HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S81/2022

BETWEEN:

DCM20
Appellant

and

SECRETARY OF DEPARTMENT OF HOME AFFAIRS
First Respondent

ASSISTANT DIRECTOR, MINISTERIAL INTERVENTION, DEPARTMENT OF HOME AFFAIRS
Second Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

PARTS I, II & III: CERTIFICATION AND INTERVENTION

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

2. The Attorney-General for the State of Victoria (**Victoria**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth), in support of neither the appellant nor the respondents.

PART IV: ARGUMENT

(a) Introduction and summary

3. This appeal concerns administrative processes undertaken by the Department of Home Affairs (**Department**) in relation to a request made by the appellant. The request was for the Minister for Immigration, Citizenship and Multicultural Affairs (**Minister**) to exercise the power in s 351(1) of the *Migration Act 1958* (Cth) (**Act**) to substitute for a decision of the Migration Review Tribunal a decision more favourable to the appellant.

4. The request was assessed by an officer of the Department, the second respondent, against guidelines issued by the Minister (**Guidelines**) (BFM 68-78). The second respondent did not bring the appellant's request to the Minister's attention because, in her assessment, the request was of a kind that the Guidelines instructed officers of the Department not to bring to the Minister's attention (CAB 7-8).

5. It is common ground that the administrative processes undertaken in relation to the request did not have a statutory basis (AS [23]-[24]; CS [12]-[14]).[1] Rather, those processes were a form of non-statutory executive action, involving the exercise of the aspect of Commonwealth executive power which "extends to the execution and maintenance … of the laws of the Commonwealth".[2]

6. The appellant seeks various forms of relief in relation to those administrative processes, including a declaration that the second respondent's "assessment … and resulting action … was legally unreasonable and infected by jurisdictional error", a writ of certiorari quashing the "assessment", a declaration that the appellant's request "is not finalised", and a writ of mandamus requiring the second respondent "to deal with the [appellant's] request according to law" (CAB 171).

7. The Full Court of the Federal Court held that the administrative processes undertaken in relation to the request were amenable to judicial review on the ground that they were legally unreasonable, but found that the ground was not made out. By notice of contention, the first respondent puts in issue whether those processes are amenable to judicial review on that ground, and whether any of the relief sought by the appellant is available to her (CAB 173-174).

8. Victoria's submissions address only the issues presented by the notice of contention.

9. Victoria does not submit that non-statutory executive action can never be amenable to judicial review. However, non-statutory executive action often has characteristics which, for various reasons, make that action insusceptible to judicial review — either at all, or on particular grounds. In each case, the question is whether, having regard to the nature and subject matter of the non-statutory executive action in respect of which relief is sought, that action is amenable to judicial review on the grounds advanced.[3]

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1 See *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 (***SZSSJ***) at [54] (the Court).

2 Constitution, s 61. See *Plaintiff S10 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 (***Plaintiff S10***) at [51] (French CJ and Kiefel J).

3 See *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 220-221 (Mason J); *Minister for Arts, Heritage and Environment v Peko-Wallsend* (1987) 15 FCR 274 at 277-278 (Bowen CJ), 302-304 (Wilcox J); *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 369-370 (Gummow J); *Victoria v Master Builders' Association of Victoria* [1995] 2 VR 121 at 133-136 (Tadgell J), 147-149 (Ormiston J), 164 (Eames J); *Xenophon v South Australia* (2000) 78 SASR 251 (***Xenophon***) at [57]-[62] (Bleby J; Lander J agreeing). See also *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (***CCSU***) at 399 (Lord Fraser of Tullybelton), 407 (Lord Scarman), 408, 410 (Lord Diplock), 417 (Lord Roskill); *R (Miller) v Prime Minister* [2020] AC 373 at [35] (the Court).

10. These submissions do not attempt to state exhaustively the limits that govern judicial review of non-statutory executive action, or the circumstances in which, by reason of its nature and subject matter, non-statutory executive action will not be amenable to judicial review. Instead, these submissions focus on the characteristics of the non-statutory executive action which is the subject of this appeal, and explain why that action is not amenable to judicial review on the ground of legal unreasonableness.

