HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **JOSEPH MILLER**
Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP, AND MULTICULTURAL AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

I. CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

II. THE ISSUE

The issue

2. The issue posed by the appeal is whether the Full Court was correct to conclude that compliance with the requirement in s 29(1)(c) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) was a condition of making an application to the second respondent (**Tribunal**) for review of a decision by a delegate of the first respondent under s 501CA of the *Migration Act 1958* (Cth) (**Migration Act**). The appellant's suggested second issue,[1] abstractly framed, adds nothing to the first.

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[1] AS, [3]: "In assessing whether a provision imposes an obligation compliance with which is essential to validity … is it relevant that the provision uses the word 'must'?"

Matters not in issue

3. It is also useful to identify certain matters that are not in issue on the appeal.

a) The appellant does not contend that s 29 of the AAT Act did not apply with respect to the making of an application to the Tribunal for review of the decision of a delegate of the Minister on 15 March 2021 under s 501CA of the Migration Act. He correctly accepts that s 29 of the AAT set out requirements governing the "manner" of making an application for review to the Tribunal of such a decision (AS [7]).

b) The appellant does not contend that s 29(1) of the AAT Act does not establish any conditions for the making of an application to the Tribunal for review of the delegate's decision. Thus, the appellant accepts that an application is not made unless there is compliance with the requirement in s 29(1)(a) (AS [21]). But the appellant submits that the requirements of s 29(1) are "mandatory as to some of the integers therein and directory as to others" (AS [20]).[2]

c) The appellant does not contend that the documents that he lodged with the Tribunal on 24 March 2021 – being a date within the 9-day period allowed for the making of an application for review of the delegate's decision by s 500(6B) of the Migration Act – "contain[ed] a statement of the reasons for the application" within the meaning of s 29(1)(c) of the AAT Act.[3]

d) Finally, no issue of "substantial compliance" arises on this appeal. As noted above, the appellant does not contend that he complied (substantially or otherwise) with the requirement in s 29(1)(c). And the appeal does not raise any "substantial compliance" with any "form".[4]

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2 Adopting the language of Davies and Gummow JJ in *Formosa v Secretary, Department of Social Security* (1988) 46 FCR 117, 123.

3 The appellant made that submission to the Full Court: he submitted that the application "impliedly" contained a statement of reasons for the application. The Full Court rejected that submission (see CAB 135 [5], 140-143 [29]-[40]), and the appellant does not reagitate it on appeal to this Court.

4 Neither the AAT Act nor the Migration Act prescribe a form for the making of an application for review of decisions under s 501CA of the Migration Act. Compare, for example, *MZAIC v Minister for Immigration and Border Protection* (2016) 237 FCR 156 (Full Court), concerning the requirement in s 412(1)(a) of the Migration Act that an application for review of a "Part 7-reviewable decision" must be made in the approved form, read in light of s 25C of the *Acts Interpretation Act 1901* (Cth) dealing with "substantial compliance" with a form. Notably, in this case, the appellant has never sought to defend the reasoning of the Tribunal in reliance on *MZAIC*: see CAB 52 [34] ff.

III. SECTION 78B NOTICES

4. The Minister has considered whether notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) is required, and he agrees with the appellant that it is not.

IV. FACTS

5. The Minister agrees with the appellant's summary of the factual background.

V. ARGUMENT

6. The Minister's short answer to the appeal is, in summary, as follows:

a) The Tribunal's jurisdiction is engaged by the making of an application.

b) Section 29(1) of the AAT Act establishes requirements for the making of an application for review of a decision. Paragraph (d), concerning the time within which an application may be made, was disapplied with respect to decisions under s 501CA of that Act, and a different and shorter deadline was imposed in its place (9 days after notification of the decision): s 500(6B) of the Migration Act. Related provisions in s 29(7)-(10) of the AAT Act allowing for an extension of time were also disapplied.

c) Section 29(1)(c) of the AAT Act was not disapplied or modified by the Migration Act. Accordingly, the question that arises is the proper construction of s 29(1)(c) of the AAT Act in its unmodified form.

d) Considering the unmodified form of s 29(1) of the AAT Act, there is no reason to distinguish between the requirements in paragraph (a) (form of an application), paragraphs (c), (ca) and (cb) (content of an application) and paragraph (d) (time within which any application must be made), in assessing the consequences of non-compliance with the requirements set out therein. If there is non-compliance with any of paragraphs (a), (ca), (cb) or (d), an application has not been made; the text and context impel the same answer for (c). Insofar as paragraph (b) (fees) stands in a different position, that is the result of specific statutory context (in s 69C) illuminated by a specific legislative history; the particular position of paragraph (b) does not suggest that paragraph (c) stands in a different position to the other requirements in s 29(1)(a), (ca), (cb) and (d) as to the making of an application for review.

