HIGH COURT OF AUSTRALIA

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Details of Filing

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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

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: STATEMENT OF ISSUES

2. Did Parliament intend that, in every case where an applicant applies to the Administrative Appeals Tribunal (**Tribunal**) for merits review of an administrative decision, the inclusion of a statement of the applicant's reasons for making the application — which could be no more than a perfunctory statement that the primary decision was wrong — would be essential to the validity of the application?

3. In assessing whether a provision imposes an obligation compliance with which is essential to validity (ie a "mandatory" rather than a "directory" obligation), is it relevant that the provision uses the word "must"?

PART III: NOTICE OF CONSTITUTIONAL MATTER

4. No notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV: DECISIONS OF THE COURTS BELOW

5. The reasons of the Full Court of the Federal Court of Australia are reported at *Miller v Minister for Immigration, Citizenship and Multicultural Affairs* (2022) 295 FCR 254 (**FC**). The reasons of the primary judge are not reported; their medium neutral citation

is *Miller v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 489 (**PJ**).

PART V: MATERIAL FACTS

6. The appellant wanted to challenge a decision by a delegate of the first respondent (**Minister**) not to revoke the cancellation of his visa under s 501CA(4) of the *Migration Act 1958* (Cth). His migration agent lodged with the Tribunal, within the nine-day time period specified by s 500(6B) of the *Migration Act*, an application for review of the decision (**CAB 5–6**). The migration agent used a form approved by the President of the Tribunal entitled "Application for review to the Migration and Refugee Division". The application identified the "Decision to be reviewed" as "Non-revocation of a visa cancellation" and was accompanied by an uploaded document containing the delegate's decision record including the delegate's reasons (**CAB 7–40**).

7. Section 29 of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) sets out certain requirements governing the "manner" of making an application to the Tribunal. In the courts below, the Minister accepted that the application complied with all the requirements in s 29(1) of the AAT Act, save one. Section 29(1)(c) says of an application: "unless paragraph (ca) or (cb) applies or the application was oral—must contain a statement of reasons for the application".

8. The Tribunal form used by the appellant's migration agent contained no space in which to state the appellant's reasons for the application. A different form was, in fact, the form identified on the Tribunal's website for use in applications relating to s 501 of the *Migration Act*. This form is entitled "Application for Review of Decision (Individual)" (**CAB 122–130**). It stated at the top of the first page (**CAB 122**):

> This form is for use in the AAT's General Division, Freedom of Information Division, National Disability Insurance Scheme Division, Security Division, Small Business Taxation Division, Taxation & Commercial Division and Veterans' Appeals Division.

9. Nowhere did this form state that it was for use in relation to migration matters. To the contrary, on the first page of the "Guide to Applying for Review" contained within the form (**CAB 125**), it stated:

> If you want to apply for a review of a decision in the AAT's Migration & Refugee Division or Social Services & Child Support Division, go to www.aat.gov.au and follow the links on the website.

10. In any event, this form did contain space on its second page, in section 3, for an applicant to state "Reasons for the Application". It asked "Why do you claim the decision is wrong?" and directed attention to a section within the Guide (**CAB 123**). That section of the Guide, entitled "Reasons you are making an application", stated (**CAB 126**):

> You must tell us briefly why you want to have the decision reviewed. For example, you may think the decision is wrong and a different decision should be made, or the information you provided was not taken into account, or the law was not applied correctly. We cannot start the review if you do not answer this question.

11. At a directions hearing on 1 April 2021, the Tribunal requested that the appellant provide by 9 April 2021 an email stating the reasons for his application (**CAB 51 [32]**). On that day, the appellant's migration agent emailed those reasons: "The Minister erred in concluding that there is not another reason why the original decision to cancel the applicant's Resident Return (Subclass 155) visa should be revoked" (**CAB 137, FC [20]**).

12. The Tribunal went on to hear and determine the application to it, and ultimately upheld the Minister's decision (**CAB 134, FC [3]**). However, it was conceded by the Minister before the primary judge that, if the Tribunal had jurisdiction, its decision was affected by jurisdictional error and had to be quashed (**CAB 134, FC [4]**). But the Minister contended — and the courts below accepted — that the matter should not be remitted to the Tribunal because it lacked jurisdiction.

13. Both the primary judge and the Full Court held that the inclusion within an application to the Tribunal of a statement of the kind referred to by s 29(1)(c) of the AAT Act — which both the Tribunal guidance and the Minister conceded could say no more than "I believe the decision is wrong" — was essential to the validity of the application and, hence, the Tribunal's jurisdiction. Once the email of 9 April 2021 was provided, an application in the required form had been made. However, because this was outside the nine-day period specified by s 500(6B) of the *Migration Act* and because that sub-section disapplies the Tribunal's ordinary powers in s 29(7) and (8) of the AAT Act to extend the time within which an application may be made, the "perfected" application was out of time.

