

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, JAGOT AND BEECH-JONES JJ

JOSEPH MILLER

APPELLANT

AND

MINISTER FOR IMMIGRATION, CITIZENSHIP
AND MULTICULTURAL AFFAIRS & ANOR

RESPONDENTS

Miller v Minister for Immigration, Citizenship and Multicultural Affairs
[2024] HCA 13
Date of Hearing: 14 February 2024
Date of Judgment: 17 April 2024
S120/2023

ORDER

1. *Appeal allowed.*
2. *Set aside the orders made by the Full Court of the Federal Court of Australia on 15 November 2022 and, in their place, order that:*
 - (a) *the appeal be allowed;*
 - (b) *order 2 of the orders made by the Federal Court of Australia on 4 May 2022 be set aside and, in its place, order that the application for review filed in the Administrative Appeals Tribunal on 24 March 2021 be remitted to the Tribunal, differently constituted, for determination according to law; and*
 - (c) *the first respondent pay the appellant's costs of the proceeding in the Federal Court of Australia and of the appeal to the Full Court of the Federal Court of Australia.*
3. *The first respondent pay the appellant's costs of the appeal to this Court.*

On appeal from the Federal Court of Australia

Representation

P D Herzfeld SC with J G Wherrett for the appellant (instructed by Zarifi Lawyers)

N M Wood SC with K R McInnes for the first respondent (instructed by Sparke Helmore Lawyers)

Submitting appearance for the second respondent

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Miller v Minister for Immigration, Citizenship and Multicultural Affairs

Statutes – Construction – Non-compliance with condition precedent to exercise of statutory jurisdiction – Consequences for validity of exercise of jurisdiction – Where appellant's visa cancelled under s 501(3A) of *Migration Act 1958* (Cth) – Where delegate of Minister decided under s 501CA(4) not to revoke original decision – Where appellant's migration agent applied to Administrative Appeals Tribunal ("Tribunal") for review of delegate's decision – Where s 29(1)(c) of *Administrative Appeals Tribunal Act 1975* (Cth) provides that application to Tribunal for review of decision "must contain a statement of the reasons for the application" – Where application made by appellant's migration agent contained no statement of reasons for application – Whether non-compliance with requirement of s 29(1)(c) resulted in invalidity of application such that jurisdiction of Tribunal to review decision not engaged – Whether legislative purpose to invalidate application and deprive Tribunal of jurisdiction for want of compliance with requirement of s 29(1)(c).

Words and phrases – "application for review of a decision", "capricious", "condition precedent to the exercise of a statutory jurisdiction", "imperative language", "imperative term", "insufficient statement of reasons", "jurisdiction", "legislative history", "legislative intention", "legislative purpose", "mechanism for review", "must contain", "non-compliance", "permissive term", "statement of the reasons for the application", "statutory context", "statutory scheme".

Acts Interpretation Act 1901 (Cth), s 36.

Administrative Appeals Tribunal Act 1975 (Cth), ss 2A, 29(1)(a), 29(1)(b), 29(1)(c), 29AB, 33(1)(b), 33(2A)(a), 40(1)(a), 42A(5)(b), 43(1), 43(6), 69C.

Administrative Appeals Tribunal Amendment Act 2005 (Cth), Sch 1, item 95.

Migration Act 1958 (Cth), ss 500(1)(ba), 500(6B), 501G(1).

1 GAGELER CJ, GORDON, EDELMAN, JAGOT AND BEECH-JONES JJ.
The question in this appeal is whether non-compliance with the requirement of s 29(1)(c) of the *Administrative Appeals Tribunal Act 1975* (Cth) ("the AAT Act") – that an application to the Administrative Appeals Tribunal ("the Tribunal") for review of a decision "must contain a statement of the reasons for the application" – results in invalidity of the application such that the jurisdiction of the Tribunal to review the decision is not engaged. The answer is that it does not.

Facts and procedural history

2 Mr Miller is a Fijian national whose Resident Return (Subclass 155) visa was cancelled under s 501(3A) of the *Migration Act 1958* (Cth) ("the Migration Act"). A delegate of the Minister for Immigration, Citizenship and Multicultural Affairs ("the Minister") decided under s 501CA(4) of the Migration Act not to revoke that original decision on the basis that the delegate was not satisfied in terms of s 501CA(4)(b)(ii) that there was "another reason why the original decision should be revoked". Mr Miller was notified of the decision of the delegate in accordance with s 501G(1) of the Migration Act on 16 March 2021.

