HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY **NO M 29 OF 2020**

MINISTER FOR HOME AFFAIRS

BETWEEN: **COMMONWEALTH OF AUSTRALIA**

Appellants

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

Respondent

SUBMISSIONS OF THE APPELLANTS

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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. This appeal concerns s 494AB of the *Migration Act 1958* (Cth) (**the Act**), which is headed "Bar on certain legal proceedings relating to transitory persons". Section 494AB(1) provides that proceedings against the Commonwealth[1] of certain kinds "may not be instituted or continued in any court" (except the High Court[2]). Three kinds of proceedings are identified in s 494AB(1) as follows:

> (a) proceedings relating to the exercise of powers under section 198B;
>
> (ca) proceedings relating to the performance or exercise of a function, duty or power under Subdivision B of Division 8 of Part 2 in relation to a transitory person; and
>
> (d) proceedings relating to the removal of a transitory person from Australia under this Act.

3. The issues in this appeal arise in a context where:

   (a) the respondent sued the appellants in the tort of negligence, alleging a breach of a duty of care said to arise because the appellants had caused her to be taken to Nauru pursuant to s 198AD and had taken certain actions in Nauru under s 198AHA (both of which are found in Subdivision B of Division 8 of Part 2); and

   (b) the respondent sought relief, including injunctive relief, about the ongoing medical treatment that the appellants were to provide her (being treatment that, in practice, required her to remain in Australia).

   In that context, the issues are as follows.

4. ***First***, did 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, having regard to the significance of Subdivision B of Division 8 of Part 2 (in particular, ss 198AD and 198AHA) in the respondent's negligence claim? The Full Court answered "no", holding that s 198AHA does not "intersect" with s 494AB(1)(ca) at all, and separately that s 494AB(1)(ca) does not apply

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1 Defined in s 494AB(4) to include an officer of the Commonwealth, and any other person acting on behalf of the Commonwealth.

2 The exception for the High Court arises from s 494AB(3).

to actions in negligence. The appellants contend that this answer, and the reasons for it, are wrong.

5. ***Second***, did 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, because the claim and relief sought explicitly or implicitly required the appellants to exercise the power conferred by s 198B to bring the respondent to Australia for treatment? The Full Court answered "no". The appellants contend that this answer was wrong, and that the Full Court elevated form over substance in answering that question as it did.

6. ***Third***, did 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, because the claim and relief sought explicitly or implicitly required the appellants not to remove the respondent from Australia? The Full Court answered "no". The appellants contend that this answer was wrong, and that the Full Court again elevated form over substance in answering that question as it did.

PART III SECTION 78B NOTICE

7. No notice need be given under s 78B of the *Judiciary Act 1903* (Cth).

PART IV REPORTS OF DECISIONS BELOW

8. The judgment of the Full Court of the Federal Court has not been reported. Its medium neutral citation is *FRM17 v Minister for Home Affairs* [2019] FCAFC 148.

PART V FACTS

A. The case as "instituted"

9. On 20 December 2017, the respondent commenced proceedings against the appellants by originating application filed in the Federal Court. The indorsement on the originating application was four paragraphs long [Joint Appellants' Book of Further Materials (**ABFM) 4-10**)].

10. By paragraph one, it claimed that the second appellant (the Commonwealth), "in exercise of its powers under s 198AHA of the *Migration Act 1958* and/or s 61 of the Constitution owes a duty of care to [the respondent]". This was said to be because the Commonwealth "transferred the [respondent] from Australia to Nauru pursuant to s 198AD and 198AHA of the Migration Act", "maintains a significant involvement in the day-to-day operation of regional processing activities in Nauru in respect of the [respondent]" and "maintans a

significant involvement in the day-to-day health care, education, housing and welfare of the [respondent]". By paragraph two, it claimed that the Commonwealth was in breach of that alleged duty of care because it had "failed to provide [the respondent] with access to safe and appropriate medical facilities and treatment". By paragraph three, it claimed that, as a result, she was "suffering significant harm and is at immediate risk and is exposed to the risk of further serious harm including significant psychiatric and psychological harm and death". And by paragraph four, it claimed that she "should be granted injunctive relief applied for to remedy the breach".

11. The prayer for relief sought an interlocutory order that the appellants be restrained from "[d]etaining [the respondent] and her mother and sister on Nauru or at any other off-shore processing centre not within Australia" and from "[n]ot permitting [the respondent] from travelling to another country for the purpose of obtaining urgent psychiatric medical attention" (paragraph 5). It also sought an order that the appellants "provide on an ongoing basis the psychiatric and medical care to [the respondent] as shall be clinically recommended by treating child psychiatrists or suitably qualified medical pratitioners who are providing ongoing care to the [respondent]" (paragraph 7). It contemplated the provision of "urgent psychiatric care that is clinically recommended where that care is not provided to the [respondent] in Nauru or in any other off-shore environment" (paragraph 6).

12. The respondent also filed an interlocutory application [**ABFM 11-15**]. Among other things, it sought an order that the respondent and her mother be "immediately transfer[red] … to a location where the [respondent] can receive the Specified Treatment", being "immediate comprehensive psychiatric assessment by a qualified specialist in child psychiatry", "treatment in an inpatient child mental health facility with appropriate supervision" and "an evaluation to clarify the [respondent's] diagnosis" together with "any associated or additional treatment which may be identified as necessary or desirable as a result of the carrying out of the foregoing treatment" (order 5).