11. In summary, Victoria submits that the administrative processes undertaken in relation to the appellant's request had the following characteristics relevant to whether those processes are amenable to judicial review on the ground of legal unreasonableness:

10 11.1 there was no statutory basis for those processes;

11.2 the Act did not require officers of the Department to comply with the Guidelines in dealing with the appellant's request;

11.3 officers of the Department were under no duty to bring the appellant's request to the Minister's attention, or otherwise take any action in relation to the request; and

11.4 the processes undertaken by the Department in relation to the appellant's request had no effect on rights.

12. Victoria submits that, because the processes undertaken by the Department in relation to the appellant's request had those characteristics, neither certiorari nor mandamus is
20 available in relation to the processes, and there is no basis for the Court to make a declaration that the processes were conducted in a way that was legally unreasonable.

(b) The administrative processes undertaken here

13. As noted above, the request that is the subject of this appeal was a request for the Minister to exercise the power in s 351(1) of the Act. That power is distinctive in the scheme of the Act. It allows the Minister "to grant visas which might not otherwise be able to be granted because of non-satisfaction of substantive or procedural requirements" under the Act or the *Migration Regulations 1994* (Cth) (**Regulations**).[4] The Minister may exercise the power if he or she "thinks that it is in the public interest

4 *Plaintiff S10* (2012) 246 CLR 636 at [30] (French CJ and Kiefel J).

to do so",[5] and is personally accountable to the Parliament for the exercise of the power.[6]

14. Section 351(7) of the Act provides that "[t]he Minister does not have a duty to consider whether to exercise the power in [s 351(1)] in respect of any decision, whether he or she is requested to do so by the applicant or by any other person, or in any other circumstances". Having regard to that sub-section (and its equivalents elsewhere in the Act), this Court has held that provisions such as s 351 confer "a non-compellable power that is exercised by the Minister personally making two distinct decisions: a procedural decision, to consider whether to make a substantive decision; and a substantive decision, to grant a visa".[7] The Minister has no obligation to make either decision.[8]

15. The Act does not provide for requests to be made for the exercise of the power in s 351(1), but various provisions of the Act and the Regulations "are drafted on the assumption, which recognises the practical reality, that requests will be made".[9] Reflecting that practical reality, the Guidelines instruct officers of the Department in how to deal with such requests, including how to identify requests that the Minister may wish to consider and requests that the Minister does not wish to consider. The Guidelines identify categories of cases that "[g]enerally … should not be brought to [the Minister's] attention and may be finalised without further assessment" (BFM 71).

16. Where, as in this case, the Minister has not made a procedural decision to consider whether to make a substantive decision under s 351(1) of the Act, processes undertaken by officers of the Department to assist the Minister to make that procedural decision have no statutory basis.[10] This includes processes undertaken by officers of the Department to determine whether to bring a request to the Minister's attention, including by assessing that request against the Guidelines.

17. Consistently with that proposition, the Act does not impose a duty on officers of the Department to comply with the Guidelines when determining whether to bring a request to the Minister's attention. In this respect, the Guidelines differ from directions made under s 499(1) of the Act, which a person exercising functions or powers under the Act

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5 Act, s 351(1).
6 Act, s 351(4)-(6).
7 *SZSSJ* (2016) 259 CLR 180 at [53] (the Court).
8 *SZSSJ* (2016) 259 CLR 180 at [53] (the Court).
9 *Plaintiff S10* (2012) 246 CLR 636 at [31] (French CJ and Kiefel J).
10 See *SZSSJ* (2016) 259 CLR 180 at [54] (the Court).

"must comply with".[11] An officer who departs from the Guidelines in assessing a request will not, for that reason alone, transgress any legal limit (cf AS [28]).[12]

18. In the Court below, Charlesworth J (with whom Griffiths J relevantly agreed) held that the Act impliedly imposes a duty on officers of the Department to "bring an intervention request to the Minister's attention in the absence of any lawful instruction from the Minister authorising the officer not to do so".[13] Relying on such a duty, the appellant submits that the processes undertaken by the Department in relation to her request had an effect on her rights (AS [26], [30]).