3 Section 500(1)(ba) of the Migration Act provides for the making of an application to the Tribunal for review of a decision made under s 501CA(4). Section 500(6B) of the Migration Act requires any such application to be made within nine days after the day of notification in accordance with s 501G(1). Section 500(6B) also displaces the general provisions of the AAT Act which confer discretion on the Tribunal to extend the time for the making of an application to it.¹ Calculating the period so fixed by s 500(6B) of the Migration Act in accordance with s 36 of *Acts Interpretation Act 1901* (Cth), the last day for Mr Miller to make an application to the Tribunal for review of the decision of the delegate was 25 March 2021.

4 Mr Miller's migration agent made an application to the Tribunal for review of the decision of the delegate on 24 March 2021. Apparently because the migration agent mistook the form approved by the President of the Tribunal to be used for making such an application,² the application made by the migration agent contained no statement of the reasons for the application.

1 Section 29(1)(d), (7), (8), (9) and (10) of the AAT Act.

2 See s 7 of the *Administrative Appeals Tribunal Regulation 2015* (Cth).

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5 The Tribunal held a directions hearing on 1 April 2021 at which the Tribunal requested that Mr Miller provide reasons for the application. In response to that request, Mr Miller's solicitors emailed the Tribunal on 9 April 2021. Under the heading "Why do you claim the decision is wrong?", the email stated, "[t]he 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". There is no dispute that this statement would have been sufficient to comply with s 29(1)(c) of the AAT Act had it been contained in the application made on 24 March 2021.

6 The Tribunal considered the application to have engaged its jurisdiction to review the decision of the delegate despite the application's non-compliance with s 29(1)(c) of the AAT Act and proceeded to review the decision of the delegate. The Tribunal ultimately decided to affirm the decision of the delegate.³

7 Mr Miller applied to the Federal Court of Australia under s 476A of the Migration Act for judicial review of the decision of the Tribunal. On the hearing of the application for judicial review, the Minister conceded that, if the jurisdiction of the Tribunal was engaged, then its decision was affected by jurisdictional error, but contended that the non-compliance with s 29(1)(c) of the AAT Act meant that the application failed to engage the jurisdiction of the Tribunal at all.

8 The primary judge (Derrington J) accepted the contention of the Minister that the non-compliance with s 29(1)(c) of the AAT Act meant that the application failed to engage the jurisdiction of the Tribunal. His Honour ordered that a writ of certiorari be issued quashing the decision of the Tribunal and that the application for judicial review be otherwise dismissed.⁴ The Full Court of the Federal Court (Thawley, Halley and O'Sullivan JJ) dismissed an appeal from those orders.⁵ This appeal is by special leave from the decision of the Full Court.

3 *Miller and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 1623.

4 *Miller v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 489.

5 *Miller v Minister for Immigration, Citizenship and Multicultural Affairs* (2022) 295 FCR 254.

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Locating s 29(1)(c) within the AAT Act

9 The ultimate question as to whether non-compliance with the requirement of s 29(1)(c) of the AAT Act results in invalidity of an application to the Tribunal is one of statutory construction to be determined by reference to the operation of s 29(1)(c) within the scheme of the AAT Act as amended.⁶ An appreciation of the scheme of the AAT Act and of the place of s 29(1)(c) within that scheme is therefore critical to its resolution.

10 Section 25(1)(a) of the AAT Act contemplates that provision will be made in other Acts, and in instruments made under other Acts, for applications to be made to the Tribunal for review of decisions made in the exercise of powers conferred by those other enactments. The provision that is made in s 500(1)(ba) of the Migration Act for the making of an application to the Tribunal for review of a decision made under s 501CA(4) is but one of many such provisions within various enactments enacted over the half century in which the AAT Act has been in operation.