14. For the reasons below, applying the well-established principles in *Project Blue Sky Inc v Australian Broadcasting Authority*,[1] this remarkable conclusion was wrong. Parliament did not intend for applications that do not comply with s 29(1)(c) of the AAT Act to be incapable of enlivening the Tribunal's jurisdiction.

PART VI: ARGUMENT

Wrong emphasis on the use of the word "must"

15. The Full Court "endorsed" the primary judge's reasoning at **PJ [38]** (**CAB 99**) that use of the word "must" in s 29(1)(c) "point[s] strongly to the conclusion that an application would be invalid and of no effect" if s 29(1)(c) was not complied with (**CAB 145, FC [45]**). The primary judge said s 29(1) is expressly in "obviously imperative or obligatory terms" in its use of the words "must" and "shall". The primary judge relied on the decision of the Full Court in *Fernando v Minister for Immigration and Multicultural Affairs*,[2] in which Finkelstein J said that the use of the word "must" in s 412 of the *Migration Act* "strongly suggests that an application given to the Tribunal after the relevant period has elapsed is invalid".

16. This emphasis on the word "must" is illogical. The use of imperative or obligatory terms is a necessary premise for the question posed by *Project Blue Sky*. In that case, the joint reasons said that "[a]n act done in breach of ***a condition*** regulating the exercise of a statutory power is not necessarily invalid and of no effect", and that the question was "whether there can be discerned a legislative purpose to invalidate any act that fails to comply with ***the condition***".[3] In other words, a *Project Blue Sky* analysis is only required where there is non-compliance with a "statutory command".[4]

17. This Court's decision in *Forrest & Forrest Pty Ltd v Wilson*,[5] upon which the Full Court relied (**CAB 144–145, FC [44]**), is to the same effect. In that case, the majority held that the relevant legislation imposed "essential preliminaries" to the exercise of the relevant power. In this regard, the majority distinguished the provisions considered in *Project Blue Sky* as ones where non-compliance with a "statutory ***requirement*** that an

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1 (1998) 194 CLR 355 at [91], [93].

2 (2000) 97 FCR 407 at [50].

3 (1998) 194 CLR 355 at [91] (emphasis added).

4 (1998) 194 CLR 355 at [93].

5 (2017) 262 CLR 510.

administrative agency perform its functions" in a particular manner did not result in invalidity.[6]

18. Far from the word "must" pointing the way to the solution to the problem of whether non-compliance results in invalidity, the English Court of Appeal has correctly recognised that the use of the word "shall" in legislation is often the ***origin*** of the problem. In *Petch v Gurney (Inspector of Taxes)*,[7] Millett LJ (Henry LJ agreeing) said:

> The question is not whether the requirement should be complied with; of course it should: the question is what consequences should attend a failure to comply. The difficulty arises from the common practice of the legislature of stating that something "shall" be done (which means that it "must" be done) without stating what are to be consequences if it not done.

19. If s 29(1)(c) did not use the word "must", no question of non-compliance would arise. As Millett LJ observed, the use of that word tells one nothing about the consequence of non-compliance. No textual aspect of s 29 makes plain that non-compliance has the legal consequence of invalidity of an application that seeks to invoke the jurisdiction of the Tribunal. The text is simply silent on the question. To place emphasis on the word "must" would tip the scales in favour of a statutory requirement being essential to validity in every case.

20. Thus, it is true that each of the paragraphs in s 29(1) uses the word "must" or "shall". That word has the same meaning in each paragraph: it imposes an obligation. However, that does not answer the question whether non-compliance with the obligation in question leads to invalidity. The answer to ***that*** question may be different for the different requirements stated in each of the paragraphs in s 29(1). As Davies and Gummow JJ observed in *Formosa v Secretary, Department of Social Security*,[8] "given requirements may be mandatory as to some of the integers therein and directory as to others".

21. Indeed, it is common ground between the parties that the consequence for validity of non-compliance with the paragraphs of s 29(1) is not the same for each. As the Full

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6 (2017) 262 CLR 510 at [62] (emphasis added).

7 [1994] 3 All ER 731 at 736.

8 (1988) 46 FCR 117 at 123. See also *Brayhead (Ascot) Ltd v Berkshire County Council* [1963] 2 QB 303 at 313 (Winn J, giving the judgment of the Court) ("all three requirements appear to be mandatory. It does not follow necessarily that non-compliance with any one of them will render the notice null in law, still less that the decision of which notice purports to be given is itself of no legal effect.").

Court said, "[t]here was no dispute between the parties that s 29(1)(a) set out requirements as to the form of a valid written application and that non-compliance with s 29(1)(a) results in invalidity" (**CAB 145, FC [47]**). By contrast, the Full Court also said that "[t]here was no dispute between the parties that non-compliance with the requirement in s 29(1)(b) to pay any prescribed fee did not result in invalidity of the application" (**CAB 145, FC [48]**). Accordingly, it can be seen immediately that the use of the word "must" in s 29(1) does not provide any indication of the consequences of non-compliance. As explained in *Project Blue Sky*, the question must be resolved by considering whether it was a purpose of the legislation that an act done in breach of the particular condition at issue — here, s 29(1)(c) — should be invalid.