19. Victoria submits that, contrary to the reasoning of Charlesworth J, officers of the Department were not subject to a duty to bring requests to the Minister's attention. In short, as explained by the Commonwealth (CS [20], [23]), a duty of that kind could only be imposed by the Act, but the Act does not expressly impose such a duty, and any implied duty would be inconsistent with s 351(7) (which makes clear that the Minister has no duty to consider a request). Further, because the Guidelines have no statutory force, they could not be the source of a duty for officers of the Department to refer, or otherwise take any action in relation to, a request.[14]

20. In circumstances where there is no duty on the Minister to consider a request for the exercise of the power in s 351(1) of the Act, and no statutory basis for processes undertaken by the Department in relation to requests that the Minister has not yet decided to consider, Victoria submits that there can be no duty on an officer of the Department to bring such a request to the Minister's attention, or otherwise to take any action in relation to such a request. Accordingly, the processes undertaken by the Department in relation to a request can have no effect on any right to have that request referred to, or considered by, the Minister.

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11 Act, s 499(2A).

12 See *Salemi v MacKellar [No 2]* (1977) 137 CLR 396 (***Salemi***) at 406-407 (Barwick CJ), 416 (Gibbs J); *Broadbridge v Stammers* (1987) 16 FCR 296 (***Broadbridge***) at 300 (the Court); *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189 at 208 (French and Drummond JJ). See also *Norbis v Norbis* (1986) 161 CLR 513 at 520 (Mason and Deane JJ). However, as discussed in paragraph 41 below, a failure to comply with the Guidelines may have employment or disciplinary consequences for an officer of the Department.

13 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 213 (**FC**) at [87] (Griffiths J), [253]-[270] (Charlesworth J); cf at [52] (Besanko J), [121]-[122] (Mortimer J).

14 See *Barnett v Minister for Housing and Aged Care* (1991) 31 FCR 400 at 403 (Heerey J); *Ex-Christmas Islanders Association Inc v Attorney-General (Cth)* (2005) 149 FCR 170 at [99]-[100] (French J). See also *Salemi* (1977) 137 CLR 396 at 406-407 (Barwick CJ).

21. In the Court below, Kenny, Griffiths and Mortimer JJ each referred to the processes undertaken by the Department in relation to the appellant's request having an effect on rights on the basis that they had an effect on the appellant's entitlement to a bridging visa, or her liberty.[15] For the reasons given by the Commonwealth (CS [21]-[22]), Victoria submits that the processes undertaken by the Department did not have an effect on the appellant's rights on this additional basis.

(c) Certiorari and mandamus are not available

22. As noted in paragraph 6 above, the appellant seeks certiorari and mandamus in relation to the processes undertaken by the Department in relation to her request.

10 23. Having regard to the characteristics of those processes identified in paragraph 11 above, Victoria submits that neither certiorari nor mandamus is available.

24. Because the Minister has no duty to consider a request made for the exercise of the power in s 351(1), mandamus will not issue to compel the Minister to consider such a request.[16]

25. Likewise, because, for the reasons explained in paragraphs 16 to 20 above, no officer of the Department has a duty to bring such a request to the Minister's attention, or otherwise to take any action in relation to such a request, mandamus will not issue to compel the second respondent (or any other officer of the Department) to take any step in relation to the appellant's request.

20 26. The unavailability of mandamus "entails that there is no utility in granting certiorari" to quash any action taken by officers of the Department in relation to the appellant's request.[17]

27. In any event, certiorari could not issue in relation to that action because, for the reasons explained in paragraphs 16 to 21 above, the action did not itself have any effect on rights, and the second respondent's assessment of the request was neither a condition

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15 FC at [44]-[45] (Kenny J), [85] (Griffiths J), [119] (Mortimer J).
16 See *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 (***Plaintiff M61***) at [99] (the Court).
17 *Plaintiff M61* (2010) 243 CLR 319 at [100] (the Court), citing *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441 at [48] (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ).

precedent to the exercise of the power in s 351(1) nor a matter that the Minister was required to take into account in exercising that power.[18]

(d) Declaratory relief is not available

28. The remaining remedy sought by the appellant is declaratory relief.

29. In *Graham v Minister for Immigration and Border Protection*, a majority of this Court said that:[19]

> Within the limits of its jurisdiction where regularly invoked, the function of the judicial branch of government is to declare and enforce the law that limits its own power and the power of other branches of government through the application of judicial process and through the grant, where appropriate, of judicial remedies.

30. The appellant contends that there is a legal limit on the executive power of the Commonwealth supplied by "the 'rules of reason and justice' including the common law requirement of legal reasonableness" (AS [45]), such that "any assessment of a request for Ministerial intervention under the Guidelines is required to be conducted within the bounds of legal reasonableness" (AS [46]). She contends that, if the Court finds that that limit was breached, it should grant declaratory relief to give effect to that conclusion (AS [53]).

