HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN: **MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS**
Applicant

and

JOSEPH LEON MCQUEEN
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

This outline is in a form suitable for publication on the Internet.

Part II: Propositions

Nature of this case

1. The former Minister, by two procedural decisions, chose to deal with the Respondent's case personally (Respondent's Submissions (**RS**) **[8]**, **[10]**).

2. Nothing would have suggested to the former Minister that this case was one at "*the most complex end*" (*cf* Applicant's Reply (**AR**) **[11]**).

First issue

3. In the case of a power conferred or duty imposed by an Act, the question of what form of assistance by others is permitted must be answered by construing the statute (**RS [23]**). Both the primary judge and the Full Court so approached the question.

   - Primary judge (**RS [13]**).
   - Full Court (**RS [14]**).

   Not the Minister, who contends that the Full Court erred by not following "*the orthodox approach*" (Applicant's Submissions (**AS**) **[12]**, **[25]**; **RS [23], [35], [48]-[49]**).

4. To the extent the Minister engages with construction, it is solely in reply (**AR [7]-[10]**), but shunning contextual analysis, instead adopting a "similar features" analysis e.g.: "*We say that X is also true in the case of s Y of the Act, when the Minister acts personally*" (**AR [7]**). Such approach finds no support in this Court's jurisprudence.

5. In general terms, it is permissible for the person responsible for a statutory task to be assisted in its execution. (It may even be necessary.) The issue is whether that "help" crosses over into execution of the task, in whole or part (**RS [22]**, **[36]**).

6. In respect of s 501CA(4):

   - the entire scheme – to be found in ss 476(2)(c), 500(1)(b), (ba), (3), (4), 501(3A) and 501CA – must be considered; contextually, s 501(3A) is especially significant (**RS [41]-[42]**)
   - the fact of representations having been made (and right to make them does not limit them as to topics), is the condition precedent to the exercise of the power (**RS [45]**)
   - the decision-maker is given great latitude, by "*another reason why*" (**RS [44]**)
   - power is delegable, and only difference is absence of merits review (**RS [38]-[40]**)
   - no requirement is imposed on the Minister, if the decision is made personally, to report to Parliament (*cf* s 501(3), (4A))
   - differences between s 501CA(4) (with s 501(3A)), and s 501(3) (with s 501C), are important in seeking to discern Parliament's intention (**RS [43], [45]**; *cf* **AR [9]**: "*… does not provide any relevant distinction*")

7. The authorities do not assist the Minister with his "*orthodox approach*":

   - *Peko-Wallsend* (**RS [26]-[34]**) [**JBA vol 2, tab 5 at 101-102, 104 (submission in headnote), 107 (Gibbs CJ), 114-116, 120-121, 123 (Mason J), 142-143 (Brennan J), 144-145 (Deane J), 148 (Dawson J)**]
   - *R (on the application National Association Health Stores) v Department Health* [**JBA vol 3, tab 12 at 349-352 (Sedley LJ)**]
   - *Plaintiff M1/2021 v Minister* (**RS [50]-[51]**) [**JBA vol 3, tab 11 at 324-326**]
   - *Minister v Viane* (**RS [53(e)]**) [**JBA vol 2, tab 6 at 158-160**]
   - *Tickner v Chapman* (**RS [52]-[57]**) [**JBA vol 3, tab 13 at 373-375, 380-384 (Black CJ), 395-398 (Burchett J), 410, 412-416 (Kiefel J)**]
   - *Carrascalao v Minister* (**RS [58]-[61]**) [**JBA vol 3, tab 7 at 184, 186-188, 205**]

- *Davis v Minister* (**RS [62]-[66]**) [**JBA vol 3, tab 8 at 223, 225 (Kiefel CJ, Gageler and Gleeson CJ, 230, 235-237 (Gordon J), 238-239, 243-244 (Edelman J), 269 (Jagot J)**]

8. In each of *Tickner v Chapman* and *Carrascalao*, the Full Court considered that in some circumstances it may be permissible for a Minister to rely on a Departmental summary of representations (the statute providing for an opportunity to make them, and some representations having been made) (**RS [54]-[56]**, **[61]**).

9. Notably in *Carrascalao* at [138] **[JBA vol 3, tab 7 at 205]** (a paragraph upon which the Minister relies, **AR [9]**), the Full Court observed that it had not been contended that the summary "*did not convey the force of the argument made*".

10. Preparedness to accept that, depending on the circumstances, reliance upon a summary is permissible, is the highest the authorities go in the Minister's favour. No authority has "***condon[ed]*** *the use of summaries in administrative decision-making*" (*cf* **AR [4]**).

11. It was jurisdictional error for the former Minister to fail (actually, not constructively) to perform the task conditioning the exercise of the power (*cf* **AR [12]**).

Second issue

12. If the Full Court erred because, on the proper construction of the scheme, s 501CA(4) does not prevent reliance by the Minister on only a summary of the representations, the unchallenged finding is that in this case the summary was deficient (**RS [16]-[19]**, **[21(a)]**, **[69]-[72]**).

13. In this case, the former Minister's failure to consider the representations was material. The Respondent lost the opportunity of persuading the former Minister. It is no answer to contend that the Departmental summary did not omit a "topic" arising from those representations (*cf* **AR [12]-[13]**).

Dated: 14 December 2023

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