HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN:

DCM20
Appellant

SECRETARY OF DEPARTMENT OF HOME AFFAIRS
First Respondent

ASSISTANT DIRECTOR, MINISTERIAL INTERVENTION, DEPARTMENT OF HOME AFFAIRS
Second Respondent

SUBMISSIONS OF THE FIRST RESPONDENT AND THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA (INTERVENING)

PART I FORM OF SUBMISSIONS

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

PART II ISSUES

2. On 10 January 2020, the second respondent (the **Officer**), being an officer employed in the Department of Home Affairs (the **Department**), assessed a request by the appellant that the Minister for Home Affairs (the **Minister**) exercise his personal non-compellable power under s 351(1) of the *Migration Act 1958* (Cth) (the **Act**) by reference to the "Minister's guidelines on ministerial powers (s 351, s 417 and s 501J)" (the **Guidelines**), and concluded that the request would not be referred to the Minister.

10 3. In the proceedings below, the appellant sought relief on the basis that the Officer's conduct was "unreasonable". The primary judge and the Full Court found that the Officer's assessment was amenable to judicial review on this ground, but that the appellant had not established that the Officer's conduct was "unreasonable".

4. The key issues raised by this appeal, and the answers of the first respondent (the **Secretary**) and the Commonwealth Attorney-General (**the Commonwealth parties**), are as follows:

    4.1. What was the nature of the power or capacity exercised by the Officer? *A non-statutory, non-prerogative capacity (see [12]-[25] below).*

    4.2. Is the exercise of that capacity amenable to judicial review on administrative law
20 grounds? *No (see [26]-[41] below).*

    4.3. Alternatively, if the answer to question 4.2 is "yes", is the exercise of that capacity amenable to judicial review on the ground of legal unreasonableness? *No (see [42]-[45] below).*

    4.4. If the answer to question 4.3 is "yes", has the appellant established that the conduct of the Officer was unreasonable? *No (see [47]-[50] below).*

5. The issues at [4.1] to [4.3] are raised by the Secretary's notice of contention (Amended Core Appeal Book (**CAB**) 173). As these are logically anterior to the issue at [4.4] arising on the notice of appeal (CAB 170), they are addressed first.

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

30 6. The Secretary has issued notices under s 78B of the *Judiciary Act 1903* (CAB 176).

PART IV FACTS

7. The Commonwealth parties agree with the appellant's summary narrative of facts (AS [6]-[14]).

PART V ARGUMENT

(a) The legislative scheme

8. Section 351 is one of a number of "dispensing provisions" in the Act that have a "distinctive function" in the scheme by conferring upon the Minister "a degree of flexibility", including so as to allow him or her to "grant visas that might not otherwise be able to be granted because of non-satisfaction of substantive or procedural
10 requirements".[1] The power conferred by s 351(1) is personal (subs (3)) and non-compellable (subs (7)). Section 351 establishes specific mechanisms that facilitate Parliamentary oversight of the exercise of the power (subs (4)-(6)).

9. This Court's decisions have established the following propositions.

9.1. **First**, each section confers non-compellable personal powers to make a procedural decision (ie, to consider whether to make a substantive decision) and then, if such a decision is made, to make a substantive decision (ie, whether to grant a visa).[2]

9.2. **Second**, processes undertaken by the Department to assist the Minister to consider the possible exercise of a non-compellable power derive their character from what the Minister personally has or has not done.[3] "If the Minister has not made a
20 personal procedural decision to consider whether to make a substantive decision, a process undertaken by the Department on the Minister's instructions to assist the Minister to make the procedural decision has no statutory basis".[4] Thus, when the Department applies guidelines that set out criteria as to when the Department is to refer cases to the Minister to assist the Minister to decide whether to consider

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1 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 (***Plaintiff S10***) at [30] (French CJ and Kiefel J). See also ss 48B, 195A, 417 and 501J.

2 *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 (***SZSSJ***) at [53]; see also [43] approving *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 (***Plaintiff M61***) at [70].

3 *SZSSJ* (2016) 259 CLR 180 at [54].

4 *SZSSJ* (2016) 259 CLR 180 at [54].

exercising a non-compellable power, and the result is that a case is not referred to the Minister, "no statutory power had been engaged".[5]

9.3. **Third**, whether the Minister has made a personal procedural decision in a particular case or class of cases is a question of fact.[6]

9.4. **Fourth**, even if the Minister has requested and has been given advice from the Department as to the possible exercise of a dispensing power, the Minister is not required to take that advice into account, let alone to act consistently with it.[7]

(b) A taxonomy of executive power

10. In *Davis v Commonwealth*,[8] in an analysis subsequently approved by a majority of this Court,[9] Brennan J explained that "an act done in execution of an executive power of the Commonwealth is done in execution of one of three categories of powers or capacities: a statutory (non-prerogative) power or capacity, a prerogative (non-statutory) power or capacity, or a capacity which is neither a statutory nor a prerogative capacity".