13. After a contested interlocutory hearing, on 22 December 2017 Murphy J ordered that "[a]s soon as reasonably practicable and until the hearing and determination of the action or further order the Respondents will place the Applicant in a specialist child mental health facility with comprehensive tertiary level child psychiatric assessment in accordance with the recommendations of Professor Louise Newman dated 19 December,

21 December and 22 December 2017, or as agreed between the parties". Professor Newman recommended that the respondent "be urgently admitted to a specialist tertiary level child psychiatric facility".[3] She opined that the respondent's condition could not be safely managed in the Nauruan community,[4] and that Nauru lacked an appropriate facility for her medical care.[5] In order to comply with Murphy J's order, on 24 December 2017 the respondent was brought to Australia under s 198B.

B. The case the respondent sought to "continue" at the time of the Full Court hearing

14. By further amended statement of claim dated 6 March 2019 [**ABFM 16-45**], the respondent claimed damages and an injunction that the appellants "cease to fail to discharge the responsibility that they have assumed to procure specialist child psychiatric health treatment" by procuring certain treatment and care identified in paragraph B of the prayer for relief.

15. The only pleaded cause of action was the tort of negligence. Relevantly, the respondent alleged that the Commonwealth owed her a duty of care that was variously described in the pleading, but can for present purposes be described as a duty of care relating to the respondent's shelter, accommodation, education and healthcare.[6] Although not without difficulty to disentangle, the alleged foundation for this duty (or these duties) lay in the Commonwealth having transferred the respondent to Nauru pursuant to s 198AD,[7] exercising certain "powers under s 198AHA of the Act and/or [s] 61 of the Constitution"[8] and knowledge that the Commonwealth was alleged to possess.[9]

16. The respondent alleged that the appellants breached the duty (or duties) of care identified above by various omissions,[10] and by removing her to detention on Nauru and requiring

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3 See *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* (2018) 262 FCR 1 at 12 [25] (Murphy J).

4 See *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* (2018) 262 FCR 1 at 12-13 [27] (Murphy J).

5 See *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* (2018) 262 FCR 1 at 12-13 [27], 13-14 [29] (Murphy J). See also at 15-16 [35].

6 See Further Amended Statement of Claim at [18], [22A], [31] [**ABFM 27, 30 and 38**].

7 See Further Amended Statement of Claim at [3(b)], [9(d)-(e)] [**ABFM 18 and 21**].

8 See Further Amended Statement of Claim at [9], [14], [15], [16], [17], [27] [**ABFM 20, 23-26 and 34**].

9 See Further Amended Statement of Claim at [21], [22], [30] [**ABFM 28-30**].

10 See Further Amended Statement of Claim at [32] [**ABFM 38-41**].

her to remain on Nauru.[11] These breaches were alleged to have caused her "substantial and irreparable injuries".[12] It was alleged that there was "a real and imminent risk" that if she did not "obtain appropriate treatment" and was not "removed from the conditions causing or contributing to her injuries" then "she will suffer substantial and irreparable physical harm or death and/or substantial and irreparable mental harm".[13]

17. By their amended defence [**ABFM 46-71**], the appellants denied the existence of a duty while the respondent was on Nauru,[14] and denied breach[15] and causation.[16] The appellants also alleged that the imposition of a duty of care was incompatible with the statutory duty to take her to Nauru under s 198AD and the purpose of Subdivision B of Division 8 of Part 2.[17] The appellants also alleged that the Federal Court did not have jurisdiction, by reason of s 494AB(1)(a), (ca) and (d).[18]

C. The Full Court's decision

18. ***As to s 494AB(1)(ca)***, in summary, the Full Court held that "a proceeding is related to the exercise of a function, duty or power **under** the relevant subdivision of the *Migration Act* only if that subdivision gives to the relevant performance or exercise of a function, duty or power in relation to a transitory person the capacity to affect the rights of the transitory person which are sought to be determined in the proceeding" [**CAB 73 [197]**]. Any actions taken under s 198AHA were said not to satisfy this criterion, "because it [s 198AHA] is not a source of power to engage in those actions" but merely "confers a bare capacity that enables the Commonwealth to be conferred with powers or functions or duties under the laws of a regional processing country" [**CAB 73 [199]**]. The Full Court also held that s 494AB(1)(ca) does not apply to proceedings in the tort of negligence, because the "right or duties" to be determined "arise from the common law" [**CAB 76 [209]**] and because unlawfulness (in the sense of action that is ultra vires the statute) is not an element of the cause of action [**CAB 78 [216]**]. Applying this construction, the Full Court held that s 494AB(1)(ca) did not apply to this proceeding either when it was

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11 See Further Amended Statement of Claim at [28] [**ABFM 35**].
12 See Further Amended Statement of Claim at [35] [**ABFM 42**].
13 See Further Amended Statement of Claim at [35] [**ABFM 42**].
14 Amended Defence at [18], [19], [20], [22A], [31], [38]-[39] [**ABFM 63-65 and 67-68**].
15 Amended Defence at [32] [**ABFM 67**].
16 Amended Defence at [35] [**ABFM 68**].
17 Amended Defence at [39] [**ABFM 68**].
18 Amended Defence at [40]-[48] [**ABFM 68-70**].

initiated or as currently on foot. That was so despite the respondent's pleaded reliance on s 198AHA [**CAB 80 [224]**].