Context, purpose and consequences concerning s 29(1)(c)

22. Contrary to **FC [56] and [64] (CAB 147-148, 149**), the relative insignificance of the statement of reasons required by s 29(1)(c) tends strongly against a conclusion that compliance with it is essential to validity. In this regard, nothing in s 29(1)(c) specifies the required nature or level of detail of the statement. Given that applications to the Tribunal may often by made by unrepresented persons and the informality to be expected of Tribunal proceedings, statements of the kind to which s 29(1)(c) refers might often by short, informal and legally unsophisticated. In *Re Greenham & Minister for Capital Territory*,[9] three members of the Tribunal said:

> Some applicants may lack the requisite ability or the knowledge to be able to express in precise terms the reasons for their dissatisfaction with a particular decision. But they are not, on that account, to be denied the opportunity of presenting their case to the Tribunal. Neither should this Tribunal be inhibited in its review functions by any inadequacy in the expression of the reasons for review or any lack of understanding by an applicant of the relevant issues.

23. The absence of any requirement for a detailed statement of reasons is evidenced by the Guide quoted at [10] above: it contemplates a statement which is simply that "the decision is wrong and a different decision should be made". The Tribunal has long considered that kind of statement sufficient.[10] The possibility of an uninformative

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[9] (1979) 2 ALD 137 at 141.

[10] See, eg, *Re Knight & Comcare* (1994) 36 ALD 417 at [32]: "Under the 'reasons for application' question, there is nothing wrong with just putting 'I think it's wrong' or 'I think I am entitled to disability support pension or compensation', or 'they didn't decide it correctly' or something like that"; *Re Dept of Human Services and WNRW* (2015) 66 AAR 193 at [20]: "Whilst it is less than ideal, the practice of the Tribunal has always been to accept applications which contain statements of reasons such as '…the decision is wrong' and '… the decision is contrary to law'. To do otherwise would result in many applications, made by both legally represented applicants and unrepresented applicants, being rejected on the basis that the Tribunal would not

statement is the reason for the power in s 29AB to request an applicant to provide an amended statement where it receives an uninformative statement (see further [27]-[29] below).

24. Further, both because of the absence of any requirement for a detailed statement of an applicant's reasons for applying to the Tribunal and because of the nature of the Tribunal's function as a *de novo* decision-maker, it has long been established that, in reviewing a decision, the Tribunal is not limited by the primary decision-maker's reasons or the complaints about those reasons in an applicant's statement of reasons.[11] As remarked by the Tribunal in 1994:[12]

> I have never before, in over 10 years on the tribunal, been faced with an application for leave to amend the reasons for an application. This is perhaps because they are of little significance. Once an application is lodged with the tribunal, there is a hearing de novo. The tribunal's duty is to make the correct and preferable decision, without regard to the reasons specified by the applicant in its application for seeking review, or to whether or not there were errors in the reasons of the original decision-maker.

25. It may be accepted that a well-prepared statement of an applicant's reasons for making the application may assist in the early identification of an applicant's standing (if it is in doubt) and the issues in dispute (**CAB 149, FC [64]**). It may be accepted that "[t]here are rational reasons why the legislature would require that an application in a proper form and indicating the manner in which the applicant asserts the primary decision is in error, be made within a particular time" (**CAB 112, PJ [75]**). But that does not demonstrate that the failure to provide such a statement should lead to an inability to obtain review at all. For one thing, as explained above, the grounds of complaint about the primary decision are not central to the review process. Moreover, as the Tribunal has observed: "There are many steps which are taken by the Tribunal once an application is received to ensure that a respondent is treated fairly and is afforded a proper hearing at all times."[13]

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have jurisdiction to hear those applications. This would be an unduly formal approach and would cause delay and unnecessary expense, making it difficult for applicants, and particularly unrepresented applicants, to access the review process provided by the Tribunal."

[11] *Re Greenham & Minister for Capital Territory* (1979) 2 ALD 137 at 141. See generally *Hong v Minister for Immigration and Border Protection* (2019) 269 FCR 47 (FC) at [65].

[12] *Re Knight & Comcare* (1994) 36 ALD 417 at [31].

[13] *Re Dept of Human Services and WNRW* (2015) 66 AAR 193 at [20].

26. Section 33 of the AAT Act provides a suite of provisions that give the Tribunal wide procedural powers relevant to the review application. Section 33(2A) permits the Tribunal to "require any 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". In practice, the Tribunal always undertakes management of the matters which come before it and orders the parties to file a statement of facts, issues and contentions as well as relevant evidence. It would be odd for s 29(1)(c) to render an application invalid by reason of the absence of an applicant's statement of reasons for applying to the Tribunal where the statutory procedures provided by the AAT Act otherwise provide the means whereby an applicant's grievances will be fully articulated. The Full Court's reasons simply do not engage with these points.