e) Here, there was non-compliance with s 29(1)(c) of the AAT Act before the time within which an application for review of the delegate's decision under s 501CA of the Migration Act could be made under s 500(6B) had expired.

f) Accordingly, no application was made; the Tribunal did not have jurisdiction.

g) The result here is harsh. However, that is a consequence of Parliament's (unambiguous) choice to truncate the period within which an application for review of a decision under s 501CA of the Migration Act may be lodged, and to preclude any extension of time, which together curtail the practical ability of a person to "perfect" a non-compliant application within time.

10 ***Legislative framework***

7. Section 500 of the Migration Act and the AAT Act intersect.

8. Section 25(1)(a) of the AAT Act recognises that an "enactment" (defined in s 3(1) as including an Act) may provide that applications may be made to the Tribunal for review of decisions made in the exercise of powers conferred by that enactment. Section 25(3)(c) provides that an enactment may specify conditions subject to which applications may be made.

9. Section 500(1)(ba) of the Migration Act confers a right to make an application for review of a decision of a delegate of the Minister under s 501CA, subject to certain conditions set out in the balance of s 500.

20 10. Section 29 of the AAT Act "prescribe[s] the method" by which a person's right to make an application for review located in an enactment "is to be exercised".[5] Thus, as Cooper J summarised the position in *Secretary, Department of Family and Community Services v Haagar* (emphasis added):[6]

> … **lodgment of the application for review in the manner required by the AAT Act is the act which enlivens the jurisdiction of the AAT to review**

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5 *Angus Fire Armour Australia Pty Ltd v Collector of Customs* (1988) 19 FCR 477, 480 (Sweeney J); see also 488-489 (Northrop J) and 490-491 (Jenkinson J). See also, for example, *Fitzmaurice v Repatriation Commission* (1989) 19 ALD 297, 304 (Davies J); *Eurovox Pty Ltd v Chief Executive Officer of Customs* [2000] FCA 1906, [16], [21] (Heerey J); *Goldie v Minister for Immigration and Multicultural Affairs* (2001) 111 FCR 378, [7] (Gray J, R D Nicholson and Stone JJ agreeing); *Jagroop v Minister for Immigration and Border Protection* (2014) 225 FCR 482, [89] (Dowsett, Murphy and White JJ).

6 (2001) 115 FCR 25, [10].

the decision. An application for review under s 175 of the [*Veterans Entitlements Act 1986* (Cth)], when it is made, is made under s 29 of the AAT Act. Therefore, it is made for the purposes of ss 175 and 177 of the VE Act when it is lodged as expressly required by s 29 of the AAT Act.

11. However, s 25(6) of the AAT Act recognises that, if an Act provides for applications to the Tribunal: (a) that Act may also include provisions adding to, excluding or modifying the operation of any of the provisions of the AAT Act in relation to such applications; and (b) those provisions of the AAT Act have effect subject to any such provisions. Section 25(6) recognises the possibility of the modification of the ordinary regime in the AAT Act (including in s 29) as deemed by Parliament appropriate for review of particular decisions, and "ensures that the other enactment is given priority so that the provisions of both statutes can be read together".[7]

12. Numerous subsections of s 500 of the Migration Act make provisions adding to, excluding or modifying the operation of provisions of the AAT Act. Relevantly, s 500(6B):

a) disapplies s 29(1)(d) of the AAT Act and instead makes stricter provision as to the time within which an application for review of a decision under s 501CA may be made (9 days after the day on which the person whose visa was cancelled was notified of the decision); and

b) disapplies ss 29(7)-(10) of the AAT Act (and thereby precludes any discretionary extension of the time for applying for review).[8]

13. However, s 500 of the Migration Act has not expressly or impliedly disapplied or modified s 29(1)(c). Given:

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7 *Beni v Minister for Immigration and Border Protection* (2018) 267 FCR 15, [62] (McKerracher, Reeves and Thawley JJ).