19. ***As to s 494AB(1)(a)***, the Full Court stated that the correct approach required characterisation of the proceedings as a matter of substance rather than form [**CAB 66 [181]**]. Yet despite that statement, it held that the proceedings did not "relate to" s 198B notwithstanding the fact that the respondent sought to be brought to Australia; that s 198B was the power used to bring her to Australia; and that s 198B was the only power available in the circumstances to achieve that result. The Full Court reached that conclusion by focusing on the relief explicitly sought. It held that s 494AB(1)(a) did not apply "because FRM17 did not in terms invoke [s 198B] or seek that it be exercised and did not obtain an order requiring the Commonwealth parties to exercise that power" [**CAB 89 [261]**, emphasis added].[19] On that reasoning, it was enough to avoid s 494AB(1)(a) that the relief sought was expressed generally, being capable of satisfaction by taking the respondent to any country with the requisite medical facilities. To enliven s 494AB(1)(a), it was held to be necessary that the orders sought can only be complied with by exercising a relevant power, rather than that power be one means (apparently including the only practicable means) of complying with the order [**CAB 89-90 [262]**].

20. ***As to s 494AB(1)(d)***, the Full Court again focused on the express terms of the relief sought. It seemingly held that, if the final or interlocutory orders sought did not expressly prevent the respondent from being removed from Australia, or if the proceedings did not directly challenge an exercise of power with the result of removal (eg under s 198AH(1)(c)), the proceedings did not "relate to" the removal of that person from Australia [**CAB 90 [263]-[264]**].[20] Section 494AB(1)(d) was therefore not enlivened.

PART VI ARGUMENT

A. The statutory scheme and its legislative history

21. The terms of s 494AB(1) are relevantly set out at the commencement of these submissions. To apply that section, a court must characterise a proceeding so as to determine whether it "relates to" one of the identified subject matters in the paragraphs

[19] See also **CAB 92 [271], CAB 94 [278]-[279], CAB 97 [288]-[290]**.

[20] See also **CAB 94 [281]**, **CAB 98 [291]**, where the reasoning is more clearly exposed in relation to different respondents.

of s 494AB(1). That must be done as a matter of substance rather than form. To this extent, the Full Court made no error [**CAB 56 [154], 66 [181], [183]**].

22. The importance of the expression "relating to" should not be understated: it is a broad expression[21] that "should not be read down in the absence of some compelling reason for doing so".[22] So long as a proceeding has a relationship with a subject matter in s 494AB(1)(a), (ca) or (d) that is more than accidental, insubstantial or remote, textually that is sufficient to engage s 494AB(1).

23. The Full Court accepted that "relating to" is a "broad expression", but then immediately discounted that breadth by observing that the precise degree of connection is a question of statutory construction that is affected by the "subject-matter of the inquiry, the legislative history and the facts of the case".[23] [**CAB 66 [183]**] However, the fact that the precise degree of connection may be affected by the context is not a reason to construe the words "relating to" narrowly. To the contrary, giving effect to the ordinary meaning of the words is consistent with the purpose of s 494AB, which is to limit legal proceedings concerning all aspects of regional processing (including in relation to the presence of transitory persons in Australia), subject to the inevitable concession to this Court's jurisdiction under s 75 of the Constitution. The acknowledgment of that entrenched jurisdiction as a limitation on legislative power does not deny that purpose.

24. The legislative history confirms the purpose of s 494AB identified above. The Revised Explanatory Memorandum that accompanied the 2002 Bill that first inserted s 494AB stated that that section would "stop legal proceedings being taken in relation to the 'transitory person's' presence in Australia".[24] Presence in Australia was the focus because

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21 *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 at 365 (Brennan J), 367 (Dawson J), 374 (Toohey and Gaudron JJ), 376 (McHugh J); *North Sydney Council v Ligon 302 Pty Ltd* (1996) 185 CLR 470 at 478 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 387 [87] (McHugh, Gummow, Kirby and Hayne JJ).

22 *Kennon v Spry* (2008) 238 CLR 366 at 440 [217] (Kiefel J); *Fountain v Alexander* (1982) 150 CLR 615 at 629 (Mason J); *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 330 (Toohey and Gummow JJ).

23 Citing *Travelex Ltd v Commissioner of Taxation* (2010) 241 CLR 510 at [25].

24 Revised Explanatory Memorandum, Migration Legislation Amendment (Transitional Movement) Bill 2002 (Cth) at 3 [7].

s 494AB(1) as originally enacted did not contain paragraph (ca),[25] and the original paragraphs are more overtly concerned with a transitory person's presence in Australia.

25. The purpose of limiting legal proceedings concerning the identified subject-matters did not alter when s 494AB(1)(ca) was inserted in 2012. That amendment simply expanded the subject matters of legal proceedings that were subject to s 494AB. In this regard, it is significant that s 494AB(1)(ca) was inserted at the same time as Subdivision B of Division 8 of Part 2.[26] That subdivision provides for "regional processing", including by providing that the Minister may designate a country as a regional processing country (s 198AB). If that is done (as, of course, it has been), then unless the Minister determines that s 198AD does not apply (s 198AE), or the regional processing country will not receive a person (s 198AG), "[a]n officer must, as soon as reasonably practicable, take an unauthorised maritime arrival to whom this section applies from Australia to a regional processing country" (s 198AD(2)). The evident purpose of s 494AB(1)(ca) (particularly when read together with s 494AA(1)(e)) was to prevent litigation "relating to" anything done in relation to regional processing to the full extent that this was constitutionally permissible. That is consistent with the Explanatory Memorandum, which stated:[27]

> The effect of this amendment is that legal proceedings against the Commonwealth relating to any performance or exercise of a function, duty or power under new Subdivision B of Division 8 of Part 2 of the Migration Act in relation to a transitory person cannot be instituted or continued in any court. However, this amendment does not affect the jurisdiction of the High Court under section 75 of the Constitution.