27. Further, the Tribunal has a power to "request" a clearer statement of reasons in s 29AB. The fact that the power is only to "request" not "direct" immediately casts doubt on the importance of such a statement; the Full Court ignored this point. That is consistent with the purpose of the immediate predecessor provision, s 29(1B), explained in the relevant explanatory memorandum:[14]

> This provision is made to overcome the practise of applicants submitting in their statement of reasons that there was "error in fact and law" without further substantiation, particularly where the applicant has legal representation. Such a statement does not assist the Tribunal in identifying why the applicant believes the decision under review was incorrect.
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> Where the Tribunal requests a further statement under new subsection 29(1B), paragraph 29(1)(c) of the Act would be taken to have been satisfied for the purposes of determining if a valid application has been lodged. That is, the request of a further statement by the Tribunal under new subsection 29(1B) does not mean that the original application did not contain a statement of reasons for the purposes of that subsection. ***Accordingly if the application has met the other requirements for a valid application in subsection 29(1) of the Act, the application would not be found to be invalid for failure to comply with paragraph 29(1)(c) of the Act.***
>
> There is no specific provision setting out the sanction for non-compliance with a request made by the Tribunal under new subsection 29(1B). The provision is intended to encourage applicants to make more detailed statements so as to assist the Tribunal to resolve matters as early as possible. It is not intended to disadvantage applicants with few resources.

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

28. When s 29(1B) was replaced by s 29AB, the relevant explanatory memorandum stated that it was intended to be "an equivalent provision", that "[n]o change to existing policy is intended" and that there was merely a simplification of drafting and more logical placement of the provision.[15] While it is true that the statement emphasised in the quote above was made in the context of an unclear rather than an absent statement (see **CAB 148, FC [60]**), the point remains that the policy of the provision is that "if the application has met the other requirements for a valid application in subsection 29(1) of the Act, the application would not be found to be invalid for failure to comply with paragraph 29(1)(c) of the Act".

29. It is true that, read literally, s 29AB assumes the existence of an inadequate statement of reasons for an application at the time of application. But this does not mean that the existence of such a statement is a precondition of validity. The whole purpose of the provision is to deal with an insufficiently clear statement. In a substantive sense, it is immaterial whether that lack of clarity is from a statement that simply says "the decision was wrong" or, instead, from one that is absent. Indeed, read purposively, s 29AB is capable of applying where the application includes no statement of reasons. That would be a circumstance in which an applicant's statement "does not clearly identify the respects in which the applicant believes that the decision is not the correct or preferable decision", because no such statement has been provided. A request to "amend" the statement can readily be read as a request to provide one. Such a reading would be consistent with a broad and generous reading of a power which is clearly remedial in nature.[16] And it would be consistent with the usually broad approach to the construction of merits review provisions.[17] In any event, given that the power in issue is simply to "request", even apart from s 29AB the Tribunal would have a power to request an applicant to supply a statement of reasons when one is absent.[18]

30. On the Full Court's approach, where an applicant provides a statement which says simply "the decision was wrong" the Tribunal would have jurisdiction and could direct a clearer statement but where an applicant fails to provide a statement, though it is equally ***clear*** that the applicant contends the primary decision is wrong and equally

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[15] Explanatory Memorandum to the Tribunals Amalgamation Bill 2015 (Cth) at [378], [385].

[16] See, eg, *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232 at [32], [92].

[17] *Australian Postal Corporation v Forgie* (2003) 130 FCR 279 (FC) at [66].

[18] See AAT Act, s 33(1)(a) and (1AB).

unclear what else the applicant may contend, the Tribunal would lack jurisdiction. That would be an absurd triumph of form over substance. It is an irrational, capricious and unjust operation of the provisions, which this Court should seek to avoid.[19] A statement of reasons which is not helpful at all is functionally equivalent to no statement of reasons. There is no rational reason to think that the purpose of the legislature was to invalidate an application which omitted a statement of reasons when that requirement could be fulfilled by an entirely uninformative statement such as "the decision was wrong".

31. Indeed, if the Full Court's decision is allowed to stand, one can readily conceive of a future case in which the Minister attacks an applicant's statement of reasons for an application as being so deficient as not to constitute a statement of reasons at all — for example, an applicant who simply writes "I need the Tribunal's help", "I don't want to be returned to [country]" or "I don't understand the decision" in the relevant box in a Tribunal form. Conversely, if the Minister accepts that such a statement is sufficient to discharge the requirements of s 29(1)(c) of the AAT Act, it points up the absurdity in treating it as essential to validity. It is pure pettifogging to suggest that a condition of a valid application to the Tribunal is that an applicant must provide a statement of reasons for the application even if it is utterly uninformative, and that such an applicant ought be in a different position to one who provides no statement of reasons at all.

