB 72–74 [196]–[202]**). As outlined above, the Respondent submits that the Full Court's reasoning was correct in each respect.

73. What the Court did not go on to do was explain why, at **CAB 67–68 [185]**, it had rejected the Respondent's construction—which focussed at least in substantial degree upon the nature of the connection required by the phrase "relating to" in each relevant paragraph, as distinct from the other textual matters mentioned in [72] above.

74. For the reasons given above at [16]–[38] above, a narrow approach to that phrase was appropriate; and an approach which cohered with the purpose of filtering into this Court matters that were potentially deserving of its attention, rather than matters that were plainly appropriate for lower courts. The construction that best achieved this purpose[42] was the one outlined at [65] above. The requisite relationship between the proceeding and the "exercise of power", or the "performance or exercise of a function, duty or power" or the "removal … under the Act," is one whereby the "exercise", the "performance or exercise", or the "removal," is challenged. Especially is this so if remitter is not possible.

75. In the Full Court, the Appellants stressed that remitter was possible.[43] That position invited attention to the question of what mischief s 494AB, if construed as contended for by the Appellants, was directed to. If these proceedings were commenced in this Court, and could then have been remitted to lower courts (being the very courts in which the Appellants say the Parliament was determined to stop proceedings from being instituted

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42 *Acts Interpretation Act 1901* (Cth) section 15AA.

43 *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at [20].

or continued), there is no limitation on litigation at all. All that Parliament would have done is create a burden for this Court to consider and dispose of remitter applications, including in respect of urgent injunctions such as were brought in these four proceedings.

76. On the other hand, if a proceeding caught by a paragraph of s 494AB(1) cannot be remitted, this would be important in making constructional choices. And the better view is that remitter is not possible.[44]

B. Application

Section 494AB(1)(ca)

77. Had the Full Court adopted the construction outlined at [65]–[74] above, that would have provided an additional reason for concluding that the Respondent's proceeding was not caught by s 494AB(1)(ca) either at institution or during its continuation. The complete cause of action is pleaded without reference to a function, duty or power under the Act. There is no challenge (direct or collateral), to the validity of any actual or threatened exercise of (or failure to exercise) any function, duty, or power. Quite simply, an action in tort is not a challenge to an exercise of power.[45] In characterising this proceeding, it is not relevant whether statutory powers were used, or omitted to be used, or whether the Appellants exercised non-statutory executive power under s 61 of the *Constitution*. In characterising the proceeding, it is not even necessarily relevant whether the Appellants acted with lawful authority.[46] All that matters, where an action or course of conduct by either Appellant is a material fact, is that they acted or engaged in that course of conduct.

78. It is not pleaded that any action (or inaction) occurred in the performance/exercise of functions, duties or powers found in the Act, whether in relation to the Respondent as "a transitory person" or otherwise. In particular, the pleaded duties do not refer to any function, duty, or power under the Act (and even if they did, still the proceeding would not "relate to" that function, etc.). The pleadings of breach and causation likewise do not

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44 *Cf. Plaintiff S156/2013* at [20]. There, the Court appears to have proceeded on the basis that, on remittal, the court would have been exercising jurisdiction under s 476(1) of the Act. However, if a matter is remitted pursuant to s 44 of the *Judiciary Act*, the court to which the matter is remitted exercises jurisdiction conferred by s 44(3): see *Johnstone v The Commonwealth* (1979) 143 CLR 398 at 408-9 (Aickin J); *Re Jarman; Ex parte Cook* (2997) 188 CLR 595 at 633-4 (Gummow J); *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601. This Court in *Plaintiff S156/2013* did not consider s 494AA(2), and did not have the benefit of argument from a contradictor on the question whether there was power to remit.

45 See, e.g., *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 35 [82] (McHugh J, Gleeson CJ agreeing), 78–79 [218] (Kirby J), 96 [270] (Hayne J, Gummow J relevantly agreeing at 56 [149] and see also at 59 [159] and following).

46 "On the current state of the authorities, the negligent exercise of a statutory power is not immune from liability simply because it was within power, nor is it actionable in negligence simply because it is ultra vires": *Crimmins* at 35 [82] (McHugh J, Gleeson CJ agreeing).

make any reference to functions, duties, or powers under the Act.

79. In short, the Act may form the "background to the activities"[47] of the Appellants, but it does not do any more. Section 494AB(1)(ca) is unmet.

Section 494AB(1)(a)

80. The Full Court rightly held (**CAB 95 [279]**) that s 494AB(1)(a) was not attracted. Had it accepted the Respondent's construction, it could have done so more briefly, by holding that because there was no challenge to an actual or threatened exercise of (or failure to exercise) the power conferred by s 198B, s 494AB(1)(a) was not attracted.

Section 494AB(1)(d)

81. By amendment, the Respondent sought relief requiring her and her family to be resettled in a country that was a signatory to the Refugees Convention and not to take any steps to remove her from Australia until then; alternatively, requiring the Appellants not to take steps to remove her to an RPC where she would be at risk of suffering harm; alternatively, requiring the Appellants not to take steps to remove her from Australia (other than to a Refugees Convention signatory) until she had reached maximum medical improvement, provided that her psychiatric condition would not be at risk of deterioration again (**CAB 94 [276]**). The Full Court held that, so far as she sought this relief, her proceeding related to her removal from Australia under the Act, and fell within s 494AB(1)(d) (**CAB 94–95 [281]**). This conclusion involved error. None of the injunctions sought was predicated on challenge to an exercise or non-exercise of power, and they did not seek to enforce the performance of statutory duty. They sought, rather, to procure the discharge by the Appellants of a common law duty of care.

Part VII. Estimate of hours

82. The Respondent estimates that 1.25 hours will be required to present oral argument in this appeal together with the appeal in *DIZ18*.

Dated: 5 June 2020

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[47] *Sullivan v Moody* (2001) 207 CLR 562 at 582 [62] (the Court).

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: No M 28 of 2020

Minister for Home Affairs
Commonwealth of Australia
Appellants

and

Marie Theresa Arthur as Litigation Representative for BXD18
Respondent

ANNEXURE

A LIST OF STATUES AND PROVISIONS REFERRED TO IN THE RESPONDENTS SUBMISSIONS

Constitution ss 61, 75 (as currently in force)
Acts Interpretation Act 1901 (Cth) s 15AA (as currently in force).
Corporations Act 2001 (Cth), s 124(1) (as currently in force).
Migration Act 1958 (Cth) ss 33, 42, 189, Part 2 Dov 8 Subdiv B (ss 198AA-198AJ), 198B, 494AA, 494AB (Compilation No 137).
Migration Act, 1958 (Cth) *s494AA (as at September 2001).*
Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cth) (as enacted).
Migration Amendment (Regional Processing Arrangements) Act 2015 (Cth) (as enacted).
Migration Legislation Amendment (Transitional Movement) Act 2002 Sch 1, cl 1, cl 5, cl 6 (as enacted).
Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 (Cth) Sch.1 *(*as enacted).
Regional Processing Arrangements) Act 2015 (Cth) (as enacted).
Sex Discrimination Act 1984 (Cth) (as currently in force).