8 See *Goldie v Minister for Immigration and Multicultural Affairs* (2001) 111 FCR 378, [9] (Gray J, R D Nicholson and Stone JJ agreeing): "The purpose of making the changes to normal Tribunal procedures in the case of applications under s 500 of the *Migration Act* is to expedite the determination of those applications. Under the provisions of s 500, statutory time limits are shorter than those in the AAT Act and some time limits left by the AAT Act to the discretion of the Tribunal are fixed by s 500."

a) the express language by which s 500 of the Migration Act disapplied particular elements of the AAT Act, and indeed in subsection (6B) specifically disapplied only one paragraph of s 29(1) of the AAT Act; and

b) s 500 of the Migration Act did not make any other provision dealing with the subject-matter of s 29(1)(c) of the AAT Act,

there is no basis upon which the Court can conclude it was "implicit" that Parliament disapplied or modified the requirement in s 29(1)(c) of the AAT Act, including the consequences of non-compliance with it.

14. The basis of the appellant's submission (AS [54]) that s 500(6B) "clearly treats" the requirement in s 29(1)(c) of the AAT Act "differently" to other requirements that it expressly provides 'must' be satisfied is opaque. The submission is wrong.

a) Section 500(6B) does not refer in terms to making an application "in writing"; the appellant is also wrong to suggest that an application is "made" and "then" "lodged" (cf. AS [54]). Section 500(1) of the Migration Act, consistently with s 25(1)(a) of the AAT Act, provides for the making of an application. Section 29(1) of the AAT Act, except insofar as it is modified etc. by the Migration Act consistently with s 25(6) of the AAT Act, provides for how an application is made (including but not limited to the requirement that it must be made in writing and by lodging it with the Tribunal in time).

b) The fact that s 500(6B) provides that an application "must" be lodged within 9-days and "[a]ccordingly" ss 29(1)(d) and (7)-(10) of the AAT Act do not apply, reflects Parliament "adding" a mandatory requirement as to timing in substitution for the default rules as to timing in s 29 of the AAT Act that subsection (6B) excludes, consistently with s 25(6) of the AAT Act. If anything is implicit from subsection (6B), it is an implication by the omission to mention s 29(1)(c) of the AAT Act that the default scheme in respect of that element of the AAT Act is not disturbed.

15. The question of the consequences of non-compliance with s 29(1)(c) in the AAT Act must, within the scheme of that Act (unmodified by another Act), yield of a single answer: yes or no. That question arises here given that s 29(1)(c) of the AAT Act has not been modified by the Migration Act in its application to reviews of decisions under s 501CA of the Migration Act.

Applicable principles

16. Answering the issue arising on this appeal involves a question of construction of a kind addressed by this Court in *Project Blue Sky Inc v Australian Broadcasting Authority*,[9] and (more analogously) in *Forrest & Forrest Pty Ltd v Wilson*.[10] The Court is well-familiar with those decisions, and they will be addressed at hearing.

17. However, it also assists to have regard to the principles identified by the Full Court of the Federal Court in *BXS20 v Minister for Immigration, Citizenship and Multicultural Affairs*,[11] concerning a similar question arising with respect to s 347 of the Migration Act concerning applications for review of "Part 5-reviewable
10 decisions" in the Tribunal's Migration and Refugee Division.[12]

18. Section 347(1) provided that an application for review of a "Part 5-reviewable decision" was required to be made in the approved form (para (a)), given to the Tribunal within a prescribed period (para (b)), and be accompanied by the prescribed fee (para (c)). The appellant did not pay the full amount of the prescribed fee within the prescribed period. The Full Court held that an application for review had therefore not been made, and that the Tribunal did not have jurisdiction.

19. Thawley and Kennett JJ (with whose reasons Stewart J agreed) held that compliance with the requirements in s 347(1) was necessary in order for a person to make an "application" that engages the Tribunal's jurisdiction. Their Honours held:

20 a) citing authorities of this Court,[13] that "the conclusion that a particular consequence of a proposed construction is one that Parliament is unlikely to have intended (and therefore to be avoided) needs to be grounded in the text

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9 (1998) 194 CLR 355.

10 (2017) 262 CLR 510. The issue in *Forrest & Forrest* was whether compliance with a requirement that an application for a mining lease be "accompanied by" a certain document was a condition of making the application under the *Mining Act 1978* (WA).

11 (2023) 296 FCR 63.

12 The Full Court's recent decision in *BXS20* coheres with an earlier decision of the Full Court in *Fernando v Minister for Immigration and Multicultural Affairs* (2000) 97 FCR 407 regarding an equivalent provision in s 412(1) of the Migration Act (in Part 7 of that Act).