11 Whilst the ultimate question in the circumstances giving rise to the appeal results from the operation of s 500(6B) of the Migration Act, the question itself is one going to the general operation of s 29(1)(c) of the AAT Act. The consequence of non-compliance with s 29(1)(c) for the validity or invalidity of an application for review of a decision made under s 501CA(4) of the Migration Act can be no different from the consequence of such non-compliance for the validity or invalidity of an application for review of other decisions in other legislative contexts.

12 Subject to an immaterial exception, where provision is made in another enactment for an application to be made to the Tribunal for review of a decision made under that enactment, s 27 of the AAT Act permits any such application to be made by or on behalf of any person whose interests are affected by the decision. By operation of s 30(1)(a) and (b), any person "who, being entitled to do so, has duly applied to the Tribunal for a review of the decision" automatically becomes a party to the proceeding before the Tribunal for review of the decision which is commenced by the making of the application, as does the person who made the decision.

6 *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 274 CLR 565 at 594 [86].

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13 The essential character of the jurisdiction that is to be exercised by the Tribunal in the proceeding commenced by the making of a valid application for review of a decision is indicated by ss 40(1)(a) and 43(1) and (6) of the AAT Act. Section 40(1)(a) provides that, for the purpose of reviewing a decision, the Tribunal may take evidence on oath or affirmation. Section 43(1) provides that, for the purpose of reviewing a decision, the Tribunal may exercise all powers and discretions conferred on the person who made the decision under review so as ultimately to make its own decision affirming or varying the decision under review or setting that decision aside and either deciding in substitution for it or remitting its subject-matter for reconsideration. Section 43(6) provides that a decision as varied or substituted by the Tribunal is deemed to be a decision of the person who made the decision under review.

14 The jurisdiction of the Tribunal, as is well settled, is in essence to remake the decision under review. The jurisdiction is "'to do over again' that which was done by the primary decision-maker":⁷ "to stand in the shoes of the decision-maker whose decision is under review so as to determine for itself on the material before it the decision which can, and which it considers should, be made in the exercise of the power or powers conferred on the primary decision-maker for the purpose of making the decision under review".⁸

15 In the exercise of that jurisdiction, the Tribunal is obliged by s 2A(a) and (b) of the AAT Act to pursue the objective of providing a mechanism for review that is "accessible" and that is "fair, just, economical, informal and quick". Section 25(4A) empowers the Tribunal to "determine the scope of the review of a decision by limiting the questions of fact, the evidence and the issues that it considers".

16 Section 33(1)(a) commits the procedure of the Tribunal to the discretion of the Tribunal and s 33(1)(b) requires that a proceeding before the Tribunal be conducted "with as little formality and technicality, and with as much expedition, as the requirements of [the AAT Act] and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit". Section 33(2A)(a) specifically empowers the Tribunal to make a direction in a proceeding requiring any person who is a party to the proceeding to provide further information in

7 *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430 at 447 [50].

8 *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250 at 271 [51].

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relation to the proceeding. Under s 42A(5)(b), the Tribunal is empowered to dismiss an application without proceeding to review the decision which is the subject of the application in circumstances where the applicant for review fails within a reasonable time to comply with a direction of the Tribunal in relation to the application.

17 Section 29(1) of the AAT Act is addressed to the manner in which an application to the Tribunal for review of a decision is to be made. Section 29(1)(a), (b) and (c) in their current forms were inserted into the AAT Act in 2015.⁹ Section 29(1)(a) and (c) as so inserted are relevantly unchanged from the form which they have taken in the AAT Act since 1977.¹⁰ Subject to immaterial exceptions and qualifications: s 29(1)(a) provides that an application to the Tribunal for review of a decision "must be made ... in writing"; s 29(1)(b) provides that such an application "must be accompanied by any prescribed fee" being a fee prescribed by regulations made under s 70; and s 29(1)(c) provides that such an application "must contain a statement of the reasons for the application".

