



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

BIF23

Appellant

**MINISTER FOR IMMIGRATION, CITIZENSHIP AND
MULTICULTURAL AFFAIRS**

Respondent

SUBMISSIONS OF THE RESPONDENT

I. CERTIFICATION

- 10 1. This outline of oral submissions is in a form suitable for publication on the internet.

II. PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Ground 1: “Practicable” does not take account of legal capacity or incapacity

2. ***Text, context and purpose (EFX17):*** Statutory interpretation considers text, context and purpose. *EFX17* establishes: (a) “give” and “receive” in s 501CA(3) connote the performance of a physical act, not the consequences for the recipient; (b) requiring the Minister to ensure the person understands the notice would go beyond attributing meaning to text; and (c) the gravity of the consequences for the person is not a sufficient foundation for an interpretation that is contrary to the ordinary words.
- *EFX17* (2021) 271 CLR 112 at [23], [28], [30] **JBA 3:13**; *RS* [14], [17]
- 20 • Notification does not require knowledge: *Nguyen* (1997) 74 FCR 311 at 325 (Sundberg J) **JBA 6:45**
3. ***Ordinary meaning:*** The ordinary meaning of “practicable” is feasible, from the perspective of the person performing the task.
- *M38/2002* (2003) 131 FCR 346 at [65] **JBA 6:31**; *RS* [15]
4. ***Scheme requires certainty:*** The statutory scheme requires being able to identify the time of notification with certainty, to determine the time permitted for making representations and the lawfulness of detention. Those matters tend against “practicable” depending on the recipient’s subjective understanding: *RS* [26]-[27].

5. ***Legal incapacity would not invalidate notice:*** At most, the fact that the recipient lacks legal capacity could only affect the validity of any step taken by them (such as making representations), not the prior giving of notice to them: *RS* [20]-[21].
6. However, the better view is that the validity of any representations made under s 501CA does not depend on the person's legal capacity – they should be permitted to keep this benefit.
 - *SBAH/2001* (2002) 126 FCR 552 at [1], [32] **JBA 6:38**; *SFTB* (2003) 129 FCR 222 at [7], [10]-[11] **JBA 6:39**; *RS* [23]-[25]. Those cases do not depend on the ability to regularise court proceedings by appointing a guardian: *cf Reply* [8]
- 10 7. The Minister's interpretation is supported by the use of "as soon as practicable" in other provisions of the Act, which could not depend on subjective understanding.
 - Migration Act 1958 (Cth) ss 163(3), 253(3), 487M(3) **JBA 1:03**
 - Other provisions expressly require the Minister to ensure that the recipient understand a notice: *EFX17* (2021) 271 CLR 112 at [27] **JBA 3:13**
8. ***Any individual unfairness cannot displace text:*** Arguments about the unfairness of the application of the provision in individual cases cannot displace the clear text. Potential unfairness in individual cases is inherent in any fixed time limit, and the Act contains mechanisms to overcome unfairness in individual cases (eg s 195A).
 - *AEU* (2012) 246 CLR 117 at [28], [32] **JBA 3:07**
- 20 9. ***Practicability is not a jurisdictional fact:*** The practicability of giving notice is a matter of assessment for the person giving notice (subject to judicial review for unreasonableness and other grounds), not a jurisdictional fact: *RS* [38]. The scheme requires certainty in the time of notification (as above), and "practicability" is assessed from the perspective of the person giving notice: *RS* [36]-[37], [39]-[40].
 - *Chattaway* (2020) 136 SASR 347 at [34] **JBA 5:25**
10. There is no guidance from cases considering whether removal is "reasonably practicable" under s 198(6): *MS* [38].
 - *cf AJL20* (2021) 273 CLR 43 at [30] **JBA 3:08**; *Beyazkilinc* (2006) 155 FCR 465 at [42], [44] **JBA 5:24**

Ground 2: Notice given under s 501CA(3) can only be given once

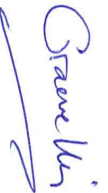
11. The scheme of the Act requires a single notification, given as soon as practicable after the cancellation under s 501(3A). This scheme evinces a contrary intention which excludes s 33(1) of the *Acts Interpretation Act 1901* (Cth).
12. The time for giving notice is tethered to a single event: the making of the cancellation decision. The date of notification establishes the time in which representations must be received (within 28 days after being given the notice: reg 2.52(2)(b)). A failure to make representations within the prescribed time engages a duty to remove the person from Australia as soon as reasonably practicable (s 198(2B)). These provisions require there to be a single notification.

- *BDS20* (2021) 285 FCR 43 at [98]-[99], [110]-[112] **JBA 5:22**
- *Manaf* (2009) 111 ALD 437 at [48] **JBA 6:34**; *RS [45]-[48]*

13. If more than 1 notification were possible, then the duty to re-notify could crystallise at any point where it would be legally unreasonable not to issue a further notice (presumably whenever there is a material change in circumstances). This floating inchoate duty is contrary to the scheme of the Act: *RS [49]-[50]*. The potential for injustice in the individual case is addressed in the Act through other means, such as s 195A: *RS [51]*.

- *BDS20* at [103], [116]-[118]

20 Dated: 3 September 2024

**GRAEME HILL****JONATHAN BARRINGTON**