

BETWEEN: **MINISTER FOR HOME AFFAIRS and ors**
Appellants
AND **DMA18 as litigation guardian for DLZ18 and anor**
Respondents

RESPONDENTS' OUTLINE OF ORAL ARGUMENT

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PART I: CERTIFICATION

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

PART II: OUTLINE OF PROPOSITIONS

1. The respondents have two central propositions:
 - (a) Any bar imposed by s494AB(1) of the *Migration Act* is limited only to certain types of proceedings;
 - (b) The Full Court was correct in concluding that the bar did not apply to these proceedings.

Interpretation – the restriction is limited

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2. In truth, s494AB(1) does not actually bar proceedings; it only imposes a restriction so that certain proceedings must be commenced in the High Court.
 3. The restriction only arises in specific circumstances:
 - (a) The statutory emphasis is upon *proceedings*. The application requires a characterisation of the nature of any proceedings, and the rights and obligations which they set out to resolve;
 - (b) It is then necessary to determine whether those proceedings *relate to* the exercise of a described statutory power or described circumstances.

4. The operation of the restriction is limited by reference to the terms of the statutory provisions upon which the appellants rely:
- (a) Section 494AB(1)(a) – *the exercise of powers under s198B*. The word *under* is important – it gives a particular focus;
 - (b) Section 494AB(1)(ca) – *the performance or exercise of a function, duty or power under* a specific subdivision of the *Migration Act*. Again, the word *under* is important;
 - (c) Section 494AB(1)(d) – *the removal of a transitory person from Australia*.

Aides in interpretation

- 10 5. These matters assist in interpreting s494AB(1):
- (a) A statute should not be interpreted as withdrawing or limiting jurisdiction unless the implication appears “*clearly and unmistakably*”:
 - *Shergold v Tanner* (2002) 209 CLR 126 at [34];
 - Full Court [178];
 - (b) When determining whether a connection can be drawn between two matters by the phrase “*relating to*” requires a full consideration of the context and the facts:
 - *Travelex Ltd v Commissioner of Taxation* (2010) 241 CLR 510 at [25];
 - Full Court [183];
- 20 (c) The prerequisite that the proceedings relate to something done “*under*” a statutory provision considerably narrows the operation of the restriction, requiring some close tie between the nature of the claim and the statutory provision;
- (d) There is nothing in the legislative history which assists the appellants’ argument;
 - (e) To the extent that the purpose behind s494AB(1) is that contended for by the appellants, that purpose is not advanced by imposing the restriction in the way proposed by the appellants.

Did the Full Court arrive at the correct result?

6. A characterisation of the nature of the proceedings is achieved by an examination of the initiating process and pleadings, resolving the question as one of substance, not form. This was the task undertaken by the Full Court:

- Full Court [104], [126], [154], [181].

7. There was no error in the conclusion at which the Full Court arrived:

(a) The Full Court carried out a close analysis of the initiating process and pleadings:

- Full Court in DMA18 [125]-[134]; in FRX17 [105]-[124].

10 (b) The Full Court concluded that the proceedings were a common law negligence claim, and did not *relate to* the relevant provisions of the *Migration Act*:

- Full Court [203]-[216]; see also DMA18 [225]-[230], [265]-[272]; and FRX17 [218]-[224], [256]-[264];

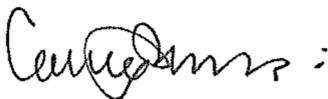
(c) That conclusion was open on the pleadings and undoubtedly correct; the claim derives from the breach of a duty of care created by the relationship between the parties:

- Further materials in DMA18 pp 211-235; in FRX17 pp 17-44;

20 (d) The nature of that relationship was one well-recognised under the general law as giving rise to a duty of care; in addition, the appellants' conduct was of a kind which triggered a duty;

(e) As such, the *Migration Act* is only relevant as background; the respondents' claims do not relate to the exercise of statutory powers under the *Migration Act* – indeed, as the Full Court observed, it may even be Nauruan law which governs these proceedings:

- *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 461, 479;
- *Birch v Central West* (1969) 119 CLR 652 at 658-659;
- Full Court [209], [215].



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