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## Details of Filing

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## Important Information

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No. NSD728 of 2019

Federal Court of Australia
District Registry: New South Wales
Division: General

**CLM18**

Appellant

**Minister for Home Affairs**

First Respondent

**Informed Referral to Status Resolution Officer**

Second Respondent

**Further Submissions of the Australian Human Rights Commission**


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1. These submissions are filed by the Australian Human Rights Commission in accordance with the orders of the Court made on 29 August 2019. They address the two issues identified in the notice given pursuant to s 78B of the *Judiciary Act 1903* (Cth) dated 5 September 2019.

**First issue**

2. The first issue arises by reason of the AHRC's reliance at the hearing upon the passage in *SZSSJ v Minister for Immigration and Border Protection* (2015) 234 FCR 1 (***SZSSJ FFC***) at 25 [83]-[84] (the Court). The AHRC's submission was to the effect that that reasoning applies also to this matter. The first respondent wishes to contest the correctness of that reasoning.

3. It should first be noticed that the reasoning at [83]-[84] is addressed to resolving the "two possible characterisations" of the facts identified at [76]. The Court there described those two possible characterisations as follows:

   (a) the Minister had decided to consider whether to exercise the powers in ss 48B, 195A and 417 in relation to SZSSJ and the ITOA was being conducted by the Department to assist him in that process (*M61* at 349 [66]); or

   (b) the Minister had not decided to consider, at that stage, whether to exercise the dispensing powers or not. On this view, it is not clear why the ITOA process is being conducted or on whose instructions or how the continued immigration detention of persons involved in that process is lawful.

4. The Minister contended for the latter possibility: *SZSSJ FFC* at [74].

5. The Court approached that issue by first referring to the Department's Procedures Advice Manual (**PAM**). It accepted that aspects of that manual may suggest that the process is "likely to be anterior to any exercise by the Minister of a dispensing power" and that the process was one which (it was "intended") may "start outside the Minister's office and about which he may never be personally aware" (if the conclusion was that *non-refoulement* obligations are not owed). However, the Court immediately expressed reservations about "whether such an arrangement can truly work that way" (at [78]). It further observed that it was a "mistake" to view the PAM in isolation and that there were two matters of "context" which assisted in the characterisation of the facts (at [79]).

6. The **first (specific) matter** concerned the magnitude of the exercise (9,258 people) and

its consequences (ongoing detention). Although the current facts are different, the Minister was likewise told that this was a large undertaking (there were "less than 1500 IMAs" yet to lodge as at 11 September 2017, with the final number expected to be "less than 800 IMAs" – see AB 190, [1]); in circumstances where at least some people faced ongoing detention (AHRC submissions – **AHRCS** – dated 27 August 2019 at [14]). In *SZSSJ FFC* the Court inferred from those matters that, although the PAM seemingly contemplated cases where the Minister may be ignorant of the circumstances surrounding the commencement of an ITOA, this was not one of those cases. In those circumstances (the Minister being aware of the ITOAs), the "unavoidable inference" was that he had already decided to consider those matters under the dispensing powers (having regard to the matters identified at [82]). The Commission contends that a similar result follows here: AHRCS [12]-[16].

7. The **second, more general consideration**, was said to support the same conclusion. By that reasoning, the Court sought to explore the matter which it had earlier observed "was not clear" (at [76(b)]). That is, *if* the Minister *had not in fact made a statutory decision*, "why" and "on whose instructions" was the ITOA process being conducted, and how was the continued immigration detention of persons involved in that process lawful? The Court's reasoning concerning s 64 of the Constitution was directed to a conclusion that "authority ultimately [derived] from the Minister" (*SZSSJ FFC* at [84]).

8. The issue then, is whether consideration of s 64 of the Constitution likewise casts light upon the authority for the Informed Referral to Status Resolution (**IRSR**) process undertaken here.