32. The approach to s 29(1)(c) for which the appellant contends coheres with the imposition in s 2A of the AAT Act of an obligation upon the Tribunal in carrying out its functions to pursue the objective of providing a mechanism of review that is "accessible" and "informal". The Full Court accepted that the context of s 29 includes s 2A, and that "[m]ore broadly, the context is one of an administrative tribunal charged with merits review, whose users will include many who are unsophisticated" (**CAB 149, FC [64]**). Section 2A discourages an interpretation which frustrates applicants from obtaining review because of technicalities.[20] Even if s 2A is "properly regarded as aspirational or exhortatory in nature", that does not mean that it is irrelevant to the construction of the AAT Act.[21] Rather, consistently with the basic principle that the AAT Act is to be

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[19] See, eg, *Shahi v Minister for Immigration & Citizenship* (2011) 246 CLR 163 at [38]; *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203 at [45].

[20] See recently *BXS20 v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 296 FCR 63 at [52] (Thawley and Kennett JJ, Stewart J agreeing).

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

construed as a whole and so as to give best effect to its purposes, a construction that is at odds with s 2A is to be avoided if possible. The Full Court's approach is plainly inconsistent with s 2A. The same points may be made about the fact that s 33(1)(b) mandates that Tribunal proceedings "shall be conducted with as little formality and technicality" as the requirements of legislation permit.

English authorities

33. While the question whether a statutory requirement is essential to validity must of course be resolved in the particular statutory context in which it is found, there are a number of English authorities which strongly support the submissions above.

34. The most directly analogous is *Howard v Secretary of State for the Environment*.[22] The relevant provision stated that an appeal from an "enforcement notice" "shall be made by notice in writing to the Minister, which shall indicate the grounds of the appeal and state the facts upon which it is based". The solicitors for the plaintiff sent a letter to the Ministry, within the time prescribed by the legislation, asking them to accept the letter as the plaintiff's notice of appeal. The letter did not set out the grounds or the facts upon which the grounds were based. The Court of Appeal held that the appeal had been validly commenced. Lord Denning MR (Stamp and Roskill LJJ agreeing) said:[23]

> The section is no doubt imperative in that the notice of appeal must be in writing and must be made within the specified time. But I think it is only directory as to the contents. Take first the requirement as to the "grounds" of appeal. The section is either imperative in requiring "the grounds" to be indicated, or it is not. That must mean all or none. I cannot see any justification for the view that is imperative as to ***one*** ground and not imperative as to the rest. If ***one*** was all that necessary, an appellant would only have to put in one frivolous and hopeless ground and amend later to add his real grounds. That would be a futile exercise. …
>
> All things considered, it seems to me that the section, in so far as the "grounds" and "facts" are concerned, must be construed as directory only: that is, as desiring information to be given about them. It is not to be supposed that an appeal should fail altogether simply because the grounds are not indicated, or the facts stated. Even if it is wanting in not giving them, it is not fatal. The defects can be remedied later, either before or at the hearing of the appeal, so long as an opportunity is afforded of dealing with them.

35. In concurring reasons, Stamp LJ observed that "[t]he purpose of requiring that the notice shall indicate the ground of the appeal and the facts on which it is based, is, as it

[22] [1975] 1 QB 235.

[23] [1975] 1 QB 235 at 242–243 (emphasis in original).

appears to me, quite clearly to give information to the Minister for the purposes of the appeal", and then said "that being the purpose", the requirements were "directory only and do not go to jurisdiction".[24]

36. The purpose of s 29(1)(c) of the AAT Act is similarly to require a person to give information to the Tribunal about the nature of the application, and any defects in providing that information are capable of being remedied later. In addition, the absurdity to which Lord Denning MR pointed of an application needing to include "one frivolous and hopeless ground" in order to be valid is analogous to the absurdity of an application needing to state only that "the decision is wrong" in order to be valid. Finally, it is clear that the use of the word "shall", which appeared twice in the same sub-section considered in *Howard*, was not regarded as determinative of the consequences of non-compliance, as the requirement that the appeal "shall be made by notice in writing to the Minister" was held to be mandatory while the requirement that the notice "shall indicate the grounds of the appeal and state the facts upon which it is based" was held to be directory. Indeed, *Howard* was one of the authorities referred to by Davies and Gummow JJ in *Formosa* (see [20] above). It evidences that there is no difficulty in the consequences of non-compliance with s 29(1)(a) being different from the consequences of non-compliance with s 29(1)(c).

37. There are also two decisions, delivered two months apart, concerning the procedure to state a case for the opinion of the High Court under the *Magistrates' Courts Act 1952* (UK).[25] The Act provided that applications to state a case "shall be made" within 21 days of the decision of the magistrates' court. Rules made under the Act provided that the application "shall identify the question or questions of law or jurisdiction on which the opinion of the High Court is sought". In both decisions, the Court held that compliance with the requirement in the Rules was not essential to the validity of the application.

