HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M29/2020
File Title:	Minister for Home Affairs & Anor v. FRX17 as litigation repr
Registry:	Melbourne
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellants
Date filed:	26 Jun 2020

Important Information

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY **NO M 29 OF 2020**

BETWEEN: **MINISTER FOR HOME AFFAIRS**

First Appellant

COMMONWEALTH OF AUSTRALIA

Second Appellant

AND: **FRX17 AS LITIGATION REPRESENTATIVE FOR FRM17**

Respondent

SUBMISSIONS OF THE APPELLANTS IN REPLY

Filed on behalf of the Appellants by:

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Date of this document: 26 June 2020

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PART I FORM OF SUBMISSIONS

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

PART II REPLY TO THE SUBMISSIONS OF THE RESPONDENTS

2. This reply adopts the submissions in reply in the *DLZ18* proceeding. It is only necessary here to explain why, in respect of this proceeding, the respondent materially misstates the nature of this proceeding against the appellants when she submits that FRM17's claims derive "from what the appellant did, not the legislation" [**RS [5(a)]**, that she did not "allege that a duty of care arose '*because*' the claimants were taken to Nauru; that was merely a background fact" [**RS [6(a)**], and that "in no sense, did the claims invoke, rely or depend upon the *Migration Act*. The *Migration Act* was only background to the claims" [**RS [12]**; see also **RS [30], [36], [37], [40]**].

3. The originating application in this proceeding identified three matters as the basis for an alleged duty of care "in exercise of its powers under s198AHA of the *Migration ACT 1958* and/or s61 of the Constitution".[1] The first matter referred expressly to being taken to Nauru under s 198AD. The second and third referred to activities, which would be authorised by s 198AHA. The respondent's apparent invitation to ignore this material because the originating application need only identify the parties and the relief sought is untenable [**RS [37(a)**]. The appellants were entitled to notice, somewhere, of the basis for the claimed relief. That notice was provided by the "Details of claim" section in the originating application.

4. In the further amended statement of claim, the respondent alleged that the appellants were "responsible for creating the RPC-1 environment on Nauru, and transferring [FRM17] to the island of Nauru, the environment of which is harmful to [FRM17]".[2] This was said to have been done "in the exercise of its powers under s 198AHA and/or section 61 of the Constitution".[3] Among other things, the appellants were said to have "assumed responsibility for the treatment of [FRM17's] mental health through its MOU and

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1 **BFM 7**.

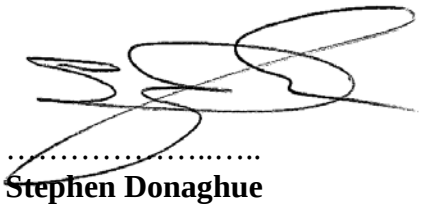
2 Further amended statement of claim at [27(g)] [**BFM 35**].

3 Further amended statement of claim at [27] [**BFM 34**].

Administrative Arrangements with Nauru",[4] the latter having been made under s 198AHA.[5] The appellants were also said to have controlled the conditions of FRM17's detention by reason of certain contracts entered into under s 198AHA.[6] Further, the respondent alleged that one of the "failures" of the appellants was that FRM17 was "removed to detention on Nauru", which allegedly caused her injury.[7]

5. Reading the further amended statement of claim fairly, it cannot meaningfully be said that the performance or exercise of functions, duties or powers under ss 198AD and 198AHA are merely matters of background.

10 **Dated: 26 June 2020**



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4 Further amended statemnet of claim at [34(d)] [**BFM 42**].

30 5 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 72 [46] (French CJ, Kiefel and Nettle JJ).

6 Further amended statement of claim at [14] [**BFM 23**], [16] [**BFM 25**], [17D] [**BFM 27**].

7 Further amended statement of claim at [28(b)] [**BFM 35**]. See also at [32(l)] [**BFM 39**].