IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M68 of 2015

BETWEEN

PLAINTIFF M68 / 2015

Plaintiff

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First Defendant

COMMONWEALTH OF AUSTRALIA

Second Defendant

TRANSFIELD SERVICES (AUSTRALIA) PTY LTD (ACN 093 114 553)

Third Defendant

PLAINTIFF'S SUBMISSIONS

5 October 2015

(filed pursuant to the orders of Nettle J of 1 October 2015)

Date of document: 5 October 2015

Filed on behalf of the plaintiff by:

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1. In order to ensure that the case can proceed without the need for an adjournment, the plaintiff is prepared to consent to a form of amendment to the Special Case at [88]-[89] as set out in the annexure to these submissions to be filed today. The plaintiff will, however, seek an order that the plaintiff's costs thrown away by reason of that amendment be paid by the first and second defendants. For the reasons that follow, those proposed amendments would not affect the manner in which the questions reserved for the opinion of the Full Court should be answered.

2. **Future conduct.** It remains the case that if the plaintiff were to be returned to Nauru she would be subject to two prohibitions on leaving the Nauru RPC without approval: s 18C(1) of the *Asylum Seekers (Regional Processing Centre) Act 2012* (Nr) (**RPC Act**) and rule 3.1.3 of the Centre Rules read with s 9(1) of the RPC Act.

3. As to the "open centre arrangements" three things should be said. **First**, the statutory basis for those arrangements is opaque. The current form of the special case refers to those arrangements having been made under s 7 of the RPC Act. The proposed amendments to the special case refer instead to a purported 'exercise of discretion' under s 18C and rule 3.1.3 (and specifically notes that the plaintiff does not concede that that discretion is or was validly exercised as alleged). **Secondly**, it is by no means clear that that is a valid "exercise of discretion": what is seemingly there involved is what has been described by the Nauruan authorities as an "approval in a general way", such that there will no longer be any eligibility criteria for participation in the arrangements. It is, at the least, highly doubtful that it would be a valid exercise of the power of "prior approval" conferred by s 18C and rule 3.1.3 to prospectively declare that the prohibitions on leaving or attempting to leave the RPC in fact apply to no-one. **Thirdly**, those "arrangements" are not the subject of legislation or delegated legislation, enacted or even in draft form. Nor has any there been any written change to the Centre Rules: note s 6(1)(b) of the RPC Act. That a Government Gazette was issued stating the Government of Nauru's future intention to implement the expanded arrangements does not detract from their transience or their fragility. The repeal of reg 9(6)(b) and (c) of the *Immigration Regulations 2014* (Nr) on 4 October 2015[1] does not alter any of the above.

4. In those circumstances, it cannot be safely assumed that the plaintiff would not be detained on her return to Nauru, particularly when the legislative and regulatory framework that remains in place there currently provides otherwise (contra the Supplementary Commonwealth Submissions - **SCS** - at [3]). Further, the plaintiff remains subject to the exercise of powers at the RPC

[1] See *Immigration (Amendment) Regulations No. 5 2015* (Nr).

permitting authorised officers to conduct frisk, scan and strip searches: PS [24]. The Commonwealth control over that detention would also continue: see PS at [53]-[69].[2] And, for essentially similar reasons, the plaintiff's claims regarding s 198AD(2) of the *Migration Act 1958* (Cth) –the **Act**- and art 5(1) of the Constitution of Nauru remain viable: contra SCS at [6], [7].

5. **Questions relating to past conduct.** The plaintiff's challenge to the Commonwealth's past conduct (including its entry into the Transfield contract and payments made thereunder) also remains on foot. So too does the plaintiff's related challenge to the validity of s 198AHA of the Act and the other provisions of Commonwealth legislation and delegated legislation impugned by the plaintiff. That the plaintiff's detention under a particular set of arrangements might *possibly* be different to that to which she was subject in the past, does not mean that there is no foreseeable consequence in the grant of relief in respect of the past arrangements. Given the diaphanous nature of the expanded open centre arrangements, it is entirely possible that there will be a reversion to the past arrangements or a version thereof. In those circumstances, the Court can more readily conclude that the plaintiff has standing to challenge the Commonwealth's past conduct.[3] Relief directed to the Commonwealth's past conduct would directly and more precisely inform the Commonwealth of matters bearing upon the exercise of power to avoid future conduct not in accordance with law.[4] That is particularly the case where there are "unresolved proceedings"[5] (here Proceedings No. M80 of 2015), the scope and possible outcome of which would be informed by a determination of the lawfulness of the Commonwealth's past conduct here. The plaintiff's case here is therefore "not moot".[6]

5 October 2015

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[2] In that regard, it can also be noted that the list of documents produced in (partial) compliance with the order of Nettle J of 2 October reveals a thorough involvement of the Commonwealth in the operation of the Nauru RPC.

[3] *Wragg v NSW* (1953) 88 CLR 353 at 392 per Taylor J (McTiernan J, Williams J agreeing at 389, Fullagar and Kitto JJ agreeing at 391). Cf *Gardner v Dairy Industry Authority (NSW)* (1977) 18 ALR 55 where the arrangements the subject of the challenge had been superseded by amending legislation.

[4] *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at [56] per Gaudron J; *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82 at [55] per Gaudron and Gummow JJ.

[5] *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1 at [29] per French CJ.

[6] Ibid.