26. The reason that Parliament sought to limit such litigation "relating to" regional processing appears from s 198AA, which sets out the purpose of Subdivision B of Division 8 of Part 2. Specifically, it records the Parliament's view that "people smuggling, and its undesirable consequences including the resulting loss of life at sea, are major regional problems that need to be addressed" and that "unauthorised maritime arrivals … should be able to be taken to any country designated to be a regional processing country".[28] That statement of purpose supports the conclusion that the role of ss 494AA(1)(e) and

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25 See *Migration Legislation Amendment (Transitional Movement) Act 2002* (Cth) Sched 1 item 6.

26 See *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth).

27 Revised Explanatory Memorandum, Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012 (Cth) 35 [257].

28 See also the Second Reading Speech for the Migration Legislation Amendment (Regional Processing and Other Measures) Bill: *Parliamentary Debates*, House of Representatives, 21 September 2011 at 10,945.

494AB(1)(ca) is to constrain, to the extent constitutionally permissible, the scope for litigation to prevent or impede the implementation of regional processing.

27. Section 198AHA was not part of Subdivision B of Division 8 of Part 2 when it was first enacted. It was inserted with retrospective effect by the *Migration Amendment (Regional Processing Arrangements) Act 2015* (Cth). Subdivision B (including s 198AHA) and s 494AB must, however, "be read together as a combined statement of the will of the legislature" and "in the light of that amendment".[29] When so read, it is apparent that the retrospective insertion of s 198AHA cannot have changed the purpose of s 494AB(1)(ca). It simply further expanded the proceedings to which the provision applies.

28. Finally, contrary to the Full Court's reasoning, no narrow meaning of "relating to" is supported by the "general proposition that a law of the Commonwealth is not to be interpreted as withdrawing or limiting a conferral of jurisdiction unless the implication appears clearly and unmistakably"[30] [**CAB 65 [178]**]. That proposition in fact has no relevant application here, because by enacting s 494AB the Parliament expressly restricted the jurisdiction of all courts other than the High Court. A rule of construction that is directed to preventing inadvertent implied limitations on the jurisdiction of courts is of no assistance in ascertaining the extent of an express restriction.[31]

B. Construction of s 494AB(1)(ca) – Ground 1

29. Both when this proceeding was instituted and when the Full Court made its decision, the appellants' duty of care was expressly alleged to arise due to the respondent's transfer to Nauru under s 198AD (which is found in Subdivision B) and due to actions taken under s 198AHA (which is also found in Subdivision B). As pleaded, the proceedings expressly concerned the consequences of those actions. Further, in so far as it was alleged that other actions should have been taken in order not to breach the alleged duty of care, the capacity of the appellants to take those actions depended in part on s 198AHA. That capacity was critical to the foundation for the negligence action, for "[t]here can be no duty to act in a

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29 *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463; *Acts Interpretation Act 1901* (Cth) s 11B(1).

30 *Shergold v Tanner* (2002) 209 CLR 126 at [34].

31 See, eg, *Australian Securities and Investments Commission v DB Management Pty Ltd* (2000) 199 CLR 321 at 340 [43] (Gleeson CJ, Gaudron, Gummow, Hayne, Callinan JJ); *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 310-311 [314] (Gageler and Keane JJ).

particular way unless there is authority to do so. Power is therefore a necessary condition of liability but it is not a sufficient condition".[32]

30. In light of those matters, this proceeding had more than an insubstantial relationship to the performance of the duty to remove under s 198AD, the taking of actions under s 198AHA and the facilitation of the function of regional processing generally through exercising authority under s 198AHA. The proceeding "related to" each of those matters, and was therefore a proceeding of a kind that attracted the bar in s 494AB(1)(ca). The Full Court erred in holding otherwise. It justified its conclusion in three ways, each of which was erroneous.

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

31. The Full Court's first justification for its conclusion concerning s 494AB(1)(ca) was that s 198AHA does not "intersect" with that provision. That was said to follow because: (i) s 198AHA confers a bare capacity or authority to act; and (ii) it "follows" that a proceeding relating to such a bare capacity or authority does not relate to "a function, duty or power" within s 494AB(1)(ca) [**CAB 73-74 [201], [203]**].

32. The first of those two steps is not controversial. The Commonwealth accepts (and, indeed, affirmatively contended in both *Plaintiff M68* and *Plaintiff S195*) that s 198AHA is "directed to nothing other than conferring statutory capacity or authority on the Executive Government to take action which is or might be beyond the executive power of the Commonwealth in the absence of statutory authority".[33] It is the Full Court's second step that should be rejected, for three reasons.

33. ***First***, contrary to the Full Court's reasoning [**CAB 71 [194]**], the second step does not "follow" from the first. There is no reason why a proceeding that takes as its factual substratum various "actions" of the Commonwealth Executive does not "relate to" a "function, duty or power" within s 494AB(1)(ca), simply because the action involved the exercise of a statutory capacity that does not directly affect rights. To require an effect on rights is to substitute a different test for that enacted by the Parliament. To illustrate, where it is asserted in negligence proceedings that legal consequences follow from a

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[32] *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 at 254 [112] (Gummow, Hayne and Heydon JJ) (emphasis added). See also at 260 [131] (Crennan and Kiefel JJ).

[33] *Plaintiff S195/2016 v Minister for Immigration and Border Protection* (2017) 261 CLR 622 at [27], approving *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [181] (Gageler J).

failure by the Commonwealth Executive to exercise a statutory capacity with reasonable care, that proceeding "relates to" the exercise of the statutory capacity in question, because it is about the legal consequences of what the Executive did or failed to do in the exercise of the capacity in question. Given the language the Parliament has used, it is beside the point whether s 198AHA confers "power" to affect "rights".