13 *Public Transport Commission (NSW) v J Murray-More (NSW) Pty Ltd* (1975) 132 CLR 336, 350; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, [47]; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, [44]; *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, [26] (French CJ and Hayne J); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, [39].

and structure of the statute, albeit the process may be assisted by common law and statutory rules of construction";[14]

b) each of paragraphs (a) to (c) of s 347(1) formed part of a "composite requirement" all introduced by the word 'must' in the chapeau and all relating in the same way – textually at least – to the condition specified in s 348(1)", and "[r]eading these provisions according to their terms, there is no basis to treat some but not all of them as jurisdictional";[15]

c) "[n]othing in the context of s 347(1) requires it to be given a strained construction in which the words of the chapeau have different effect in relation to para (c) from that which they have in relation to para (b)", noting that "if payment of the prescribed fee were not a prerequisite for review, there would be no reason for anyone to pay the fee; and s 347(1)(c) would serve little if any purpose";[16]

d) "[a] requirement for the fee to be paid by an inflexible deadline creates significant potential for people to be deprived of merits review as a result of mistakes or accidents", but that "observations about the undesirability of these outcomes do not translate in any orthodox way into a proposition about legislative intention";[17]

e) "[r]ead together, ss 347 and 348 confer a right to merits review and draw boundaries around its availability. As part of that regime, s 347(1) imposes a deadline for a review application to be made (together with a requirement for payment of a fee) … No provision is made for extensions of time. The provisions thus impose hard (and potentially very short) deadlines, despite the harsh results that they can have in individual cases. A proposition that Parliament could not have intended such results to arise thus finds no foundation in the statutory text and structure."[18]

20. This reasoning is based on established principle, it is sound, and it resonates here.

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14 (2023) 296 FCR 63, [32].
15 (2023) 296 FCR 63, [31].
16 (2023) 296 FCR 63, [31]-[32].
17 (2023) 296 FCR 63, [41].
18 (2023) 296 FCR 63, [41].

Mandatory language, in this particular context, is significant

21. The use of mandatory language ("must" or "shall") in a provision does not, in and of itself, and irrespective of the context, dictate the answer to a question of whether non-compliance results in a purported legal act being invalid.[19] No such proposition has ever been advanced by the Minister; nor was such a proposition the basis for the Full Court's judgment. The appellant sets up a straw man to demolish (AS [15] ff).

22. The Full Court held that s 29 "is concerned with the manner in which an application is to be made"; the object of s 29 is "how to invoke the jurisdiction of the Tribunal by the making of an application"; and it is "relevant in carrying out the task of determining the presumed intended consequences of non-compliance to examine the certainty with which the requirement itself is expressed".[20]

23. The Full Court's analysis accords with the reasoning of this Court in *Forrest & Forrest*, and of the Full Court in *BXS20*. There is nothing illogical about concluding that, where a provision concerning <u>how</u> an "application" is made is expressed in mandatory rather than permissive language, that naturally tends to the conclusion that a purported application made in non-compliance with that requirement is not an application within the meaning of the Act. Nothing said in *Project Blue Sky*, or said by Millet LJ in *Petch v Gurney (Inspector of Taxes)*,[21] suggests otherwise.

Context, purpose and consequences

<u>Immediate context: the other paragraphs of s 29(1) of the AAT Act</u>

24. To assist the Court, a table summarising the different requirements that have been expressed in s 29(1) of the AAT Act over time is set out in Annexure A.

25. With the possible exception of s 29(1)(b) (which is addressed at [36] to [38] below), each of the other paragraphs of s 29(1), where applicable,[22] contain requirements for making an application that thereby engages the Tribunal's jurisdiction.

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19 Though it may be relevant. See, e.g., *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506, [174] (Edelman J) and the cases there cited.

20 CAB 145 [45].

21 [1994] 3 All ER 731, 736, cited at AS [18].

22 Sections 29(1)(ca) and (cb) only apply with respect to applications for review of certain decisions under the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**). Section 29(1)(c) does not apply if s 29(1)(ca) or (cb) applies.

26. As noted above, the appellant rightly accepts that a person must comply with the requirement in s 29(1)**(a)** in order to make an application that engages the Tribunal's jurisdiction (AS [21]).

27. The appellant wrongly contends that compliance with s 29(1)**(d)** is not essential to the validity of an application (AS [41] ff).

28. The Full Court's reasons [50]-[52] (CAB 146) are sound. Compliance with the requirement in s 29(1)(d) plainly goes to the validity of an application. Indeed, were it otherwise, the requirement would be meaningless, and the associated provisions with respect to an extension of time in s 29(7)-(10) would be otiose.