9. Although yet to be developed, the first respondent's argument that it does not presumably rests upon a notion that what is expressed in s 64 travels no further than notions of Ministerial responsibility, which (it might be said) present political rather than legal constraints. It is presumably further said that such notions tell one nothing about whether the Minister is or is not <u>legally responsible</u> for a particular decision to undertake such a process. For the following reasons, that is not correct.

10. **First**, the Full Court's consideration of that issue in *SZSSJ FFC* was a consideration of a form of counterfactual: that is, if it was indeed the case that there was no statutory decision, then where was the authority for that process derived from? (see again [76(b)]).

11. **Secondly**, that then potentially directed attention to that aspect of s 61 of the Constitution which confers power to take executive action absent express statutory authority. However, that could not solve the conundrum posed at [76(b)], as s 61 makes clear that the executive power of the Commonwealth is "vested in the Queen" and "exercisable by the Governor-General as the Queen's representative".

12. **Thirdly**, it is at that point that the relevance of s 64 becomes apparent. As was noted in *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 at 558,[1] it combines with s 62 to make clear (amongst other things) that the executive power of the Commonwealth is to be exercised on the initiative and advice of Ministers.[2] Relevantly, insofar as the decision to undertake the ITOA process did not involve the exercise of a statutory power (the assumption for the purposes of the counterfactual), that involved the Minister "administer[ing]" his Department of State as an aspect of executing and maintaining the Constitution: see *Williams v Commonwealth (No 1)* (2012) 248 CLR 156 (***Williams (No 1)***) at 191 [34] (French CJ).[3]

13. **Fourthly**, and noting again the point made in *SZSSJ FFC* about the magnitude of the ITOA process, necessarily involving expenditure of public money: the further significance of s 64 is that (although not entirely free from doubt) it is that provision which (absent statutory authority) authorises expenditure made in the ordinary administration of the functions of government: see *Williams (No 1)* at [34], [83] (French CJ); and [139] (read with [143]) (Gummow and Bell JJ) and see also KM Hayne 'Government Contracts and Public Law' (2017) 41(1) MULR 155 at 167-168.[4]

14. Those matters pointed inexorably to the fact that, regardless of whether the analysis commenced from an assumption that the process was statutory or (on the counterfactual explored by the Court) non-statutory, it was in fact the Minister from whom ultimate authority was derived for the decision to conduct the ITOA process. There could be "no

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[1] See also *Re Patterson; Ex Parte Taylor* (2001) 207 CLR 391 (***Patterson***) at 402-403 [13]-[17] (Gleeson CJ) and 460 [213] (Gummow and Hayne JJ).

[2] That understanding is also reflected in s 67 of the Constitution, which provides that (until Parliament otherwise provides) the appointment and removal of "all other officers of the Executive Government of the Commonwealth" shall be vested in the "Governor General in Council". Of course, Parliament did "otherwise provide" from the enactment of the *Commonwealth Public Service Act 1902* (Cth).

[3] Noting also that *Patterson* is authority for the proposition that s 64 does not require that only one Minister may administer each Department of State: at [17], [66], [210]-[211], [320], [380] (although note Gaudron J's caveat at [66]).

[4] Compare *Williams (No 1)* at [529]-[530] (Crennan J) – to the extent her Honour was there suggesting that ss 53 and 54 of the Constitution were in fact the relevant sources of that authority for such expenditure.

such thing as an ITOA which has been prepared to assist the Minister in considering whether to lift the bar under his discretionary powers which does not proceed from an exercise of his own authority" (*SZSSJ FFC* at [85]).

15. The application of similar reasoning here likewise casts considerable doubt upon the first respondent's suggestion that the Minister was merely "noting" the relevant arrangements: RS [26].

16. That, of course, did not necessarily resolve the question of whether there had been a personal procedural decision to consider the exercise of the dispensing powers. But the fact that there could be no real controversy about the identity of the Minister as the ultimate source of authority for the process also tended to suggest that the process was in fact statutory (particularly when regard was had to the matters identified at [85], [86] concerning detention and Australia's international obligations – which, as noted above, apply also here). That state of affairs pointed to the fact that the Minister *had* in fact reached the second stage identified in *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319.