34. Alternatively, even if an effect on rights is required, the Full Court was wrong to find that s 198AHA has no such effect. In particular, it was wrong to dismiss as "trite" the submission that the "authority" provided by s 198AHA can be a "necessary ingredient of the validity … of governmental action" [**CAB 69 [190]**]. Indeed, it is the effect of a conferral of capacity or authority on the validity of executive action that explains the words "without otherwise affecting the lawfulness of that action" in s 198HA(3): the word "otherwise" acknowledges that s 198AHA(2) has some such effect: cf **CAB 70 [192]**. Given that s 198AHA confers authority to "take … any action", including action that could not lawfully have been taken in the absence of s 198AHA, it is artificial to read the phrase "function, duty or power" as failing to intersect with anything done under s 198AHA. Indeed, to read the phrase in that way fails to recognise that a Commonwealth official who has capacity under s 198AHA to exercise a power conferred by another source (such as Nauruan law) nevertheless remains a member of the Commonwealth Executive who, even when exercising power under Nauruan law, performs a Commonwealth "function". It is only on that basis that the conferral of a "capacity for executive detention so as to allow for the exercise of power from another legislative source"[34] could plausibly engage Ch III.

35. The Full Court seemingly viewed the conferral of capacity or authority by s 198AHA as doing no more than providing an empty vessel into which regional processing countries may pour powers pursuant to their own laws: **CAB 73 [199]**. That view is mistaken. It substantially understates the significance of s 198AHA. For example, it was s 198AHA that authorised the Commonwealth to enter into the administrative arrangements with Nauru [**ABFM 294-309**] upon which the respondent relies in her further amended

[34] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 111 [184] (Gageler J), upon which the Full Court relied: **CAB 69 [189]**.

statement of claim.[35] Similarly, it is s 198AHA(2)(b) that provides any necessary statutory authority for the Commonwealth to spend appropriated funds in connection with regional processing.[36] Those examples illustrate that it is not inapt to describe s 198AHA as conferring "power". Indeed, it is so described in both the heading to s 198AHA, and in decisions of this Court.[37] Once so described, the intersection between s 198AHA and s 494AB(1)(ca) is obvious.

36. ***Second***, the Full Court's reasoning assumes the existence of pure taxonomical distinctions between "powers", "functions", "duties", "authorities" and "capacities" [**CAB 71-72 [195]**]. While such distinctions are important in some legislative contexts, when used in a jurisdictional bar that compendiously seeks to limit litigation relating to regional processing, there is no basis to conclude that, by using the words "function, duty or power", the Parliament sought to leave a gap that would permit litigation concerning actions authorised by s 198AHA. The Full Court erred in approaching the words "function, duty or power" as if their selection revealed an intention to exclude other kinds of activities engaged in by the Executive, when the more plausible intention (which better gives effect to the purpose of s 494AB) was to regard the collocation as compendiously referring to all things done in executing Subdivision B of Division 8 of Part 2.

37. ***Third***, even if (which is denied) s 198AHA confers capacities and authorities that are not functions, duties or powers within the meaning of s 494AB(1)(ca), it does so for the purpose of those capacities and authorities being utilised for the purpose of implementing regional processing functions.[38] In this way, a proceeding about actions authorised by s 198AHA is nonetheless a proceeding "relating to" the performance or discharge of functions, duties or powers under Subdivision B of Division 8 of Part 2 as a whole, and therefore falls within s 494AB(1)(ca).

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35 Further amended statement of claim at [5(c)], [34(d)] [**ABFM 20 and 42**]. See *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 72 [46] (French CJ, Kiefel and Nettle JJ).

36 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [46] (French CJ, Kiefel and Nettle JJ), [175] (Gageler J) and [196] (Keane J). See more generally *Williams v Commonwealth* (2012) 248 CLR 156; *Williams v Commonwealth* (2014) 252 CLR 416.

37 See *Plaintiff S195/2016 v Minister for Immigration and Border Protection* (2017) 261 CLR 622 at 633 [16], [18].

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

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

38. The Full Court's second justification for its conclusion that s 494AB(1)(ca) did not intersect with s 198AHA was its holding that actions are only "under" a provision of Subdivision B if that provision "gives to the relevant performance or exercise of a function, duty or power in relation to a transitory person the capacity to affect the rights of the transitory person which are sought to be determined in the proceeding" [**CAB 73 [197]**]. This reasoning should be rejected for two reasons.

39. ***First***, it cannot account for the making of payments under s 198AHA(2)(b). Whether or not such payments could have been made in the exercise of non-statutory executive power,[39] they can plainly be made if authorised by s 198AHA(2)(b). However, on the Full Court's reasoning, such payments could be challenged without infringing s 494AB(1)(ca), despite the presence of s 198AHA within Subdivision B. Reasoning that would produce a result so at odds with the statutory text cannot be correct.

40. ***Second***, the Full Court imported the above test from this Court's decision in *Griffith University v Tang*,[40] but that decision offers no sound guidance concerning the interpretation of s 494AB(1)(ca). *Tang* concerned the phrase "decision of an administrative character made … under an enactment" in the *Judicial Review Act 1991* (Qld). That phrase is far removed from "proceeding relating to the performance or exercise of a function, duty or power under Subdivision B". Further, the "capacity to affect legal rights and obligations" of which the plurality spoke in *Tang* was a criterion that derived not just from the word "under", but from the whole phrase in its specific statutory context.[41]

41. It is therefore an error to allow the word "under" to distract attention from the statutory context in which s 494AB(1)(ca) appears.[42] In circumstances where the purpose of s 494AB is to limit litigation in relation to regional processing, and where the sole function of s 198AHA is to confer capacity or authority to take actions with respect to regional processing (including "the implementation of any law or policy … in connection

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39 See generally *Williams v Commonwealth* (2012) 248 CLR 156; *Williams v Commonwealth* (2014) 252 CLR 416.