18 The requirement of s 29(1)(b) of the AAT Act, that an application must be accompanied by any prescribed fee, needs to be understood in light of s 69C of the AAT Act, which provides that the Tribunal may dismiss an application to it if regulations made 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 in accordance with those regulations. In providing for an application to be dismissed for non-payment of any prescribed fee, s 69C necessarily assumes that an application that is not accompanied by any prescribed fee is a valid application. Section 69C was inserted into the AAT Act in 2013,¹¹ in substitution for a provision inserted in 1993¹² which had provided that an application was "not taken to be made" unless the prescribed fee was paid.¹³

9 Item 46 of Sch 1 to the *Tribunals Amalgamation Act 2015* (Cth).

10 See s 18 of the *Administrative Appeals Tribunal Amendment Act 1977* (Cth).

11 Item 2 of Sch 5 to the *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth).

12 *Administrative Appeals Tribunal Amendment Act 1993* (Cth).

13 Section 9 of the *Administrative Appeals Tribunal Amendment Act 1993* (Cth), inserting s 29A of the AAT Act.

19 Likewise, the requirement of s 29(1)(c) of the AAT Act, that an application contain a statement of the reasons for the application, needs to be understood in light of s 29AB of the AAT Act which is headed "Insufficient statement of reasons for application". Section 29AB provides:

"If the Tribunal considers that an applicant's statement under paragraph 29(1)(c) does not clearly 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 appropriately, within the period specified in the notice."

20 Section 29AB was inserted into the AAT Act at the same time as s 29(1)(a), (b) and (c) were inserted into the AAT Act in their current forms in 2015.¹⁴ Section 29AB was inserted in substitution for a provision which had been inserted into the AAT Act in substantially identical terms in 2005.¹⁵ The legislative history of that predecessor provision is illuminating.

21 The Explanatory Memorandum for the amending Act which in 2005 (by item 95 of Sch 1) inserted the predecessor to s 29AB (s 29(1B)) explained:¹⁶

"Under paragraph 29(1)(c) of the AAT Act, an applicant must include a statement of reasons with their application for review of a decision (unless their application is one covered by paragraphs 29(1)(ca) or (cb)). Item 95 inserts a new subsection 29(1B) into the Act. New subsection 29(1B) enables the Tribunal to obtain a further statement of reasons from the applicant if the Tribunal is of the opinion that the statement provided with the application does not assist the Tribunal in identifying why the applicant (or applicants) believes the decision is not the correct or preferable decision.

This provision is made to overcome the practise of applicants submitting in their statement of reasons that there was 'error in fact and law'

14 Item 51 of Sch 1 to the *Tribunals Amalgamation Act 2015* (Cth).

15 Item 95 of Sch 1 to the *Administrative Appeals Tribunal Amendment Act 2005* (Cth). See item 47 of Sch 1 to the *Tribunals Amalgamation Act 2015* (Cth).

16 Australia, Senate, *Administrative Appeals Tribunal Amendment Bill 2004*, Explanatory Memorandum at 27 (emphasis added).

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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.

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."

22 The Tribunal had long before 2005 accepted as sufficient compliance with s 29(1)(c) of the AAT Act statements made in an application which conveyed nothing more in substance than that the applicant was dissatisfied with the decision or that the decision was wrong and that a new decision should be made.¹⁷ As is apparent from the explanation then given in the Explanatory Memorandum, it had accordingly become common practice for applications to the Tribunal to contain statements of the reasons for the application that revealed nothing of substance about why the applicant was aggrieved by the decision sought to be made the subject of the application or about the legal or factual bases upon which the applicant proposed to argue that the Tribunal should come to a different decision in reviewing that decision on its merits. The legislative response to that unsatisfactory practice was not to strengthen the requirement of s 29(1)(c) but to supplement that requirement through the insertion of the predecessor to s 29AB.

23 The italicised words in the penultimate paragraph of the same explanation set out above reveal a clear legislative contemplation that, at least upon the insertion of the predecessor to s 29AB into the AAT Act in 2005, non-compliance

17 See *Re Greenham and Minister for Capital Territory* (1979) 2 ALD 137 at 140-141; *Re Knight and Comcare* (1994) 36 ALD 417 at 425 [32].

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with s 29(1)(c) was not to result in the invalidity of an application. Nothing in the legislative history concerning the substitution of s 29AB in 2015 suggests any departure from that legislative contemplation.

Project Blue Sky

24 In *Project Blue Sky Inc v Australian Broadcasting Authority*,¹⁸ McHugh, Gummow, Kirby and Hayne JJ explained:

"An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition."

The explanation continued:¹⁹

"Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue."