17. No error is apparent in that reasoning. It applies equally here.

**Second issue**

18. The second issue arises from the first respondent's submissions concerning jurisdiction, which were put on two bases:

    a. that any claim to be entitled to be afforded procedural fairness on the alternative basis identified by the Commission at AHRCS [21]-[25] could not be an aspect of the same "matter" before the Federal Circuit Court (so as to fall within the so called "accrued" jurisdiction – noting the caution expressed as to the use of that term by the High Court in *Rizeq v Western Australia* (2017) 262 CLR 1 at 24 [55] per Bell, Gageler, Keane, Nettle and Gordon JJ).

    b. nor, it was said, could such a claim be a matter "not otherwise within [the Court's] jurisdiction" that is "associated" with a matter in which the jurisdiction of the Federal Circuit Court of Australia is invoked within the meaning of s 18 of the *Federal Circuit Court of Australia Act 1999* (Cth).

19. The first argument rests upon an overly narrow conception of the notion of a "matter". The second fails to bring to account the fact that the two classes of matter to which s 18 refers are, by definition, not the same matter and may also be "disparate" from each other.

20. As to the first argument, it is, of course, well established that the term "matter" as it appears in ss 75 and 76 of the Constitution refers to the subject matter of the proceeding; it is distinct from the particular form of the proceeding: *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265. The test to be applied to determine whether there is a single matter (or more than one) is captured by the following passage from *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 585 [140] per Gummow and Hayne JJ:

> There is but a single matter if different claims arise out of "common transactions and facts" or "a common substratum of facts", notwithstanding that the facts upon which the claims depend "do not wholly coincide". So, too, there is but one matter where different claims are so related that the determination of one is essential to the determination of the other, as, for example, in the case of third party proceedings or where there are alternative claims for the same damage and the determination of one will either render the other otiose or necessitate its determination. Conversely, claims which are "completely disparate", "completely separate and distinct" or "distinct and unrelated" are not part of the same matter.

21. In the passage which immediately follows (at [141]), their Honours pointed to a further indicia that there is but a single matter:

> Often, the conclusion that, if proceedings were tried in different courts, there could be conflicting findings made on one or more issues common to the two proceedings will indicate that there is a single matter.

22. That is the current case. The appellant asserted below that he was entitled to be afforded procedural fairness in the IRSR process. Assume, for the sake of argument, that he said that that was so regardless of whether the process was statutory or non-statutory, but sought to pursue that claim in a fragmented way (putting aside any difficulties associated with possible abuse of process): invoking the jurisdiction conferred by s 39B of the *Judiciary Act 1903* (Cth)[5] in this Court and claiming that the decision was non-statutory, but that he was entitled to procedural fairness on the basis identified in the AHRCS at [21]-[25]; and contending in the Federal Circuit Court that the decision was a statutory decision to which procedural fairness attached on the basis argued below. The resolution of each of those disputes would depend upon a finding as to a critical common issue: the characterisation of the facts and circumstances said by the appellant in the proceeding

[5] Note *Jabbour v Secretary, Department of Home Affairs* [2019] FCA 452 at [26].

below to amount to a personal procedural decision (akin to the characterisation question identified in *SZSSJ FFC* at [76] – extracted at [3] above). The possibility of there being conflicting findings on that (critical) issue is obvious.

23. More than that:

    a. that state of affairs is akin to that identified in *Wakim* at [140]: alternative claims, where the determination of one will either render the other otiose or necessitate its determination; and

    b. there is a largely overlapping substratum of facts. In that regard:

        i. the facts and circumstances giving rise to the alleged duty in each case are largely common. In each case, for the reasons explained at [2]-[17] above, the duty arose from a decision of the Minister to adopt the IRSR Process, being a process which involved an exercise of power having the potential to adversely to affect the appellant's rights and interests: AHRCS [19] and [22].

        ii. The facts and circumstances involved in the breach of duty in each case are likewise largely overlapping: AHRCS at [20], [24].