29. The appellant's assertion that the "practical reality" is that non-compliance with s 29(1)(d) "does not deprive the Tribunal of jurisdiction to determine the application", and therefore compliance with s 29(1)(d) is not "as a matter of substance" essential to the validity of an application blurs the legal issue (AS [44]).

30. The time identified in s 29(1)(d) (the "prescribed time") is capable of being extended by a different "application" under s 29(7) made after the expiry of the ordinary deadline (s 29(8); that is, *nunc pro tunc*). If an extension is granted under s 29(7), a purported application that was incompetent at the time that it was made is rendered competent by that exercise of power.[23] If an extension is not granted – including because by operation of s 500(6B) of the Migration Act no power to grant an extension under s 29(7) is available – then the purported application for review made outside time was and remains invalid.

31. None of the above is inconsistent with what is said in *Barker v Palmer*.[24] The context to Grove J's statement of the general principle is the preceding sentence, that "[i]n construing Acts of Parliament, provisions which appear on the face of them obligatory, cannot, without strong reasons given, be held only directory."[25] Grove J's statement of the rule should not be understood as meaning that an application filed out of time and without the power extending time having been exercised (where such power has been conferred) is nevertheless valid.

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23 Cf. *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, [30].

24 (1881) 8 QBD 9, cited at AS [42].

25 (1881) 8 QBD 9, 10.

32. As to paragraphs **(ca)** and **(cb)**, there is clear utility in the Tribunal obtaining the documents described therein at the time that the application is made, in light of the nature of reviews under ss 54 and 83B of the ASIO Act. As the appellant accepts (AS [46]), compliance assists the Tribunal in ascertaining whether the person has standing by reference to the particular requirements of s 27AA of the AAT Act (see s 29(1)(ca)(i) and (cb)), and in ascertaining whether a person has made an application on the permissible ground under ss 54(2) or 83B(2) of the ASIO Act (see s 29(1)(cb)).

33. The absence of any power corresponding to s 29AB with respect to statements under ss 29(1)(ca) and (cb) does not indicate that those paragraphs have a different operation to s 29(1)(c): cf. AS [47]. There is simply no need for a s 29AB equivalent. The matters that are required to be stated by s 29(1)(ca) and (cb) go to the heart of whether the Tribunal has jurisdiction to hear a matter under ss 54 or 83B of the ASIO Act. There is a single ground upon which a review of this kind can be brought and an application will thus either state that ground (and be valid) or will not state that ground (and be invalid).

34. Further, there is no limit on the number of applications that may be made under ss 54(2) or 83B(2) of the ASIO Act; nor is there any time limit for making such an application. If an application did not comply with s 29(1)(cb), an applicant could simply apply again with a statement setting out the available ground on which the application may be made. There is therefore no need for a s 29AB equivalent to operate in respect of s 29(1)(cb).

35. And it would be anomalous if compliance with s 29(1)(ca) and (cb), each of which is a substitute for s 29(1)(c) where applicable, were essential for validity of a relevant application in the Security Division, but compliance with s 29(1)(c) in relation to an application in the General Division was not.

36. With respect to s 29(1)**(b)**, as the Full Court rightly held ([53]-[54], CAB 146-147), statutory context and legislative history are crucial to understanding its operation.

37. As the Full Court explained, under the original AAT Act,[26] fees were not required to be paid at all. In 1977, s 70 was inserted, which authorised regulations to make provision requiring the payment of fees (but not in a provision of the Act that went

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[26] *Administrative Appeals Tribunal Act 1975* (1975/91).

to the validity of an application).[27] In 1993, s 29A was introduced, which provided a negative deeming provision: an application is "not taken to have been made" unless the fee is paid, but contemplated that the fee could be paid after lodgement.[28] In 2012, s 29A was repealed and s 69C was introduced, allowing further flexibility.[29] Section 69C(1) provides that the Tribunal may dismiss an application if regulations under s 70 prescribe a fee to be payable in respect of the application, and the fee has not been paid by the time worked out under the regulations.[30]

38. Seen in light of s 69C, and informed also by the legislative history, it is apparent that Parliament has not required the payment of fees at the same time as the application is lodged, or even perhaps before the deadline in s 29(1)(d) for applying.[31]

39. However, there is no such contextual or historical support for the proposition that s 29(1)(c), which speaks to what an application must "contain" (as compared to what must "accompany" an application), can be complied with after expiry of the time in which an application may be made.