25 Their Honours went on to observe that breach of a condition regulating the exercise of a statutory power which does not result in invalidity might nevertheless result in an unlawful act capable of being restrained by injunction.²⁰ Contrary to a theme of the argument of the Minister in the present appeal, that observation cannot be taken to indicate that a condition which, if breached, does not result in invalidity can only ever be a condition which is otherwise capable of enforcement by a court. It is not unknown for a condition regulating the exercise of a statutory

¹⁸ (1998) 194 CLR 355 at 388-389 [91].

¹⁹ (1998) 194 CLR 355 at 389 [91] (footnote omitted).

²⁰ (1998) 194 CLR 355 at 393 [100].

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power to be construed as no more than an aspiration or exhortation²¹ or for such a condition to be construed as giving rise only to administrative consequences in the event of non-compliance.²² Indeed, s 29AB of the Migration Act is a ready example. In the language of the Explanatory Memorandum for the amending Act which inserted its predecessor, s 29AB is a provision designed to "encourage" and to carry no specific "sanction" for non-compliance.²³

26 The principle of statutory construction expounded in *Project Blue Sky* operates in the same way in respect of a condition that is a condition precedent to the exercise of a statutory jurisdiction as it does in respect of a condition that is a condition of the exercise of a statutory jurisdiction. Contrary to another theme of the argument of the Minister, a condition precedent to the exercise of jurisdiction neither stands outside the principle nor calls for any modification of its operation.

27 Two other aspects of the principle of statutory construction expounded in *Project Blue Sky* are of present significance.

28 The first is that mere use of imperative language to express a condition imports no presumption that non-compliance with the condition is intended to result in invalidity. That is not to deny that juxtaposition of an imperative term ("must") with a permissive term ("may") to express different requirements of the one statutory scheme might in an appropriate statutory context indicate that the imperative term is used to express a legislative intention that non-compliance is to result in invalidity whilst the permissive term is used in contradistinction to express a legislative intention that non-compliance is not to result in invalidity.²⁴

29 The second is that identical imperative language might be used in a particular statutory scheme to express a suite of requirements, some of which will admit of one answer to the *Project Blue Sky* question and some of which will admit

21 eg *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 434 [9].

22 eg *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454 at 459-460.

23 See Australia, Senate, *Administrative Appeals Tribunal Amendment Bill 2004*, Explanatory Memorandum at 27.

24 See *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at 321 [77], 344 [166], 354 [206].

of another answer. Thus, it is unsurprising to find that the parties to the present appeal were agreed that non-compliance with s 29(1)(a) of the AAT Act results in invalidity of an application, were agreed also that non-compliance with s 29(1)(b) does not result in invalidity of an application, and were in dispute as to whether non-compliance with s 29(1)(c) results in invalidity of an application.

Section 29(1)(c)

30 The answer to the ultimate question whether non-compliance with the condition of the making of an application to the Tribunal in s 29(1)(c) of the AAT Act – that an application contain a statement of the reasons for the application – results in invalidity of the application accordingly turns on the answer to the *Project Blue Sky* question whether there is to be discerned a legislative purpose to invalidate an application that fails to comply with that specific condition.

31 The starting point of the requisite analysis is to recognise that the circumstance that s 29(1)(c) of the AAT Act provides that an application "must" contain a statement of the reasons for the application is little more than that which poses the *Project Blue Sky* question. The use of that imperative terminology does not in the context of the AAT Act necessarily point to an affirmative answer.

32 Multiple considerations point inexorably to a negative answer. Unlike s 29(1)(a) of the AAT Act, which sets out how an application "must be made", s 29(1)(c) sets out information that an application which is made "must contain". The information to be provided in compliance with s 29(1)(c) is not as to any objective circumstance but is limited to the subjective reason of the applicant for making the application. In the language of s 29AB, it is at most information as to why the applicant believes that the decision sought to be reviewed is not the correct or preferable decision. That information is to be provided in the application notwithstanding that the very fact of the making of the application carries with it the necessary implication that the applicant is dissatisfied with the decision sought to be reviewed.