24. Contrary to what is seemingly put by the respondent (T24-25), there is no requirement for a "complete overlapping of the underlying substratum of facts, allegations and claims for relief between the different parts of the matter": *Rana v Google* (2017) 254 FCR 1 (***Rana***) at 9 [29] (Allsop CJ, Besanko and White JJ, emphasis added). Nor is it necessary that there be identity between the parties to those different aspects of the matter: see eg the various claims in *Fencott v Muller* (1983) 152 CLR 570 at 596-597 and cf the first respondent's submissions at T44.

25. Even if that be wrong, s 18 of the *Federal Circuit Court of Australia Act 1999* (Cth) is not so limited: as Allsop CJ observed in *Macteldir Pty Limited v Dimovski* (2005) 226 ALR 773 (***Macteldir 2005***) at 791 [67] (dealing with the then similar terms of s 32 of the *Federal Court of Australia Act 1976* (Cth)) "[t]he only High Court authority is to the effect (conformably with the words of s 32) that s 32 of the FCA Act deals with separate and distinct matters". As his Honour went on to note:

> The word "associated" is not a synonym for "accrued". In *Philip Morris Inc v Adam P Brown Male Fashions* (1981) 148 CLR 457, Barwick CJ at 476 indicated

> that "associated" embraced matters which may be disparate from each other, that is, not within the "accrued" jurisdiction of the already conferred federal matter. Gaudron J in *PCS Operations Pty Ltd v Maritime Union of Australia* (1998) 153 ALR 520, 521 was of the view that Barwick CJ's views were implicit in the other judgments in that case. (See *Philip Morris* at 494-95, 518, 521-22.)

(See, to similar effect, his Honour's views in *Elbe Shipping SA v The Ship "Global Peace"* (2006) 154 FCR 439 at 454-455 [60] and M Leeming *Authority to Decide*, The Federation Press (2012) 118-120).

26. It is true that those matters have occasionally generated some misunderstandings, including in the earlier decision of the Full Court in *Macteldir Pty Limited v Dimovski* (2003) 132 FCR 492 at 505 [55] (***Macteldir 2003***) (with which Allsop CJ expressed his disagreement in *Macteldir 2005*).[6] However, that decision is, as his Honour there observed, at odds with the only High Court authority dealing with that issue. Moreover, the later decision of the Full Court of this Court in *Rana* accords with the views expressed by Allsop CJ in *Macteldir 2005* and in *Elbe Shipping*: see *Rana* at [23]; *Elbe Shipping SA v The Ship "Global Peace"* (2006) 154 FCR 439 at 454-455 [60] (while that passage may not form part of the ratio, it is plainly seriously considered dicta).

27. Accordingly, to the extent that *Macteldir 2003* holds otherwise, this Court would not follow that decision on the basis it is plainly wrong.

28. Given that matters can be "associated" even if "disparate" the commonality between the claims identified at paras [22], [23] above was sufficient to conclude that the claim identified by the Commission at AHRCS [21]-[25] was (if truly a separate matter) at least "associated" with the matter the subject of the proceeding below. In respect of that associated matter, the effect of s 18 of the *Federal Circuit Court of Australia Act 1999* (Cth) is that "[t]o the extent that the Constitution permits" jurisdiction was conferred on the Court below to the extent it was "not otherwise within its jurisdiction". The first respondent identifies no constitutional obstacle that would not "permit" that conferral of jurisdiction. If he is correct in submitting that the claim identified by the Commission at AHRCS [21]-[25] is a matter that is not otherwise within the jurisdiction of the Federal Circuit Court, the effect of s 18 is to confer jurisdiction in respect of that matter.

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[6] Other examples are collected in M Leeming *Authority to Decide*, The Federation Press (2012) at 118-119.

29. For either of those reasons, the primary judge had jurisdiction to consider that issue.

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