31. Victoria submits that because the administrative processes carried out in relation to the appellant's request had no statutory basis, had no effect on rights, and were not undertaken in performance of a duty which required those processes to be undertaken, there is no basis for this Court to make a declaration that those processes were conducted in a way that was legally unreasonable. Given those characteristics of the processes, the authority to carry out the processes was not conditioned by a requirement of legal reasonableness and, even if it was, declaratory relief would not be warranted.

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18 See *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 (***Ainsworth***) at 580 (Mason CJ, Dawson, Toohey and Gaudron JJ), 595 (Brennan J); *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 159, 162, 165 (Brennan CJ, Gaudron and Gummow JJ).

19 (2017) 263 CLR 1 at [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). See also *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 (***Quin***) at 35-36 (Brennan J); *SZSSJ* (2016) 259 CLR 180 at [81] (the Court); *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 (***MZAPC***) at [29] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

(i) The second respondent's authority to assess the request was not conditioned by a requirement of legal reasonableness

32. This Court has not previously recognised a common law principle to the effect that the executive power of the Commonwealth is subject to a legal limit requiring that power to be exercised reasonably.

33. Rather, this Court has recognised a common law principle of statutory construction to the effect that "when a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised".[20] That principle reflects a broader common law principle of statutory construction that "such decision-making authority as is conferred by statute must be exercised according to law and to *reason* within limits set by the subject matter, scope and purposes of the statute".[21]

34. This latter principle has been described as "deeply rooted" in the common law.[22] It is often traced to the speech of the Lord Halsbury LC in *Sharp v Wakefield*,[23] who in turn referred to a report of the judgment in *Rooke's Case*.[24] Notably, and consistently with the fact that the principle traced to those cases is a principle of statutory construction, both *Sharp v Wakefield* and *Rooke's Case* concerned the exercise of powers conferred by or under statute.[25] Neither case concerned the legal limits that apply to non-statutory executive action.

35. The function of a court conducting judicial review of an exercise of a statutory power on the ground that it is legally unreasonable is to ensure that the repository of the power "stays within the limits of the decision-making authority conferred by the statute".[26]

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20 *Kruger v Commonwealth* (1997) 190 CLR 1 at 36 (Brennan J). See *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (***Li***) at [24] (French CJ), [63] (Hayne, Kiefel and Bell JJ), [88]-[89] (Gageler J); *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 (***SZVFW***) at [53] (Gageler J), [89] (Nettle and Gordon JJ), [131] (Edelman J).

21 *Li* (2013) 249 CLR 332 at [90] (Gageler J) (emphasis in original).

22 *Li* (2013) 249 CLR 332 at [90] (Gageler J). See also FC at [31] (Kenny J).

23 [1891] AC 173 at 179 (Lord Halsbury LC). See *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189 (Kitto J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at [67] (McHugh and Gummow JJ); *Li* (2013) 249 CLR 332 at [24] (French CJ), [64]-[65] (Hayne, Kiefel and Bell JJ), [90] (Gageler J); *SZVFW* (2018) 264 CLR 541 at [53] (Gageler J). See also *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 (***Stretton***) at [5] (Allsop CJ).

24 (1598) 5 Co Rep 99b; 77 ER 209.

25 *Rooke's Case* concerned the powers of a Commissioner of Sewers appointed under the statute of 6 Hen VI c 5. *Sharp v Wakefield* concerned the power to renew a licence under liquor licensing Acts of 1828, 1872 and 1874.

26 *MZAPC* (2021) 95 ALJR 441 at [29] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

The relevant limits of that authority are identified through a process of statutory construction: the statute determines both whether the authority is conditioned by a requirement of legal reasonableness and, if so, what standard of reasonableness applies.[27] As Hayne, Kiefel and Bell JJ explained in *Li*:[28]

> The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.

36. Subject to considerations of materiality,[29] the consequence of a finding that a statutory power was conditioned by a requirement of legal reasonableness and was exercised in a way that was legally unreasonable (applying the standard of reasonableness indicated by the true construction of the statute) will be that the repository of the power has exceeded the limits of the decision-making authority conferred by the statute. This will have the result that the purported exercise of power lacks "such force and effect as is given to it by the law pursuant to which it was [done]".[30]

37. Any common law principle to the effect that the executive power of the Commonwealth is subject to a requirement that the power be exercised reasonably could not operate in the same way.