38. In the first decision, *R v Croydon Justices, ex parte Lefore Holdings Ltd*,[26] the Court of Appeal held that, even though the application did not identify a question of law in terms,

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[24] [1975] 1 QB 235 at 243.

[25] There are also authorities holding that requirements imposed by predecessor rules made under this legislation were "directory" and "[did] not go to the jurisdiction in this court to hear and adjudicate upon a case stated": see *Parsons v F W Woolworth & Co Ltd* [1980] 1 WLR 1472 at 1475 (Donaldson LJ, Bristow J agreeing) (and the cases cited there).

[26] [1980] 1 WLR 1465.

it was valid on the basis that there was substantial compliance with the Rules as there was enough information in the application to work out what the relevant question of law was.[27] In coming to that conclusion, Lawton LJ (Waller LJ agreeing) observed that "the 'general object intended to be secured' by the change in the law was the speeding up of justice … [and] not to curtail the opportunities for doing justice".[28] In this regard, his Lordship observed that he had to "bear in mind that all sorts and manner of persons come before the magistrates' courts", and that "[i]t would be a sad state of affairs if … a mere failure to comply with a procedural rule should in all circumstances keep an applicant away from the seat of justice".[29]

39. In the second decision, *Robinson v Whittle*,[30] the applicant filed an application within 21 days, but the application did not identify the relevant question of law. A supplementary notice was filed specifying the question of law, but it was filed outside the 21 day time limit. The Queen's Bench Division (Donaldson LJ, Bristow J agreeing) held that the application had been validly filed. His Lordship said:[31]

> In my judgment r 65(1) is to be treated as directory and not mandatory. An application must be made within three weeks to comply with the terms of s 87. If it complies with that section, but does not comply with the rules, that irregularity can be corrected, even if it is corrected outside the 21-day period specified by the statute, provided always that it is corrected before the case comes before this court. In other words the original application in this case was not a nullity. As it was not a nullity, it can be, and has been, corrected.

40. These cases provide further examples of the use of the word "shall" not being determinative of the consequences of non-compliance, given both the Act and the Rules used the word "shall" to specify the relevant requirement. Further, the identification of the question of law under the legislation considered in these decisions is analogous to the identification of a statement of grounds for the purposes of an application to the Tribunal. As was done in *Robinson v Whittle*, it is possible for the statement of grounds to be submitted after the application has been lodged (for example, where requested under s 29AB). In light of that power, consistent with *Robinson*, it should be inferred that Parliament did not intend that a statement of grounds was essential to the validity of an application. As was recognised in *R v Croydon Justices*, this construction

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27 [1980] 1 WLR 1465 at 1471.

28 [1980] 1 WLR 1465 at 1470.

29 [1980] 1 WLR 1465 at 1470.

30 [1980] 3 All ER 459.

31 [1980] 3 All ER 459 at 462.

accommodates the fact that "all sorts and manner of persons" come before the Tribunal and avoids a "sad state of affairs" if they were to be shut out for failure to comply with a procedural rule that regularly serves no purpose in any event.

Other paragraphs of s 29(1)

41. The matters above are sufficient to dispose of the appeal favourably to the appellant. The conclusion is reinforced by the fact that, contrary to the Full Court's view (**CAB 146, FC [52]**), the requirement to lodge an application within the prescribed time in s 29(1)(d) is ***also*** not as a matter of substance essential to its validity.

42. In *Barker v Palmer*,[32] Grove J (Lopes J agreeing) said:

> The rule is that provisions with respect to time are always obligatory ***unless*** a power of extending the time is given to the court and there is no such power here.

In *Petch v Gurney (Inspector of Taxes)*,[33] Millett LJ (Henry LJ agreeing) referred to this passage as encapsulating the "normal" rule. *Barker v Palmer* has likewise been said to state the "general principle" or the "rule" in Australia.[34]

43. The "normal rule" applies in the present context. The Tribunal (ordinarily) has the power to extend the time for making an application in s 29(7), including pursuant to s 29(8) after the time has expired. It follows that failure to comply with the requirement to lodge an application within the time specified in s 29(1)(d) does not render the application invalid.

44. This approach to s 29(1)(d) does not "elide" the application for review and the application to extend time (**cf CAB 146, FC [52]**). The practical reality is that compliance with s 29(1)(d) does not deprive the Tribunal of jurisdiction to determine the application if the Tribunal chooses to do so. Compliance with s 29(1)(d) is thus not as a matter of substance essential to the application's validity.

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[32] (1881) 8 QBD 9 at 10 (emphasis added).

[33] [1994] 3 All ER 731 at 738. See also *Robinson v Secretary of State for Northern Ireland* [2002] NI 390 at [83] (Lord Millett).

[34] *Transport Amalgamated Pty Ltd v AAA Transport Pty Ltd* [1975] WAR 101 at 103 (Lavan J); *R v Police Appeal Board; Ex parte McGee* (1984) 36 SASR 455 at 457 (Zelling J); *Re Death of "MRG"; Ex parte Curtin* (1997) 94 A Crim R 88 at 93 (Owen J). See also Pearce, *Statutory Interpretation in Australia* (9th ed, 2019) at [11.26] (emphasis added). Compare, for example, *Jones v Territory Insurance Office* (1988) 93 FLR 308 at 316 (Asche CJ), where there was no power to extend time.

