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
SYDNEY REGISTRY

JOSEPH MILLER
Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

FIRST RESPONDENT'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

Applicable principles

1. The single question is whether compliance with s 29(1)(c) of the AAT Act is a condition of making an application for review of a decision under s 501CA of the Migration Act. The applicable principles of statutory construction are clear. They were applied in similar, but not identical, legislative contexts by this Court in *Forrest*, and more recently by the Full Federal Court in *BXS20*: **RS [16]-[20]**.

Relationship between AAT Act and Migration Act

2. The AAT Act is designed to intersect with a wide range of principal legislation. The AAT Act establishes default rules, including for how an application is made (s 29) and who can make an application (ss 27, 27AA).

3. The AAT Act contemplates derogation from the default rules (s 25(6)). The Migration Act does so here expressly, and in limited and precise ways. Relevantly, s 500(6B) only disapplies or modifies s 29(1)(d) and (7)-(10). The Migration Act does not impliedly disapply or modify s 29(1)(c), either the express requirement for an application to contain a statement of reasons, or the embedded or implied provision as to the consequences of non-compliance with the requirement: **RS [7]-[15]**. If anything, the imperative for speedy decision-making on an application for review of a decision under s 501CA (see s 500(6L)) reinforces the rationale for compliance with s 29(1)(c) of the AAT Act being a condition of the making of a valid application: **PJ [63]**.

Text

4. The use of precise and mandatory language in s 29(1) is significant to the question of construction here – i.e., in this particular statutory context: **RS [21]**; **FC [44]**. There are four related features of the text of s 29 that strongly point to the conclusion that compliance with para (c) is a condition of the making of a valid application.

   (a) *First,* is the very the subject to which s 29(1) is directed (the "manner of applying for review"): **RS [22]-[23]**;

   (b) *Second*, is the particular subject to which s 29(1)(c) is directed, being what the application must "contain" (as distinct from what must "accompany" it) (s 29(1)(b), read with s 69C);

   (c) *Third*, s 29(1) is directed to how an application is made; but it does not in itself impose an obligation on any person to do any thing. It is therefore distinct from the provision at issue in *Project Blue Sky*. If s 29(1)(c) were not a condition on the making of an application, it would be otiose: PJ [65]; *BXS20* at [33]. Para (c) would be unenforceable, its mandatory character would therefore be illusory, and its inclusion in s 29(1) would serve no rational purpose;

   (d) *Fourth*, it would be incongruous to construe ss 29(1)(a) and (d) as conditions of making a valid application, but not (c): FC [27], [45]-[56]; *Forrest & Forrest* at [69]; *BXS20* at [31]-[34]; cf. *Formosa* at 120, 123. (The appellant agrees that (a) is a condition of making an application. The appellant disputes that (d) is a condition; but that proposition is unsustainable.)

5. Section 29(1)(b) is affected by s 69C, and is illuminated by a particular legislative history. Section 69C bears no significance as to the question of the significance of non-compliance with s 29(1)(c); just as it has none for paras (a) or (d): **RS [36]-[39]**.

6. Section 29AB also supports the FC's construction: it assumes that an application may contain a statement of reasons (albeit one that is of limited utility); it cannot be construed as authorising the Tribunal to require a statement to be provided when none was contained in the original application: **RS [43]-[45]**.

Purpose

7. There is a rational purpose served by 29(1)(c) as construed by the FC. It is obviously desirable that the Tribunal be provided information that may assist it at the outset, and para (c) is apt to promote the realisation of that objective. The rule in para (c) is particularly useful to facilitate the Tribunal ascertaining whether a purported applicant has standing by reference to s 27 of the AAT Act and (therefore) whether the Tribunal

has jurisdiction at all, or power to make directions under s 33 of the AAT Act: **RS [40]-[42]**. It is irrelevant that different choices might have been made by Parliament: *Forrest & Forrest* at [84]-[85]; *BXS20* at [32]-[33], [41].

Construction by reference to consequences

8. As there is a discernible, rational purpose to s 29(1)(c) of the AAT Act as construed by the FC, the Court should not adopt a strained construction to avoid supposed harsh consequences: **RS [51]**; *BXS20* at [32]-[33].

9. In any event, harsh consequences are not a necessary consequence of the FC's construction of s 29(1)(c) as a default rule. Under the default rules, an extension of time under s 29(7) could be granted in appropriate cases to allow an applicant more time to make a valid application. The harsh consequences in this case are the combined product of: (a) the appellant's agent's error; (b) s 29(1)(c) of the AAT Act as construed by the FC: and (c) the disapplication/modifications of s 29(1)(d) and (7)-(10) of the AAT Act made by s 500(6B) of the Migration Act that truncate the time for an application and preclude an extension. Section 500(6B) is unambiguous: **RS [49]-[51]**.

Utility of the rule vs. utility of particular statements given in fact

10. Section 29(1)(c) as construed by the FC has utility, even if particular statements of reasons given in fact may be or more or less useful. The requirement for a statement of reasons in an application represents a relatively straightforward rule, with limited room for debate regarding compliance. But imposing the requirement as a condition on making an application is apt to facilitate administrative efficiency (especially in the assessment of standing before any powers may be exercised or purportedly exercised by the Tribunal, including under s 33 of the AAT Act): **RS [42]**. Section 29AB confers power on the Tribunal to elicit more useful statements in appropriate cases.

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NICK WOOD
(03) 9225 6392
nick.wood@vicbar.com.au

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KYLIE MCINNES
(03) 9225 7222
kylie.mcinnes@vicbar.com.au