38. Unlike a power conferred by a provision of a statute, the executive power of the Commonwealth is not a single power, the authority to exercise which is capable of being made subject to compliance with a single standard of reasonableness (cf AS [45]). The "executive power of the Commonwealth" is a term used to describe the entirety of the power vested by s 61 of the Constitution, which extends to the execution and maintenance of the Constitution and the laws of the Commonwealth. Like the executive

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27 See *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473 (Dixon CJ); *Li* (2013) 249 CLR 332 at [66]-[67] (Hayne, Kiefel and Bell JJ); *SZVFW* (2018) 264 CLR 541 at [12] (Kiefel CJ), [54], [58]-[59] (Gageler J), [90]-[98] (Nettle and Gordon JJ), [132]-[135] (Edelman J); *MZAPC* (2021) 95 ALJR 441 at [30] (Kiefel CJ, Gageler, Keane and Gleeson JJ). See also *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 (***Singh***) at [48] (the Court); *Stretton* (2016) 237 FCR 1 at [5], [7], [9]-[12] (Allsop CJ). In some cases, the proper analysis may be that the statutory power is not subject to a legal limit requiring that it be exercised reasonably: see *Li* (2013) 249 CLR 332 at [92] (Gageler J); *Singh* (2014) 231 FCR 437 at [43] (the Court); *SZVFW* (2018) 264 CLR 541 at [53] (Gageler J).

28 (2013) 249 CLR 332 at [67] (Hayne, Kiefel and Bell JJ) (citations omitted).

29 See, generally, *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 (***Hossain***) at [27]-[31] (Kiefel CJ, Gageler and Keane JJ); *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at [45] (Bell, Gageler and Keane JJ); *MZAPC* (2021) 95 ALJR 441 at [1]-[3] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

30 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 (***Bhardwaj***) at [46] (Gaudron and Gummow JJ); *Hossain* (2018) 264 CLR 123 at [23] (Kiefel CJ, Gageler and Keane JJ); *MZAPC* (2021) 95 ALJR 441 at [29] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

power of the States, that power has a wide variety of manifestations, in a wide variety of contexts — some statutory, and some non-statutory.[31] If the valid exercise of a particular manifestation of the executive power of the Commonwealth is to depend on compliance with a particular standard of reasonableness, both the limit on the authority to engage in that exercise of power and the relevant standard of reasonableness must therefore derive from some source other than the mere fact that the power being exercised is the executive power of the Commonwealth.

39. Here, the appellant suggests that the Act is the source of a requirement for officers of the Department to conduct any assessment of the appellant's request within the bounds of legal reasonableness (AS [42]). However, as explained by the Commonwealth (CS [45]), no such requirement can be implied from the Act in circumstances where the processes undertaken by the Department in relation to the appellant's request had no statutory basis.

40. The appellant also suggests that the Guidelines are the source of both a requirement for officers of the Department to conduct any assessment of the appellant's request within the bounds of legal reasonableness (AS [46]), and the standard of reasonableness to be applied (AS [27], [46]-[48]).

41. Victoria submits that the Guidelines cannot be the source of a legal limit on the valid exercise of the executive power of the Commonwealth. As discussed in paragraph 17 above, the Act does not impose a duty on officers of the Department to comply with the Guidelines when determining whether to bring a request to the Minister's attention. The Guidelines have no footing in the Act. Instead, they are instructions from the Minister to officers of the Department about how the Minister wishes requests to be assessed. A failure by an officer of the Department to comply with the Guidelines may have employment or disciplinary consequences for the officer,[32] or provide grounds for

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31 See *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at [114], [124], [126]-[127] (French CJ), [214] (Gummow, Crennan and Bell JJ), [328]-[329] (Hayne and Kiefel JJ); *Williams v Commonwealth* (2012) 248 CLR 156 at [22] (French CJ), [121], [123] (Gummow and Bell JJ), [482]-[485] (Crennan J), [582]-[583] (Kiefel J). See also *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 230-231 (Williams J); *Davis v Commonwealth* (1988) 166 CLR 79 at 109-110 (Brennan J); *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 464 (Gummow J); *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195 at [86] (Gummow, Hayne, Heydon and Crennan JJ).