40 (2005) 221 CLR 99.

41 See *Griffith University v Tang* (2005) 221 CLR 99 at 121-122 [60]-[61], 126 [71], 128 [78]-[80].

42 *Griffith University v Tang* (2005) 221 CLR 99 at 125 [69] (Gummow, Callinan and Heydon JJ).

with the role of [a] country as a regional processing country"), there is no discernible reason why the Parliament would have intended to exclude action taken pursuant to authority conferred by s 198AHA from the coverage of s 494AB(1)(ca). That would be inexplicable as a matter of policy. Such irrational and improbable outcomes should not be imputed to the Parliament where an alternative construction is open.[43]

42. The Full Court's assertion that the reasoning in *Tang* was applicable to s 494AB(1)(ca) resulted in it asking a question far removed from the text of that provision [**CAB 72-73 [197]**]. Specifically, it erred by asking whether s 198AHA is the source of the power to affect rights, when it should have asked simply whether a proceeding that concerns actions that are authorised by s 198AHA "relates to" the performance or exercise of "functions, duties or powers" of the specified kind.

Negligence proceedings

43. The Full Court's third justification for its conclusion concerning s 494AB(1)(ca) was that it does not apply at all to claims in negligence, apparently because they arise at common law and not under the Act [**CAB 75 [205], 76 [209]-[210]**], and because the validity of executive action "does not bear directly upon the liability of the statutory authority pursuant to a common law duty" [**CAB 75 [206]**]. According to the Full Court, "[t]he proposition that the pleaded acts were authorised should, at least, have some direct legal consequence in the case" [**CAB 75 [207]**]. That requirement is not satisfied "merely because some of the facts said to give rise to a duty are claimed to be authorised by ss 198AB or 198AD" [**CAB 76 [208]**]. The result was that s 494AB(1)(ca) applies to proceedings only where the cause of action is sourced in the statute or where validity is an element in the cause of action [**CAB 78 [216]**]. That reasoning should be rejected for two reasons.

44. ***First***, it gives an unjustifiably narrow reading to the words "relating to". That is most clearly illustrated by considering a case involving an allegation that a Commonwealth officer breached a duty of care owed by the Commonwealth by taking a person to Nauru in performance of the duty imposed by s 198D. That allegation is not directed to the validity of the removal, but only to whether it sounds in damages. Yet a proceeding raising such an allegation would plainly "relate to" s 198D. The Full Court's reasoning cannot

[43] See *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203 at 217 [45] (French CJ, Kiefel, Bell and Keane JJ), 232 [100] (Nettle J); *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at 509 [48] (French CJ, Hayne, Crennan and Kiefel JJ).

account for that example. Allegations that concern the existence of a duty of care may likewise engage s 494AB(1)(ca), because the existence and content of such a duty commonly depends on the statutory framework,[44] as is clearly illustrated by negligence suits in the immigration detention context.[45] There is no justification for treating s 494AB(1)(ca) as inapplicable to negligence claims as a class simply because such claims cannot satisfy an additional criterion with no textual foundation, being a requirement to show that the fact that "the pleaded acts were authorised … [has] some direct legal consequence in the case" [**CAB 75 [207]**].

45. ***Second***, as a matter of policy, there is no plausible reason why the Parliament would wish to allow proceedings in negligence with respect to regional processing, while at the same time limiting claims for breach of statutory duty, misfeasance in public office and judicial review, all of which the Full Court accepted were barred by s 494AB(1)(ca) [**CAB 78 [216]**]. Again, such an improbable intention should not be attributed to the Parliament where an alternative construction is open that better fits the purpose of the provision.[46]

Specific errors in the Full Court's application of s 494AB(1)(ca) to this proceeding

46. In paragraphs 31 to 45 above, the appellants have identified the errors in the Full Court's construction of s 494AB. Those paragraphs are common to the submissions in each proceeding. It remains to address how those errors contributed to the Full Court concluding erroneously that s 494AB(1)(ca) did not apply to this proceeding.

47. ***First***, consistently with its reasoning that a conferral of capacity or authority under s 198AHA did not intersect with s 494AB(1)(ca), the Full Court held that the express references to s 198AHA in the respondent's pleading were insufficient to enliven s 494AB(1)(ca) [**CAB 79 [218]**]. For the reasons given above, that construction of these provisions, and the conclusion that followed from it, was wrong. As described in Part V above, the respondent's case depended upon her removal to Nauru under s 198AD, and alleged actions taken by the Commonwealth thereafter for which s 198AHA provided essential support. These alleged actions were engaged in within the context of the regional

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44 See generally *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at [3] (Gleeson CJ), [18], [25]-[27], [33]-[34] (Gaudron J), [49], [51], [70]-[71], [87]-[88], [91]-[93] (McHugh J), [154]-[155], [159] (Gummow J), [209] (Kirby J); *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 at 238 [48], 239 [52] (French CJ), 244 [75], 252 [103], 254 [112]-[113] (Gummow, Hayne and Heydon JJ), 259-230 [129]-[130] (Crennan and Kiefel JJ).

45 *SBEG v Commonwealth* (2012) 208 FCR 235 at [21]-[30], [48], [53]-[55], [70]-[71]; *S v Department of Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 217 at [201], [213].

46 See cases cited in n 43 above.

processing regime in Subdivision B as a whole. That regime was central to the determination of the respondent's claim. That was ample to support the conclusion that the proceeding "related to" Subdivision B so as to attract the bar in s 494AB(1)(ca).

