HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

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Important Information

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Form 27F – Outline of oral submissions

Note: see rule 44.08.2.

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY
BETWEEN:

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Applicant

and

JOSEPH LEON MCQUEEN
Respondent

APPLICANT'S OUTLINE OF ORAL SUBMISSIONS

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The Full Court's decision precludes reliance on a Departmental summary (AS [25]-[29]; Reply [3])

1. The Full Court concluded that the "Minister was required personally to consider Mr McQueen's representations to him, and could not rely on a summary produced to him by his officers in the Departmental brief": **FC [43] (AB 328)** see also **FC [78]-[106] (AB 337-345**).

2. That statement was unqualified by reference to the accuracy or completeness of the summary. The effect is that a decision-maker cannot rely on a summary or synthesis of representations without falling into jurisdictional error (see also **FC [84] (AB 338)**).

3. There is no dispute between the parties that the Full Court's decision precludes reliance on a Departmental synthesis or summary of representations: see **RS [3], [14], [46]-[47]**.

The Full Court's approach is inconsistent with authority (AS [15]-[24])

4. The Full Court's decision is inconsistent with a well-established line of authority. In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 30 (**JBA Tab 5 at 107**), Gibbs CJ accepted the "Minister cannot be expected to read for himself all the relevant papers that relate to the matter", and that it "would not be unreasonable for him to rely on a summary of the relevant facts furnished by the officers of his Department". Brennan J stated (at 66 (**JBA Tab 5 at 143**)) that a "Minister may retain

his power to make a decision while relying on his Department to draw his attention to the salient facts".

5. In *Tickner v Chapman* (1995) 57 FCR 451 at 497 (**JBA Tab 13 at 416**), Kiefel J accepted that a "'consideration' of the representations" does not require the Minister to "personally read each representation", but a summary must "provide[] a full account of what is in them".

6. In *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352 at [138] (**JBA Tab 7 at 205**) the Full Court (Griffiths, White and Bromwich JJ) held that "the Minister was entitled to have regard to the Department's summary of the material".

7. In *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214 (**JBA Tab 8**):

   (a) Kiefel CJ, Gageler and Gleeson JJ (at [25] (**JBA 225**)) referred with approval to the articulation by Brennan J in *Peko-Wallsend* of the relationship between a Minister and his or her Department;

   (b) Gordon J (at [91] (**JBA 235**)) stated that "the Minister may personally make a statutory decision while relying on the department's summary, provided the Minister does in fact have regard to all relevant considerations that condition the exercise of the power", referring also to Brennan J in *Peko-Wallsend;* and

   (c) Jagot J (at [295] (**JBA 269**)) stated the fact that a Minister's appreciation of a case may "to a great extent" depend on the analysis and advice of departmental officers does not mean the Minister is not personally making the decision.

8. This approach is also orthodox in the United Kingdom: see *R (on the application of National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 (**JBA Tab 12**).

Section 501CA(4) stands in no different position (AS [30]-[40]; Reply [4]-[11])

9. Section 501CA(4) does not preclude reliance upon a summary. There is error if, and only if, the result of relying on the summary is that the Minister makes some recognised jurisdictional error.

10. This is the necessary premise of the decision in *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 96 ALJR 497 at [23], [25] (**JBA Tab 11 at 324-325**). If the Minister does not act unreasonably in not considering lengthy, unclear and apparently irrelevant

representations, the Minister does not act unreasonably by relying on a summary which (for example) excludes such representations.

11. That the representations "as a whole" are a mandatory relevant consideration focuses attention on the substance of the representations, not the precise form in which they are submitted: see *Minister for Home Affairs v Buadromo* (2018) 267 FCR 320 at [41] (**JBA Tab 10 at 305**).

12. No feature of s 501CA(4) means that reliance on a summary of representations is necessarily insufficient.

The Departmental summary was not materially deficient (AS [41]-[42]; Reply [12]-[13])

13. The Full Court failed to identify any omission, misstatement or error in the Department's summary. Nor did the Full Court identify any feature of the summary which was different to the original representations, such that it was something that the decision-maker was required to consider or could realistically have led them to make a different decision.

14. Error is not established by the mere fact that the summary did not convey the "full sense and content of the representations" (cf **FC [91]** (**AB 340**)).

Dated: 14 December 2023

Perry Herzfeld SC

Naomi Wootton