32 See, for example, *Public Service Act 1999* (Cth), ss 13(5) and 15. See, generally, *Comcare v Banerji* (2019) 267 CLR 373 at [65]-[72], [82]-[83] (Gageler J), [122]-[123], [148], [150] (Gordon J). See also *Broadbridge* (1987) 16 FCR 296 at 300 (the Court). See further *Xenophon* (2000) 78 SASR 251 at [14] (Prior J), where his Honour noted that, if the Attorney-General were to act other than in accordance with

a complaint to be made about the officer (for example, to the Commonwealth Ombudsman). But, unless given statutory force, instructions from a Minister to officers of a department cannot, of themselves, create limits on the valid exercise of executive power which are capable of enforcement through the grant of public law remedies. Those limits must have some other source.

42. Victoria accepts that, *if* the valid exercise of the executive power of the Commonwealth by an officer of the Department assessing a request against the Guidelines depended on compliance with a particular standard of reasonableness, then the Guidelines may assist in identifying the relevant standard of reasonableness. However, in circumstances where the Guidelines have no statutory force, it cannot be said that any departure from the Guidelines would *necessarily* be legally unreasonable (cf AS [50]). And it does not follow from the fact that the Guidelines may assist in identifying a standard of reasonableness that the Guidelines are themselves capable of creating a limit on the valid exercise of executive power.

43. In the absence of any identified basis for concluding that the second respondent's authority to assess the appellant's request was conditioned by a requirement of reasonableness, Victoria submits that there is no basis to make a declaration of the kind sought by the appellant.

(ii) Even if the second respondent's authority was conditioned by a requirement of legal reasonableness, breach of that requirement would have no meaningful consequence here

44. Even if it was concluded that the second respondent's authority to assess the appellant's request was conditioned by a requirement of legal reasonableness, Victoria submits that, having regard to the characteristics of the processes undertaken in relation to the appellant's request identified in paragraph 11 above, the conclusion that the second respondent's authority had been exceeded would have no meaningful consequences.

45. As noted in paragraph 36 above, where the repository of a statutory power exceeds the limits of the authority conferred by the statute, the result will ordinarily be that the

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certain non-binding guidelines, "the remedy with respect to such action would be a reprimand or censure from the Premier".

purported exercise of power lacks "such force and effect as is given to it by the law pursuant to which it was [done]".[33]

46. Where an exercise of *statutory* power is said to affect rights, a court on judicial review can give effect to a conclusion that the exercise of the power lacks statutory force by granting certiorari to quash that purported effect on rights. Similarly, where an exercise of statutory power is said to constitute the performance of a duty, a court can give effect to such a conclusion by granting mandamus to compel the duty to be performed.

47. Ordinarily, where a purported exercise of statutory power has no effect on rights and does not involve the performance of a duty, this "require[s] the further conclusion that no declaration of right should be made",[34] because the conclusion that the purported exercise of power lacks statutory force would have no practical consequences.[35] In such circumstances, a declaration would be "a bare declaration, not declaratory of any present right, and amounting only to an acknowledgement of past infringement" of a limit on the exercise of the power.[36]

48. Occasionally, even where certiorari and mandamus are not available, the conclusion that a purported exercise of statutory power lacks statutory force may have some practical consequence which makes it appropriate to declare that the repository of the power exceeded the limits of the decision-making authority conferred by the statute.[37] In such cases, as well as having that practical consequence, the declaration reflects the Court's recognition that limits imposed by the Parliament on the valid exercise of executive power have been exceeded.[38]

49. Where an exercise of *non-statutory* executive power is said to affect rights, a possible consequence of the conclusion that the power was exercised in breach of a legal limit

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33 *Bhardwaj* (2002) 209 CLR 597 at [46] (Gaudron and Gummow JJ); *Hossain* (2018) 264 CLR 123 at [23] (Kiefel CJ, Gageler and Keane JJ); *MZAPC* (2021) 95 ALJR 441 at [29] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

34 *Plaintiff M61* (2010) 243 CLR 319 at [101] (the Court).

35 See *Gardner v Dairy Industry Authority (NSW)* (1977) 52 ALJR 180 at 188 (Mason J), 189 (Aickin J); *Ainsworth* (1992) 175 CLR 564 at 582 (Mason CJ, Dawson, Toohey and Gaudron JJ). Cf *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at [233] (Kiefel and Keane JJ).