48. ***Secondly***, the Full Court interpreted the respondent's pleaded case about the exercise of "powers" under s 198AHA as a reference instead to "capacities" [**CAB 79 [218]**]. Further, contrary to the Commonwealth's position, but without full argument on the point, the Full Court held (seemingly on a final basis) that there was no inconsistency between the duties which the respondent alleged and the statutory scheme [**CAB 79 [221]**]. Given that s 494AB(1) applies not only to the continuation of proceedings, but also to their institution, its engagement cannot depend on whether particular arguments succeed or fail.[47] The Commonwealth having put the compatibility with the Act of the alleged duty of care in issue in a non-colourable way, the correct conclusion was that the proceeding fell within s 494AB(1)(ca). It was not open to the Full Court to consider and reject the Commonwealth's argument concerning the relationship between the alleged duty and the Act, and on that basis then to conclude that the proceeding did not engage s 494AB(1)(ca), because s 494AB(1)(ca) precluded the Full Court from deciding the point. All the Full Court was entitled to do was "decide whether it has authority to decide the claim that is made to it",[48] and that authority did not depend on the Full Court's view of the merits.

49. ***Thirdly***, the lack of express reference in the relief sought to a "function, duty or power under Subdiv B" [**CAB 80 [224]**] is not determinative. The Full Court's holding to the contrary elevated form over substance.

50. ***Fourthly***, the Full Court erred in holding that s 494AB(1) does not apply to negligence claims [**CAB 79 [221]**, **80 [224]**]. Aspects of the statutory scheme were critical to the respondent's case, including because the scheme required her removal to Nauru, and then provided the capacity for the Commonwealth to engage in the actions in Nauru about which she complained. In issuing an interlocutory injunction, Murphy J accurately recorded the centrality of s 198AHA to the applicant's claim.[49] The fact that a proceeding

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47 See *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212 at 219 (Bowen CJ, Morling and Beaumont JJ); Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (2nd ed, 2020) at 42.

48 *New South Wales v Kable* (2013) 252 CLR 118 at 134 [34] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

49 See *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* (2018) 262 FCR 1 at 18-19 [43]-[47], 19 [51].

alleging common law negligence does not depend on the invalidity of the actions that are in issue does not deny that the proceeding "relates to" Subdivision B. For all those reasons, the Full Court should have held that this proceeding fell within s 494AB(1)(ca).

C. Construction of s 494AB(1)(a) – Ground 2

51. Section 494AB(1)(a) applies where proceedings "relat[e] to the exercise of powers under section 198B". Section 198B confers power on an officer to bring a transitory person to Australia for a temporary purpose. The Commonwealth argued below that s 494AB(1)(a) is engaged where a party seeks orders that would require an officer to exercise that power, whether those orders are sought expressly or as a matter of substance. The Full Court agreed that substance over form was to be preferred [**CAB 56 [154]**], but then concluded that s 494AB(1)(a) did not apply to this proceeding for reasons that focussed almost entirely on matters of form. In so proceeding, the Full Court erred.

52. At the time this proceeding was instituted, in substance the respondent was seeking orders that she be brought to Australia to receive medical treatment. Specifically, she sought interlocutory relief preventing the Commonwealth from "[d]etaining [the respondent] and her mother and sister on Nauru or at any other off-shore processing centre not within Australia" (para 5), and the provision of "urgent psychiatric care that is clinically recommended where that care is not provided to the [respondent] in Nauru or in any other off-shore environment" (para 6). Further, the application was supported by affidavit material which repeatedly and expressly referred to the need for transfer to Australia,[50] which Murphy J described as "important evidence" in his reasons for granting the interlocutory injunction.[51] Indeed, Murphy J's reasons noted that the respondent sought transfer to Australia.[52]

53. Once it is recognised that this proceeding involved, as a matter of substance, an application for an order that the respondent be brought to Australia, the proceeding should have been held to be "related to" an exercise of power under s 198B. That follows because s 198B confers power for the specific purpose of enabling an officer to bring a transitory

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50 See Newhouse affidavit of 20 December 2017 [**ABFM 347, 351 at [11], 354, 361**]; Newhouse affidavit of 22 December 2017 [**ABFM 372-373**].

51 *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* (2018) 262 FCR 1 at 15 [35].

52 *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* (2018) 262 FCR 1 at 17 [38].

person to Australia for a temporary purpose (including medical treatment,[53] as is confirmed by the relevant explanatory memorandum[54]). Section 198B was introduced as part of a suite of measures to ensure that "the transitory person's presence in Australia is as short as possible and that action cannot be taken to delay that person's removal from Australia".[55] The suite of measures included not just s 198B, but also amendments to s 42(2A) (so as to "allow a non-citizen to travel to Australia without a visa … if the non-citizen is brought to Australia under the new s 198B"[56]), a new s 46B (to bar transitory persons from making a valid application for a visa whilst in Australia) and s 494AB.[57] Those measures together allowed a transitory person to be brought to Australia for a temporary purpose without contravening s 42 (which prevents non-statutory executive power under s 61 of the Constitution from being used to bring an unlawful non-citizen into Australia[58]) and without altering the transitory person's substantive rights (as would have occurred if the transitory person was granted a visa,[59] because grant of a visa would entitle the non-citizen to be at liberty in Australia and to apply for other visas). When read together with the other measures introduced at the same time, it is apparent that s 198B provides not just a mechanism to bring transitory persons to Australia for a temporary purpose, but the only mechanism that can achieve that result without altering the transitory person's substantive rights. Consistently with that submission, the Full Court found that the power "in fact" exercised to bring the respondent to Australia "was the power conferred by s 198B" [**CAB 87-88 [255]**].