45. It follows that, far from the various paragraphs in s 29(1) each imposing conditions compliance with which is essential to the Tribunal having jurisdiction to determine an application, ***both*** paras (b) and (d) impose conditions which are ***not*** essential to validity. That casts further doubt on the suggestion that para (c) does so.

46. The Full Court asserted that s 29(1)(ca) and (cb) "express requirements which must be complied with for a valid application to exist, at least before expiry of any prescribed time for the lodging of an application" (**CAB 147, FC [55]**). The Court did not explain why. To the contrary, neither of those paragraphs is essential to the validity of an application. It is true that the inclusion of a copy of the security assessment and a statement of grounds (para (ca)), or a statement of grounds (para (cb)), may have utility in assessing the standing of the applicant under s 27AA or the nature of the application. But that does not demonstrate that failure to provide such material should lead to an inability to obtain review at all. Such a result cannot have been intended by Parliament where, as discussed above, the Tribunal can exercise its power under s 33 of the AAT Act to make directions that will enable it to determine the applicant's standing and the issues in the review.

47. In any event, there is an important contextual difference between para (c) on the one hand, and paras (ca) and (cb) on the other. The power to request an amended statement of reasons in s 29AB (discussed above) only applies to s 29(1)(c). Accordingly, there is no express power to request an amended statement of grounds where there is an application under s 54(1) or (2) of the *Australian Security Intelligence Organisation Act 1979* (Cth). This contextual matter may provide a basis to conclude that the consequences of non-compliance with para (c) are different from the consequences of non-compliance with paras (ca) and (cb).

The relevance of s 500(6B) of the *Migration Act*

48. As noted above, the Tribunal ordinarily has the power to extend the time for the making of an application under s 29(7) and (8) of the AAT Act. However, s 25(6) of the AAT Act provides:

> 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 this Act in relation to such applications; and

(b) those provisions have effect subject to any provisions so included.

49. The ability to apply to the Tribunal for review of a decision of a delegate of the Minister under s 501CA(4) of the *Migration Act* not to revoke a cancellation decision is provided by s 500 of the *Migration Act*. That section modifies the time limit for the making of an application to the Tribunal and excludes the Tribunal's power to extend time. Section 500(6B) provides:

> If a decision under section 501 of this Act, or a decision under subsection 501CA(4) of this Act not to revoke a decision to cancel a visa, relates to a person in the migration zone, an application to the Tribunal for a review of the decision must be lodged with the Tribunal within 9 days after the day on which the person was notified of the decision in accordance with subsection 501G(1). Accordingly, paragraph 29(1)(d) and subsections 29(7), (8), (9) and (10) of the *Administrative Appeals Tribunal Act 1975* do not apply to the application.

50. The Full Court sought to avoid responsibility for the harsh consequences of its approach by pointing to the fact that, ordinarily, time can be extended pursuant to s 29(7) and (8) of the AAT Act to allow an invalid application to be "perfected". That this was not possible here because of s 500(6B) of the *Migration Act* was, according to the Full Court, irrelevant because s 29(1)(c) of the AAT Act "is not to be construed by reference to a statute which modifies its operation" (**CAB 148, FC [57]**). The Full Court's attempt to place upon s 500(6B) of the *Migration Act* responsibility for the capriciousness of the outcome which the Full Court reached was wrong for three reasons.

51. *First*, quite apart from s 500(6B), it is a solemn farce to rely on the circuitous device of an extension of time to permit an "invalid" application to be "perfected" simply by the addition of the statement "I think the decision is wrong".

52. *Secondly*, where the interpretation of a statute is ambiguous, subsequent legislation may throw light on the correct construction.[35] Section 500(6B), which originally applied only to decisions under s 501, was inserted into the *Migration Act* in 1998.[36] Plainly,

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[35] *Deputy Federal Commissioner of Taxes v Elder's Trustee & Executor Co Ltd* (1936) 57 CLR 610 at 625-626 (Dixon, Evatt and McTiernan JJ) and the cases cited there.

[36] *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth) Sch 1 item 21. The phrase "or a decision under section 501CA(4) of this Act not to revoke a decision to cancel a visa" was added subsequently: see *Migration Amendment (Character Cancellation Consequential Provisions) Act 2017* (Cth) Sch 1 item 13. The Explanatory Memorandum said that the relevant amendments "give effect to the policy intention that a decision under section 501CA not to revoke a visa cancellation under subsection 501(3A) should be subject to the same rules that govern review of other decisions under section 501 by the AAT", which relevantly included "rules that govern the lodgement of documents with the AAT": Explanatory Memorandum to the Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016 (Cth) at [43].