Apparent purpose of s 29(1)(c)

40. The appellant invites the Court to characterise the requirement in s 29(1)(c) of the AAT Act for an application to include a statement of reasons as having "relative insignificance" to the Tribunal's function (AS [22]). And yet the appellant correctly concedes that a "well-prepared statement of an applicant's reasons for making [an] application may assist in the early identification of an applicant's standing … and the issues in dispute" (AS [25]).[32]

41. The appellant's concession undermines his argument. Once it is appreciated that the inclusion of a statement of reasons in an application may assist the Tribunal –

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27 *Administrative Appeals Tribunal Amendment Act 1977* (1977/58).

28 *Administrative Appeals Tribunal Amendment Act 1993* (1993/31).

29 *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (2012/186).

30 Regulation 24(2) of the *Administrative Appeals Tribunal Regulation 2015* as in force at the time of the Tribunal's decision prescribes the time as the end of 6 weeks starting on the day the application is lodged.

31 See reg 24 of the *Administrative Appeals Tribunal Regulation 2015*. It may be unnecessary for this Court to determine whether, in order for a purported application ultimately to be determined by the Tribunal on its merits (as distinct from dismissed), fees would have to be paid.

32 The grounds can also assist the Tribunal to identify which decision is sought to be reviewed: see, e.g., *YXVZ and Child Support Registrar (Child support second review)* [2020] AATA 4802, [70].

particularly to assess whether a purported applicant has standing[33] and therefore whether the Tribunal has jurisdiction – it is discernible why Parliament would require the provision of such a statement as a condition of the making of a valid application.

42. It does not follow that, because s 29(1)(c) has been construed such that the requirement may be satisfied by a brief explanation, compliance with the requirement is not a condition of making an application for review.

a) Requiring a statement of reasons as a condition of making an application for review is apt to promote a more efficient system of review, because it is apt to elicit statements that assist the Tribunal at an early stage (including to assess standing). That is so, notwithstanding that on particular occasions statements of reasons given may not be particularly useful.

b) Parliament could have sought to impose some prescriptive standard as to the adequacy of reasons, but that would have been apt to lead to the proliferation of inconvenient and costly disputes about whether reasons given in fact were adequate and therefore whether the Tribunal had jurisdiction.

c) Alternatively, Parliament could not have required a statement of reasons to be contained in an application. But that would have meant that the Tribunal would not get the benefits that accrue – at least at a system-level – from requiring such reasons to be given at the outset.

d) Accordingly, the choice that Parliament made was not the only one that it could have made, but it is a perfectly intelligible one. Parliament adopted a simple rule: an application must contain a statement of reasons, however briefly expressed. And Parliament included a different mechanism in s 29AB to deal with the circumstance that a statement of reasons is included, but the statement is unhelpfully brief etc. That provision is addressed below.

The significance of s 29AB

43. The power of the Tribunal in s 29AB to request an "applicant" to "amend" their statement under paragraph 29(1)(c) if the Tribunal considers that it does not clearly identify the respects in which the applicant believes that the decision is not the correct

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[33] See AAT Act, ss 27 and 27AA.

or preferable decision strongly supports the Minister's construction. That is because s 29AB in its terms presupposes that there is an "applicant" who has already given such a "statement" (however useful or otherwise it may be).

44. The appellant's submission that s 29AB should be read "purposively" such that it is "capable of applying where the application includes no statement of reasons" (AS [29]), is untenable: it presupposes a purpose in order to support the appellant's desired construction, and it contradicts the statutory text.

45. A predecessor to s 29AB was first introduced into the AAT Act as s 29(1B). Contrary to the appellant's submissions, the explanatory memorandum accompanying the Bill that introduced s 29(1B)[34] does not suggest compliance with the requirement in s 29(1)(c) does not bear on the validity of an application. Indeed, as the Full Court correctly observed of the explanatory memorandum ([60], CAB 148): "it is clear that the drafter proceeded upon the assumption that a 'further statement' could only be requested where the application already contained a statement. This is made clear in the first sentence. All that the last sentence makes clear is that the request for a further statement cannot result in invalidity for non-compliance with s 29(1)(c)."

Other provisions

46. Other provisions of the AAT Act relied upon by the appellant do not assist his case.

47. **Section 33** does not indicate that compliance with s 29(1)(c) is not a condition going to validity of an application (cf. AS [26]). The Tribunal's power to require a person "who is a party to the proceeding to provide a statement of matters or contentions upon which reliance is intended to be placed at the hearing" (emphasis added) is only available where a valid application for review has been made. Section 33 underscores the importance of a person setting out their reasons for review in s 29(1)(c), including so as to enable the Tribunal to identify whether a purported application has been brought by a person with standing (a "party") at all, and therefore so as to enable the Tribunal to assess whether it can make directions at all.