54. In circumstances where the text, purpose and statutory context of s 198B all point to that section being the uniquely appropriate power to be used to bring a transitory person to

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53 *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582 at 590-591 [12] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

54 See Revised Explanatory Memorandum, Migration Legislation Amendment (Transitional Movement) Bill 2002 (Cth) at 2 [5].

55 See Revised Explanatory Memorandum, Migration Legislation Amendment (Transitional Movement) Bill 2002 (Cth) at 2 [5]. That purpose was recognised at **CAB 57 [157(b)]**.

56 Revised Explanatory Memorandum, Migration Legislation Amendment (Transitional Movement) Bill 2002 (Cth) at 5 [15].

57 The Full Court recognised some of that history, although it made no mention of the amendment to s 42 or s 46B: **CAB 60 [166]**.

58 The executive having no power to dispense with this statutory prohibition: see *Port of Portland v Victoria* (2010) 242 CLR 348 at 359-360 [13].

59 It would be possible for the Minister to grant a special purpose visa to the transitory person under s 33(2)(b), but that is a discretionary power which the Minister has no duty to exercise, and for which he is accountable to the Parliament under s 33(8): *Illukkumbura v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1715 at [8] (Edmonds J). A court could not, either on an interlocutory basis or a final basis, order that any person be granted such a visa.

Australia for medical treatment, the Full Court should have held that, as a matter of substance [**CAB 65-66 [180]**], any proceeding that seeks relief of that kind is a proceeding that "relates to" the exercise of power under s 198B, and thereby attracts the jurisdictional bar in s 494AB(1)(a). But the Full Court did not so hold. Instead, it gave determinative significance to the fact that the respondent "did not in terms invoke [the power in s 198B] or seek that it be exercised and did not obtain an order requiring the Commonwealth parties to exercise that power" [**CAB 89 [261]**]. In other words, it held it to be sufficient to avoid s 494AB(1)(a) that the orders sought did not expressly require compliance through the exercise of power under s 198B.

55. That reasoning cannot be correct. It should not make any difference whether or not an application mentions s 198B "in terms", because s 198B is the relevant power whenever a transitory person seeks to be brought to Australia for medical treatment whether or not it is expressly pleaded or invoked. For that reason, in any case where a transitory person seeks relief that, as a matter of substance, requires the person to be brought to Australia for a temporary purpose, that application "relates to" the exercise of power under s 198B of the Act. The Full Court erred by failing to so hold.

56. Nor is it possible to avoid s 494AB(1)(a) by seeking relief that requires a person to be treated in any appropriate place other than a regional processing country (ie without mentioning Australia), if in practice the orders sought could be complied with only by bringing a transitory person to Australia. As a matter of substance, there is no difference between an application that seeks transfer to Australia "in terms", and an application that seeks an order requiring the applicant to be provided with a specific form of medical treatment within, for example, 48 hours, if the only place the specified treatment could be provided within the specified timeframe is Australia. In practice, if either order is made, it requires an exercise of the power under s 198B. For that reason, in substance, an application in either form "relates to" the exercise of power under s 198B, and therefore engages s 494AB(1)(a).

D. Construction of s 494AB(1)(d) – Ground 3

57. A similar issue arises in respect of s 494AB(1)(d). Properly construed, s 494AB(1)(d) is enlivened if the form of interlocutory or final relief seeks, in substance, to prevent the

removal of the respondent from Australia.[60] For that reason, the question whether a proceeding "relates to" the removal of the respondent from Australia cannot be answered by focusing only on the express terms of the relief sought. For that reason, the Full Court erred in holding that a direct relationship with removal was required, such as would exist, for example, if a person challenged a determination that a person no longer needed to be in Australia for a temporary purpose [**CAB 90 [264]**].

58. The respondent sought a final injunction to compel the appellants to "procure specialist child psychiatric health treatment" by procuring treatment in a "specialist child mental health treatment facility with comprehensive tertiary level child psychiatric assessment by a specialist paediatric child psychologist and psychiatrist".[61] That level of treatment cannot be provided in a regional processing country.[62] In those circumstances, in substance the respondent sought an order that would prevent an officer from removing her back to Nauru even if that would otherwise have been required under s 198AD (when read with s 198AH(1A)). An order that intercepts the duty under s 198AD should have been held to be sufficient to enliven s 494AB(1)(d).

PART VII ORDERS SOUGHT

59. The appellants seek the orders in the notice of appeal.

PART VII ESTIMATE OF HOURS

60. The appellants estimate that up to 2.5 hours may be required to present oral argument (including reply) in this matter and the other three matters.

Dated: 8 May 2020

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60 *Applicants WAIV v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1186 at [31] (French J).

61 Paragraph B of the prayer for relief [**ABFM 43**].

62 See *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* (2018) 262 FCR 1 at [27], [35]-[36].

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

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

COMMONWEALTH OF AUSTRALIA
Second Appellant

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

ANNEXURE

A LIST OF STATUTES AND PROVISIONS REFERRED TO IN THE APPELLANTS' SUBMISSIONS

Constitution ss 61, 75 (as currently in force).

Acts Interpretation Act 1901 (Cth) s 11B (as currently in force).

Migration Act 1958 (Cth) ss 33, 42, 189, Part 2 Div 8 Subdiv B (ss 198AA-198AJ), 198B, 494AA, 494AB (Compilation No 137).

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 (Regional Processing and Other Measures) Act 2012 (Cth) (as enacted).

Migration Legislation Amendment (Transitional Movement) Act 2002 (Cth) Sched 1 item 6 (as enacted).