

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

M 28 and M 30 of 2020

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

BETWEEN:

MINISTER FOR HOME AFFAIRS

First Appellant

COMMONWEALTH OF AUSTRALIA

Second Appellant

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and

DJA18 as litigation representative for DIZ18

Respondent

RESPONDENTS' OUTLINE OF ORAL SUBMISSIONS

Legend

FRM AS refers to the Appellants' submissions in the *FRM17* matter.

BXD RS refers to the Respondent's submissions in the *BXD18* matter.

30 **DIZ RS** refers to the Respondent's submissions in the *DIZ18* matter.

Part I. Certification

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

Part II. Propositions which the Respondents intend to advance in oral argument

A. Construction of s 494AB

2. The Appellants' case rests on an asserted purpose of s 494AB being to "prevent litigation 'relating to' anything done in relation to regional processing to the full extent that this was constitutionally permissible" (**FRM AS [25]**) or "to limit legal proceedings concerning all aspects of regional processing" (**FRM AS [23]**; see also **[26], [36], [41]**). This unfounded premise should not be accepted.
- 10 3. The Appellants' asserted purpose is inconsistent with the statutory text, which is far more targeted (**BXD RS [16]–[18]**). The language of s 494AB(1) can be contrasted with other provisions – *e.g.* s 486B(1) and s 486C(1)(a), (b): "proceedings ... that raise an issue in connection with", or "a proceeding ... that raises an issue ... that relates to".
4. Section 494AB did not have the Appellants' asserted purpose when it was enacted (**BXD RS [21]**), and none of the subsequent amendments reveal that it came to have that purpose (**BXD RS [22]–[24]**).
5. In particular, the purpose of inserting s 198AHA into Subdiv B of Div 8 of Part 2 was manifestly not to broaden the scope of s 494AB(1)(ca) (**BXD RS [29]–[30]**).
- 20 6. Section 198AA does not support the Appellants' asserted purpose (**BXD RS [32]**). The Appellants have not explained how their construction would advance the object of addressing people smuggling and its undesirable consequences, or the ability to take unauthorised maritime arrivals to a regional processing country.
7. The Appellants have not identified how anything said by the Full Court on "relating to", or on the recognised presumption against withdrawal of jurisdiction, led to error by that Court in its construction of s 494AB. In fact, there was nothing erroneous in the Full Court's approach (**BXD RS [33]–[34]**).
8. The Appellants' wide purpose would lead to inconvenient and improbable outcomes, which are not to be attributed to the legislature (**BXD RS [35]–[38]**).
- 30 9. The Full Court was right to conclude that it is not possible to discern one overarching purpose of s 494AB(1), other than the purpose that certain categories of proceedings must be commenced in this Court (**BXD RS [68]**).
10. Section 494AB(1) is directed to a proceeding, the reality and substance of which comprises or involves a challenge to one of the matters identified in s 494AB(1) (**BXD RS [65]**). This

construction coheres with a purpose of filtering into this Court matters deserving of its attention (**BXD RS [74]**). *A fortiori* if remittal is not possible.

11. Alternatively, the Full Court’s construction and application of s 494AB(1) was correct.

B. Section 494AB(1)(ca) was not attracted

12. *BDX18* and *DIZ18* are actions in negligence, where: (1) pleaded facts occur in the context of the regional processing arrangements; and (2) the “capacity” of the Commonwealth to have engaged in some of the acts pleaded is confirmed by provisions in Subdiv B. These matters are insufficient for the actions to be “relating to” the performance or exercise of a function, duty or power under Subdiv B (s 494AB(1)(ca)).

10 13. The text of s 494AB(1)(ca) is not “relating to [Subdiv B]”. The necessary nexus is with “the performance or exercise of a function, duty or power under” Subdiv B. The need to consider the consistency of a posited duty with the statute will not, when the court comes to consider that issue, involve any material relationship with the actual performance or exercise of any statutory function, duty or power (**BXD RS [39]–[40]**).

14. Nothing turns on whether actions taken (or not taken) by the Commonwealth were in the exercise of a capacity conferred or confirmed by s 198AHA(2) (**BXD RS [42]–[50]**). Section 494AB(1)(ca) applies to the performance or exercise of functions, duties or powers; a capacity is none of these things.

20 15. Subdiv B does not comprise or contain a statutory regime governing the conduct of the Commonwealth or its agents in or in relation to regional processing countries. The “capacity” conferred or confirmed by s 198AHA does not restrict or regulate the Commonwealth’s actions and does not displace general law duties or obligations. The respondents do not challenge any action in taking them to Nauru under s 198AD, and s 198AD does not say anything about their rights while in Nauru.

16. The Full Court’s review of pleadings reveals there was no material connection between the matters in issue and the performance or exercise of a function, duty or power under Subdiv B. At most, Subdiv B was relevant at the level of background or context (**BXD RS [56]**).

30 17. (**Notice of Contention in *BDX18*; Cross-Appeal in *DIZ18***) Nothing in the actions brought by the Respondents involves a challenge to the performance or exercise of a function, duty or power under Subdiv B (**BXD RS [77]–[79]; DIZ RS [24]**).

C. Section 494AB(1)(a) was not attracted

18. The Full Court did not find, and there was no evidence, that the medical care sought by *BXD18* was only available in Australia (**BXD RS [61]**).

19. Further, it was common ground below that s 198B was not the only power available to enable BXD18 to be brought to Australia: **CAB 97 [289] (BXD RS [62])**.
20. **(Notice of Contention in BXD18; Cross-Appeal in DIZ18)** Nothing in the actions brought by the Respondents involves a challenge to an actual or threatened exercise of (or failure to exercise) the power under s 198B **(BXD RS [80]; DIZ RS [26])**.
21. **(Cross-Appeal in DIZ18)** Further, although DIZ18 did seek an order requiring transfer to Australia, she was agnostic as to which power might be used to effect it. Choice by the Appellants to use s 198B rather than other powers does not convert the negligence action into one relating to the exercise of power under s 198B **(DIZ RS [25]–[28])**.

10 **D. Section 494AB(1)(d) was not attracted**

22. At institution, BXD18 did not seek to be brought to Australia; thus, she cannot have sought to prevent her removal from Australia. Her Statement of Claim does not have the effect that discharge of the pleaded duty of care requires BXD18 to be kept in Australia **(BXD RS [63]–[64])**.
23. **(Notice of Contention and Cross-Appeal in BXD18)** Although BXD18 sought relief preventing removal from Australia, her case (including as to relief) was based on a common law duty of care, and not on a challenge to an exercise or non-exercise of power under the Act **(BXD RS [81])**.
24. **(Cross-Appeal in DIZ18)** The relief sought by DIZ18 did not require that she be kept in Australia **(DIZ RS [33]–[34], [37])**, her removal was not imminent **(DIZ RS [35]–[36])**, and in any event she did not challenge a removal, threat to remove, or failure to remove her under the Act **(DIZ RS [30])**.

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E. Remittal is not possible

25. The better view is that this Court cannot remit a proceeding within s 494AB(1), and, further, it cannot be continued in any other court **(BXD RS [75]–[76])**. For the reasons advanced in support of the Notice of Contention, only few proceedings come within s 494AB(1) and thus cannot be remitted (or continued in any other court).

Dated: 31 August 2020



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Chris Horan



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Lisa De Ferrari