11. For the reasons outlined below, the conduct of the Officer at issue in this appeal involved the exercise of a non-statutory non-prerogative capacity.

(i) The Officer's conduct had no statutory basis

12. The appellant correctly concedes that the Minister has made no personal procedural decision in relation to him (AS [23]-[24]). It is clear that the issuing of the Guidelines did not manifest a personal procedural decision by the Minister to consider cases that meet any criteria set out therein, as clause 1 of the Guidelines states that their purpose is to explain the circumstances in which the Minister "may wish" to consider intervening in a case (JM 62). Contrary to AS [22], there is no material difference between the current Guidelines and the predecessor guidelines considered in *Plaintiff S10*. In particular, both

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5 *SZSSJ* (2016) 259 CLR 180 at [47]; see also *Plaintiff S10* (2012) 246 CLR 636 at [46], [52] (French CJ and Kiefel J) and [91] (Gummow, Hayne, Crennan and Bell JJ).

6 *SZSSJ* (2016) 259 CLR 180 at [55]. See also [33], [44], [72], [89].

7 *Plaintiff M61* (2010) 243 CLR 319 at [77]; *SZSSJ* (2016) 259 CLR 180 at [53]-[54].

8 (1988) 166 CLR 79 at 108.

9 See, eg, *Commonwealth v AJL20* (2021) 95 ALJR 567 (***AJL20***) at [43] (Kiefel CJ, Gageler, Keane and Steward JJ).

sets of guidelines include a direction that certain requests are not to be brought to the Minister's attention at all.[10]

13. As French CJ and Kiefel J put it in *Plaintiff S10*, the guidelines "operate as a screening mechanism in relation to any requests which the Minister has decided are not to be brought to his or her attention".[11] Both the predecessor and the current guidelines are "variants, in public administration, of departmental processes which are anterior to the exercise of statutory powers but do not constitute or evidence their exercise".[12]

14. Members of this Court have repeatedly and correctly applied the analysis in *Plaintiff S10* and *SZSSJ* to conclude that an officer's conduct by reference to the Guidelines does not involve the exercise of statutory power.[13] That being so, the appellant's submission that assessments against the Guidelines, while not having a statutory basis, "cannot be said to have no relationship at all to the laws of the Commonwealth" (AS [24]) goes nowhere. The appellant not having sought leave to challenge the above authorities, it is not open to her to contend that the Officer's assessment against the Guidelines involves the exercise of statutory power (if that is, indeed, what is sought to be suggested).

(ii) The Officer's conduct did not involve the exercise of prerogative power

15. Justice Brennan's tripartite characterisation of executive power in *Davis* used the term "prerogative" in the strict sense in which it was used by Sir William Blackstone, to refer only to "those rights and capacities which the King enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects".[14]

[10] As to the predecessor guidelines, see *Plaintiff S10* (2012) 246 CLR 636 at [35]-[36] (French CJ and Kiefel J) and [91] (Gummow, Hayne, Crennan and Bell JJ). The predecessor guidelines are at JM 68.

[11] (2012) 246 CLR 636 at [46]. Similarly, as Gummow, Hayne, Crennan and Bell JJ put it at [91]: "By these directions the Minister has determined in advance the circumstances in which he or she wishes to be put in a position to consider exercise of the discretionary powers by the advice of departmental officers."

[12] *Plaintiff S10* (2012) 246 CLR 636at [47].

[13] See *Plaintiff S28/2018 v Minister for Home Affairs* [2018] HCATrans 168 at lines 111-113 (Gageler J); *Plaintiff S322/2018 v Minister for Immigration, Citizenship and Multicultural Affairs* [2019] HCATrans 96 at lines 50-82 (Edelman J) and the transcripts there cited; *Plaintiff S53/2019 v Minister for Immigration, Citizenship and Multicultural Affairs* (2019) 94 ALJR 1 at [7] (Gageler J).

[14] *Davis* (1988) 166 CLR 79 at 108, quoting Blackstone, *Commentaries on the Laws of* England (1765), Bk 1, p 232; see also *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 (***Plaintiff M68***) at [133] (Gageler J). That definition was used in preference to Dicey's broader definition, which encompassed all non-statutory executive power: Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959), p 424. See also *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at [126] (French CJ), [214] (Gummow, Crennan and Bell JJ).

