HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **MARTIN JOHN DAVIS**
Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS
First Respondent

and
SECRETARY OF DEPARTMENT OF HOME AFFAIRS
Second Respondent

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **DCM20**
Appellant

and

SECRETARY OF DEPARTMENT OF HOME AFFAIRS
First Respondent

and

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

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

Part I: PUBLICATION OF SUBMISSIONS

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

Part II: OUTLINE OF ORAL SUBMISSIONS

2. The Commonwealth's notice of contention raises two issues: first, what are the relevant legal rules that "determine the limits and govern the exercise" of non-statutory, non-prerogative powers of the Commonwealth; and, second, if there has been a transgression of those legal rules, what relief, if any, is available or appropriate? (Davis CAB, 176-178; DCM20 CAB, 173)

3. South Australia's submissions are focussed on the first issue: what are the relevant legal rules that govern the exercise of non-statutory capacities of the Commonwealth? (SA, [4]-[7])

4. South Australia has not made written submissions on the second issue. (SA, [8]) Accordingly, nothing in South Australia's submissions may be understood to contradict the submissions of the Commonwealth on this issue. Indeed, South Australia embraces the Commonwealth's submission that "[j]udicial review provides no remedies to protect interests, falling short of enforceable rights" (DCM20 Cth, [26]-[30]).

5. Returning to the first issue, the Appellants submit that the non-statutory capacities of the Commonwealth must be exercised in accordance with legal reasonableness. (Davis AS, [42]; DCM20 AS, [40]) Consideration of that submission must commence by identifying the potential sources of a duty to act legally reasonably. (SA, [19]) The Appellants submit that the source of the obligation for which they contend is the common law. (DCM20 AR, [14])

6. South Australia submits that if this Court accepts the Appellants' submission that the non-statutory capacities of the Commonwealth are conditioned by legal reasonableness, then such a limitation should be understood to be sourced, not in the common law, but in the terms of the particular grant of executive authority. (SA, [40])

7. The proposition that the executive may condition the grant of a non-statutory capacity by enforceable legal limits finds support in the decision of *R v Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 QB 864 (JBA 8, tab 52). (SA, [40]) The amenability of the Criminal Injuries Compensation Board to judicial

review did not arise from limitations imposed by the common law. Amenability arose because the executive instrument that established the Board also defined the legal limits of its authority (JBA 8, tab 52, pp 876, 884, 888, 891).

8. Further support for the discernment of justiciable limits on the grant of non-statutory capacities can be derived from the speeches of Lord Fraser, with whom Lord Brightman agreed, in *CCSU v Minister for Civil Services* [1985] 1 AC 374 (JBA 7, tab 39, pp 383, 385, 391, 397, 398, 399, 423-424). The speeches of Lords Scarman (p 407), Diplock (p 411) and Roskill (p 417) went further to hold that putting justiciability limits to one side, non-statutory executive powers are subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power.

9. The CCSU decision has been considered by Australian courts at an intermediate appellate level. Shortly after the case was decided it received endorsement, by way of *obiter dicta*, in *Minister for Arts, Heritage and Environment v Peko-Walsend Ltd* (1987) 15 FCR 274 (JBA 7, tab 44). The decision was applied in *Victoria v Master Builders' Association* [1995] 2 VR 121 (JBA 8, tab 59). However, most recently, in *L v South Australia* (2017) 129 SASR 180, the reasoning of Lord Fraser was preferred to that of Lords Scarman, Diplock and Roskill (JBA 7, tab 43, [134], [198], [199]).

10. The narrower source of an obligation to act legally reasonably, namely as a condition, express or implied, from the terms of the grant of executive authority, should be preferred to acceptance of a free-standing common law principle. (SA, [40]) This approach promotes congruence with the manner by which jurisdictional limits on the grant of statutory powers are discerned. It ensures that the grounds of review are tethered to the text, context and purpose of the particular grant. (SA, [10])

11. The following features that commonly attend the grant of non-statutory capacities should be brought to bear in determining whether the particular grant in question is conditional:

    a. In contrast to the exercise of statutory powers, by virtue of the facultative nature of the non-statutory capacities, their exercise does not unilaterally alter legal rights. (SA, [30], [37])

b. The grant of statutory powers are generally more readily susceptible to review because they are conferred for specific purposes. By contrast, the authority to exercise non-statutory capacities is often cast in general terms or by reference to broad policy functions. (SA, [31], [38])

c. The conferral of non-statutory capacities is generally subject to ministerial and ultimately parliamentary oversight. Further, failings in the exercise of such capacities may be the subject of disciplinary action. (SA, [32], [39])

12. It follows that the faithful construction of the terms by which a particular non-statutory capacity is conferred will very rarely lead to the result that such powers are conditioned by an obligation to act legally reasonableness. (SA, [40])

13. The inherent unlikelihood that the executive will intend to fetter the non-statutory capacities of its own officers finds reflection in the narrow exception to the general position, that a person acting without statutory authority is not amenable to judicial review, as noted by Justice Brennan in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 (JBA 3, tab 9, p 585, fn 48).

Dated: 20 October 2022

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