Parliament intended applications to be submitted ***only*** within a short period of time. In the relevant Second Reading Speech, the Minister said that the Bill would introduce "strict time limits for the conduct of merits review cases involving character where the non-citizen is in Australia" and that it was "***essential*** that merits review cannot be used to prolong stay in Australia at taxpayers' expenses".[37] The Explanatory Memorandum said that the amendment was "necessary in order to expedite review of decisions made by a delegate of the Minister under the new character provisions".[38]

53. There is no suggestion in the terms of the legislation or any of the extrinsic material that Parliament considered this would alter the settled Tribunal practice giving a statement of reasons by an applicant little significance. This Court should accept that Parliament proceeded upon the correct construction of its previous legislation in enacting s 500(6B), and intended its legislation "to operate rationally, efficiently and justly, together".[39]

54. *Finally*, and in any event, s 500(6B) of the *Migration Act* in fact makes it clear that, ***at least*** in relation to reviews provided by s 500 of the *Migration Act*, a statement of reasons as required by s 29(1)(c) is not essential to validity. As noted above, s 25(6) of the AAT Act expressly contemplates that another Act may modify the operation of the AAT Act. Where another Act modifies the operation of s 29 of the AAT Act, it is necessary to construe those provisions together in determining what is essential to the validity of an application. Section 500(6B) provides that an application "must" be lodged with the Tribunal within nine days. The fact that s 500(6B) refers only to the making of an application in writing (which is then "lodged" with the Tribunal), within nine days after notification of the decision, evinces an intention to make compliance only with those criteria essential to the validity of the application.

55. It is true that it is implicit in s 500(6B) that s 29(1)(c) of the AAT Act still "applies" to the application (given certain other subsections of s 29 "do not apply"). However,

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[37] Second Reading Speech for the Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1997 (Cth), Commonwealth of Australia, House of Representatives, *Hansard* (20 October 1997) 10364 (emphasis added).

[38] Explanatory Memorandum to the Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1997 (Cth) at [2], [37].

[39] *Commissioner of Stamp Duties v Permanent Trustee Co Ltd* (1987) 9 NSWLR 719 at 723-724 (Kirby P), quoted with approval in: *Maroondah City Council v Fletcher* (2009) 29 VR 160 at [85] (Warren CJ and Osborn AJA), [205] (Redlich JA); *Shaw v Yarranova Pty Ltd* (2006) 15 VR 289 at [76] (Neave JA, Eames JA agreeing); *Donohue v Director of Public Prosecutions* (2011) 215 A Crim R 1 at [84] (Buss JA, Murphy JA and Hall J agreeing).

s 500(6B) clearly treats that requirement (as well as the requirement to pay the prescribed fee in s 29(1)(b)) differently to the requirements that it expressly provides "must" be satisfied.

56. This construction is consistent with the extrinsic material discussed above. Parliament wanted to ensure that applications for review were commenced ***quickly*** so that they could be finalised more quickly. That objective would be undermined if the Tribunal were able to exercise jurisdiction in a case where the application was filed out of time. That objective is not undermined by an application that is filed within time being valid notwithstanding that the application does not contain a statement of reasons. In this regard, Parliament knew that the Tribunal had a range of powers available to it to ensure that the relevant issues were identified in the course of the review.

PART VII: ORDERS SOUGHT

57. The appellant seeks the following orders:

1. Appeal allowed.

2. Set aside the orders made by the Full Court of the Federal Court of Australia and in their place order that:

   (a) the appeal to the Full Court be allowed;

   (b) paragraph 2 of the orders made by the primary judge on 4 May 2022 be set aside and in its place order that: (i) the application for review filed in the Tribunal on 24 March 2021 be remitted to the Tribunal, differently constituted, for determination according to law; and (ii) the first respondent pay the applicant's costs of the proceeding before the primary judge as agreed or assessed; and

   (c) the first respondent pay the appellant's costs of the appeal to the Full Court as agreed or assessed.

3. The first respondent pay the appellant's costs in this Court as agreed or assessed.

PART VIII: ESTIMATED TIME

58. The appellant estimates that up to 1.5 hours will be required for oral argument, including reply.

Dated 3 November 2023

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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

ANNEXURE TO THE APPELLANT'S SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the appellant sets out below a list of the constitutional provisions and statutes referred to in his submissions.

No	Description	Version	Provision(s)
1.	*Administrative Appeals Tribunal Act 1975* (Cth)	Current	ss 2A, 25, 27AA, 29, 29AB, 33
2.	*Administrative Appeals Tribunal Act 1975* (Cth)	Compilation prepared as at 16 May 2005	s 29(1B)
3.	*Australian Security Intelligence Organisation Act 1979* (Cth)	Current	s 54
4.	*Migration Act 1958* (Cth)	Current	ss 500, 501CA
5.	*Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth)	As enacted	Sch 1 item 21
6.	*Tribunals Amalgamation Act 2015* (Cth)	As enacted	Sch 1 item 46