36 *Minister for Immigration and Multicultural Affairs v Ozmanian* (1996) 71 FCR 1 (***Ozmanian***) at 31 (Kiefel J; Sackville J agreeing).

37 See, for example, *Ainsworth* (1992) 175 CLR 564 at 582 (Mason CJ, Dawson, Toohey and Gaudron JJ), 597 (Brennan J); *Plaintiff M61* (2010) 243 CLR 319 at [99]-[103] (the Court).

38 See *Kioa v West* (1985) 159 CLR 550 at 611 (Brennan J): "The supremacy of Parliament, a doctrine deeply imbedded in our constitutional law and congruent with our democratic traditions, requires the courts to declare the validity or invalidity of executive action taken in purported exercise of a statutory power in accordance with criteria expressed or implied by statute".

on the authority to exercise that power may be that the purported effect of the exercise of the power can be quashed by certiorari. Similarly, where an exercise of non-statutory executive power is said to constitute the performance of a duty, a possible consequence of the conclusion that the power was exercised in breach of such a legal limit may be that the duty remains unperformed, such that its performance can be compelled by mandamus.

50. By contrast, where, as in this case, administrative processes carried out by a public servant have no statutory basis, have no effect on rights, and are not undertaken in performance of a duty which requires those processes to be undertaken, the conclusion that those processes were carried out in breach of some non-statutory limit on the authority to undertake them has no meaningful consequence. Those processes are already of no legal force or effect, so the fact that they were carried out in breach of some non-statutory limit cannot deprive them of legal force or effect. Nor is there any relevant limit imposed by the Parliament the breach of which can be publicly recognised.

51. As noted in paragraph 41 above, it may be that the fact that a public servant carries out administrative processes in breach of a non-statutory limit on the authority to undertake those processes has disciplinary or employment consequences for the public servant. But, absent a statutory basis, an effect on rights, or a duty which might be found to remain unperformed, Victoria submits that this Court should not make "a bare declaration … amounting only to an acknowledgement of past infringement" of a condition governing the public servant's authority to carry out those processes.[39]

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39 *Ozmanian* (1996) 71 FCR 1 at 31 (Kiefel J; Sackville J agreeing).

PART V: ESTIMATE OF TIME

52. It is estimated that up to 10 minutes will be required for the presentation of Victoria's oral argument in both this proceeding and *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (M32/2022).

Dated: 15 August 2022

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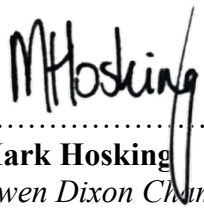

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S81/2022

BETWEEN:

DCM20
Appellant

and

SECRETARY OF DEPARTMENT OF HOME AFFAIRS
First Respondent

ASSISTANT DIRECTOR, MINISTERIAL INTERVENTION, DEPARTMENT OF HOME AFFAIRS
Second Respondent

ANNEXURE TO SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

Pursuant to Practice Direction No. 1 of 2019, Victoria sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
PART A: LIST OF CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS REFERRED TO IN SUBMISSIONS			
	Constitutional provisions		
1.	*Commonwealth Constitution*	Current	s 61
	Statutes		
2.	*Migration Act 1958* (Cth)	As at 10 January 2020 (Compilation No. 147, in force 5 December 2019 to 10 August 2020)	ss 351, 499
3.	*Public Service Act 1999* (Cth)	Current	ss 13, 15
	Statutory instruments		
4.	*Migration Regulations 1994* (Cth)	As at 10 January 2020 (Compilation No. 203, in force 19 December 2019 to 28 February 2020)	

PART B: LIST OF ENGLISH AND UK STATUTES REFERRED TO IN SUBMISSIONS			
5.	*Alehouse Act 1828* (9 Geo 4, c 61)	In force 15 July 1828	
6.	*Assises, Wages of Artificers, Parliament, Commissioners of Sewers, Wool Act 1427* (6 Hen 6, c 5)	In force 1427	
7.	*Licensing Act 1872* (35 & 36 Vict, c 94)	In force 10 August 1872	
8.	*Licensing Act 1874* (37 & 38 Vict, c 49)	In force 30 July 1874	