33 Accordingly, the information to be provided in compliance with s 29(1)(c) need not be information of the slightest assistance to the Tribunal or any other party to the proceeding. No doubt, as the Minister argues, compliance with the condition might assist the Tribunal in making an early assessment of the standing of the applicant and of the issues that might be sought to be raised and the evidence that might be sought to be led by the applicant in the proceeding before the Tribunal. But equally, compliance with the condition might be so perfunctory or formulaic as to be of no assistance whatsoever, as is demonstrated by the Minister's acceptance that a statement as uninformative as "[t]he Minister erred in concluding

that there is not another reason why the original decision to cancel [Mr Miller's] Resident Return (Subclass 155) visa should be revoked" would have been sufficient compliance with the condition had the statement been contained in Mr Miller's application.

34 Moreover, leaving s 29AB of the AAT Act to one side, the Tribunal has ample capacity to compel an applicant to provide reasons for the application at a meaningful and appropriate level of detail from the moment the proceeding is commenced. The Tribunal can compel an applicant to provide those reasons by directing the provision of further information under s 33(2A)(a) of the AAT Act and has the ability to enforce any such a direction under s 42A(5)(b) by making an order dismissing the application in the event of non-compliance.

35 The Minister argues that s 29AB of the AAT Act indicates to the contrary in that the section on its proper construction empowers the Tribunal to request an applicant to amend a statement in an application, to clarify the respects in which the applicant believes that the decision is not the correct or preferable decision, only where there has been compliance with s 29(1)(c) by inclusion of a statement in an application. Absent a statement having been made in an application in compliance with s 29(1)(c), so the argument goes, there is simply nothing to amend.

36 Acceptance of the Minister's construction of s 29AB would not compel the conclusion that non-compliance with s 29(1)(c) is intended to result in the invalidity of an application. At most, acceptance of the Minister's construction of s 29AB would compel the conclusion that non-compliance with s 29(1)(c) is intended to result in the unavailability of the power conferred by s 29AB.

37 To discern within this overall context a legislative purpose to invalidate an application and thereby to deprive the Tribunal of jurisdiction for want of compliance with a condition which requires the provision of information entirely subjective to the applicant, compliance with which might be entirely inutile and non-compliance with which would be readily remediable by directions made by the Tribunal within jurisdiction, would be to attribute to the legislature an intention which would be arbitrary to the point of being capricious. Hardly needing to be repeated is that attribution of a legislative intention to produce a consequence

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which appears to be "absurd"²⁵ or "capricious"²⁶ or "irrational or unjust"²⁷ is to be avoided where the statutory text is not intractable.

38 To discern such a legislative purpose would also be to attribute to the legislature an intention wholly at odds with the express legislative imposition on the Tribunal of the obligation in s 2A(a) and (b) of the AAT Act to pursue the objective of providing a mechanism for review that is accessible, fair, just, economical, informal, and quick. Antithetically to each of those legislative aspirations, invalidity of an application for non-compliance with s 29(1)(c) would result in a mechanism for review which would shut out persons adversely affected by reviewable decisions who might have substantial reasons for seeking review of those decisions but who, through mistake or misfortune or lack of education or linguistic skills, failed to express those reasons in their written application. Antithetically also to the legislative aspiration of s 33(1)(b), that a proceeding before the Tribunal be conducted without undue formality and technicality, and with due expedition, invalidity of the application would give rise to the farcical (and, in terms of public administration, highly inconvenient) prospect of a contestable preliminary issue in a proceeding before the Tribunal as to whether markings contained in an application (which might be in a language other than English or in the form of a scribble or an emoji) conveyed sufficient information to comply with s 29(1)(c).

Disposition

39 The following orders are to be made:

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 be allowed;

25 *Federal Commissioner of Taxation v Barton* (1957) 96 CLR 359 at 368.

26 *Cooper Brooks (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 322; *Shahi v Minister for Immigration and Citizenship* (2011) 246 CLR 163 at 177 [38].

27 *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at 509 [48]; *Ueese v Minister for Immigration and Border Protection* (2015) 256 CLR 203 at 217 [45].

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- b) order 2 made by the primary judge be set aside and, in its place, order that 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
 - c) the first respondent pay the appellant's costs of the proceeding before the primary judge and of the appeal.
3. The first respondent pay the appellant's costs of the appeal to this Court.