48. And there is nothing "inconsistent" between the Full Court's construction of s 29(1)(c) and **s 2A** of the AAT Act (cf. AS [32]). Section 2A is "aspirational or exhortatory in nature", and concerns how the Tribunal is to "pursue the objective" of

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[34] Explanatory Memorandum to the Administrative Appeals Tribunal Amendment Bill 2004 (Cth) at 27.

providing a mechanism of a review that achieves the goals set out therein.[35] It says nothing as to the anterior question of whether there is an application for the Tribunal to consider at all.

Consequences

49. The Full Court's construction of s 29(1)(c) of the AAT Act (i.e., that compliance goes to the validity of the application) does not in itself lead to any absurd or harsh result. Any harshness arises not from the construction of s 29(1)(c), but from the modifications to s 29(1)(d) made by the Migration Act*:* FC [57] (CAB 148).

50. Absent the modifications to s 29(1)(d) and (7)-(10) wrought by s 500(6B) of the Migration Act, any harshness wrought by the Minister's construction of s 29(1)(c) would be capable of being ameliorated by an extension of time in appropriate cases. Thus, a purported application that does not include a statement of reasons would be invalid, but the affected person could, on application, obtain an extension of time under s 29(7) (i.e., on the basis that he or she used the wrong form or overlooked the requirement), and thereby "perfect" the application within the (extended) deadline by providing the requisite statement of reasons.[36]

51. Yet there can be no doubt that Parliament intended that applications for review of decisions under s 500 of the Migration Act must be made within the strict 9-day time limit set by s 500(6B). That leaves little room for a person to "perfect" a purported but non-compliant application in circumstances such as the present. But the modifications effected of s 500(6B) of the Migration Act, which entail that there is little time for correcting any error or oversight, simply admit of no ambiguity. And it is wrong in principle to adopt a strained construction of s 29(1)(c) of the AAT Act, being a default provision of general application in a wide array of legislative settings, so as to avoid perceived harshness in a given case that is (at least in part) the product of s 500(6B) of the Migration Act.

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35 *Fard v Secretary, Department of Immigration and Border Protection* [2016] FCA 417 at [80].

36 Cf. *Minister for Immigration and Citizenship v Chan* (2008) 172 FCR 193, [14] (Marshall J) [51]-[54] (Lander J). See also *Thayananthan v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 297, [33]; *Yilmaz v Minister for Immigration and Multicultural Affairs* (2000) 100 FCR 495, [19]-21] (Spender J) and [72] (Gyles J); *BXS20 v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 296 FCR 63, [40] (Thawley and Kennett JJ, Stewart J agreeing).

52. The caution expressed by the Full Court in *BXS20*, especially at [41], as to construction of a provision of this kind based on the perceived harshness of its operation in particular cases is well-made.

English authorities

53. Resort to English authorities (AS [33]-[40]) is not particularly useful in construing the AAT Act. In any event, the appellant is wrong to submit that they "strongly support" his argument here on the construction of the AAT Act.

54. The English case that the appellant contends is "most directly analogous" (AS [34]) is *Howard v Secretary of State for the Environment.*[37] But that case is distinguishable; and the reasoning employed does not assist to resolve the question arising in the present case. The Court placed particular emphasis on the provision in question requiring the relevant notice to "indicate the grounds of the appeal and state the facts on which it is based;…" (emphasis added). It was the prescriptive nature of that requirement, and the consequences of holding such a prescriptive requirement to be "mandatory", that persuaded the Court to conclude that it was merely "directory".[38] Yet as the appellant has himself correctly argued, the requirement in s 29(1)(c) of the AAT Act is not at all prescriptive; it is readily capable of being complied with. Nor, of course, did the legislation in *Howard* have a provision equivalent to s 29AB.

55. This Court has also urged cation in applying the *Project Blue Sky* analysis to considerations of the jurisdiction of courts.[39] The English cases considering the jurisdiction of courts (AS [37]-[40]) should therefore be approached with considerable caution. They are in any event distinguishable.

56. *R v Croydon Justices, ex parte Lefore Holdings Ltd*[40] considered a question of compliance with rule 65 of the *Magistrates' Court Rules 1968*.[41] Lawton LJ held that non-compliance with procedural rules should not "keep an applicant away from the seat of justice",[42] proceeded to decide whether the Court should "waive the strict

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37 [1975] 1 QB 235.

38 [1975] 1 QB 235, 242 (Lord Denning MR, Stamp LJ and Roskill LJ agreeing).

39 *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364 at [10], [13]-[15], [28].

40 [1980] 1 WLR 1465.

41 See the rule set out at [1980] 1 WLR 1465 at 1469-1470.

42 [1980] 1 WLR 1465, 1470.

provisions of the law" based on substantial compliance with the rule,[43] and ultimately found that the application had substantially complied with the rule. The case does not assist the appellant because it suggests that compliance with the relevant rule was required for a valid application,[44] but that substantial compliance was achieved on the facts. Yet, here, the appellant here does not contend that the purported application complied (substantially or otherwise) with the requirement in s 29(1)(c).

57. *Robinson v Whittle* holds that rule 65 was directory and not mandatory. But little or no reasoning is given, so it is of little persuasive value. Furthermore, as noted above, the later decision of a superior court in *R v Croydon Justices, ex parte Lefore Holdings Ltd* considered that compliance with rule 65 was mandatory.

VI. NOTICE OF CONTENTION OR OF CROSS-APPEAL

58. The Minister has not filed any notice of contention or of cross-appeal.

VII. ESTIMATE OF TIME FOR ORAL ARGUMENT

59. The Minister estimates that one hour and fifteen minutes will be required for presentation of his oral argument.

Dated: 1 December 2023

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[43] [1980] 1 WLR 1465, 1471.
[44] [1980] 1 WLR 1465, 1470.

Annexure A

The effect of key changes to the AAT Act leading to the current form of s 29 is summarized in tabular form below, by reference to the varying requirements over time for an application: (a) to be made in writing and/or in a prescribed form or orally; (b) to be accompanied by any prescribed fee; (c) to contain a statement of reasons or ground; and (d) to be lodged within a prescribed time.

Act no.	**Writing/form**	**Fee**	**Reasons**	**Time**
1975/91 (the original Act)	Writing: "shall" Form: "shall"	*No requirement*	"shall"	"shall"
1977/58	Writing: "shall" Form: "may"	Section 70(2)[45] added		Scheme in section 29(2)-(10), incl. for extension of time, added
1993/31		Section 29A[46] added		
1995/175			"must" Section 29(1)(ca) and (cb) added	

[45] Relevantly, section 70(2)(a)(i): "Without limiting the generality of sub-section (1), (a) the regulations may make provision (i) prescribing fees to be payable in respect of applications to the Tribunal; …".

[46] "(1) Subject to subsection (2), an application to the Tribunal, whether for a review of a decision or otherwise, is not taken to be made unless the prescribed fee (if any) in respect of the application is paid. (2) An application in respect of which a fee is waived under the regulations, whether at the time of lodgement or later, is taken to be made at the time it is lodged with the Tribunal."

Act no.	Writing/form	Fee	Reasons	Time
2005/38			Section 29(1B)[47] added	
2012/186		Section 29A repealed Section 69C added		
2015/60	Writing or orally in certain cases: "must" No form req.	"must"	Section 29(1B) repealed; s 29AB (to similar effect) added	

[47] "If: (a) an application contains a statement under paragraph (1)(c); and (b) the Tribunal is of the opinion that the statement is not sufficient for the Tribunal to readily identify the respects in which the applicant believes that the decision is not the correct or preferable decision; the Tribunal may, by notice given to the applicant, request the applicant to amend the statement, within the period specified in the notice, so that the statement is sufficient to enable the Tribunal to readily identify the respects in which the applicant believes that the decision is not the correct or preferable decision."

Annexure B

Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019,* the Minister sets out below a list of the particular statutes referred to in the submissions.

No.	Statute	Version	Provision(s)
1.	*Administrative Appeals Tribunal Act 1975* (Cth)	Current	ss 2A, 25, 27AA, 29, 29AB, 33, 69C, 70
2.	*Administrative Appeals Tribunal Act 1975* (Cth)	Compilation prepared as at 16 May 2005	s 29(1B)
3.	*Administrative Appeals Tribunal Amendment Act 1977* (Cth)	As enacted	s 36 (inserting s 70 into the AAT Act)
4.	*Administrative Appeals Tribunal Amendment Act 1993* (Cth)	As enacted	s 9 (inserting s 29A into the AAT Act)
5.	*Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth)	As enacted	Sch 5, item 2 (inserting s 69C into the AAT Act)
6.	*Australian Security Intelligence Organisation Act 1979* (Cth)	Current	ss 54, 83B
7.	*Migration Act 1958* (Cth)	Current	ss 347-348, 500, 501, 501CA