16. In *Plaintiff M68*, Gageler J explained that Brennan J's tripartite categorisation highlights "the essential difference between an act done in the execution of prerogative power and an act done in the execution of a non-prerogative executive capacity": [15]

> An act done in the execution of a prerogative executive power is an act which is capable of interfering with legal rights of others. An act done in the execution of a non-prerogative executive capacity, in contrast, involves nothing more than the utilisation of a bare capacity or permission, which can also be described as ability to act or as a 'faculty'.

17. The Commonwealth accepts that judicial review is possible with respect to the exercise
10 of prerogative executive power in some cases on some grounds. It is not, however, necessary to explore the boundaries of that proposition, because this case clearly does not involve the exercise of prerogative power. Nothing that the Officer did was "unique" to the executive government or incapable of being carried out by a "non-public actor".

18. Nor, for the reasons that follow, was anything that the Officer did "capable of interfering with the legal rights of others", that being the "essential difference" between prerogative powers and non-statutory capacities identified by Gageler J in the passage above.

19. While the appellant's submissions contain a heading "The finalisation of the request affected rights and interests", her submissions do not identify any effect on "rights" (AS [29]-[32] referring only to "interests"). That is not surprising, as this Court has clearly
20 held that an officer's non-statutory assessment of a request against Ministerial guidelines does not affect rights. In *Plaintiff S10*, French CJ and Kiefel J expressly so held.[16] Justices Gummow, Hayne, Crennan and Bell apparently agreed, citing with approval[17] a passage in the reasoning of Lindgren J in *Raikua v Minister for Immigration and Multicultural and Indigenous Affairs*,[18] which included the holding that an officer's action in not referring a request to the Minister "does not itself affect legal rights". [19]

20. *Plaintiff S10* is inconsistent with the appellant's argument (AS [26]; also [30], [51]), and with the reasoning of Charlesworth J (J [253]-[270], CAB 130-133),[20] that officers of the Department have a "duty" to "bring the existence of a request personally to the Minister's

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15 (2016) 257 CLR 42 at [134]-[135] (emphasis added).
16 (2012) 246 CLR 636 at [2]-[3].
17 (2012) 246 CLR 636 at [91].
18 (2007) 158 FCR 510 at [63]-[66].
19 (2007) 158 FCR 510 at [64]. See also [70]-[74], where his Honour reiterated that the non-referral by the officer was "not subject to judicial review", including on grounds essentially similar to those advanced by the appellant here, in circumstances where that conduct "did not affect legal rights".
20 Griffiths J agreed with her Honour's analysis: J [87], CAB 87.

attention" that can only be displaced or modified by lawful instructions from the Minister, such that the appellant had a correlative qualified right to have her request brought to the Minister's attention. Such a duty (and a correlative right) could only be sourced in the Act. Yet not only does nothing in the Act support it, the posited duty is incompatible with s 351(7). In effect, the appellant seeks to circumvent s 351(7) by implying what would amount to a duty to "consider whether to consider" exercising the power in s 351(1).[21] Justices Besanko (J [52], CAB 74) and Mortimer (J [121]-[122], CAB 98) were correct to doubt this aspect of Charlesworth J's analysis, because the plain effect of s 351(7) is that the Minister need never become aware of requests for the exercise of a

10 dispensing power (which logically must mean that they need not be brought to the Minister's attention).[22] In those circumstances, the arrangements that the Minister chooses to make with the Department to identify the cases that should be brought to his or her attention, and those that should be screened out, were "entirely a matter for the Minister".[23] They "relate to the internal affairs of the government in terms of how it organises itself".[24] That is not a proper subject for judicial review.

21. Unlike the situation in *Plaintiff M61*, in the present case the Officer's conduct did not have any effect on the appellant's liberty. In *Plaintiff M61*, refugee status assessments by officers (and reviews by contractors) had a statutory foundation because the Minister had made a procedural decision to consider the exercise of dispensing powers. That

20 statutory foundation was critical to the Court's reasoning, including the reasoning that the assessment had an effect on liberty by prolonging detention.[25] In this case, there was no such procedural decision, no statutory foundation, and the Officer's assessment did not prolong the appellant's detention (not only for the above reasons, but also because the appellant was not detained when the Officer's assessment occurred).[26]

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21 Cf. Mortimer J at J [121], CAB 98. See also *Plaintiff M61* (2010) 243 CLR 319 at [99]; *SZSSJ* (2016) 259 CLR 180 at [12] and [50]; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441 (***S134/2002***) at [48] (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ) and [100] (Gaudron and Kirby JJ).

22 See *Plaintiff S10* (2012) 246 CLR 636 at [31], [50] (French CJ and Kiefel J), [99(iii)] (Gummow, Hayne, Crennan and Bell JJ). See also *SZSSJ* (2016) 259 CLR 180 at [53]; cf AS [30].

23 *Raikua* (2007) 158 FCR 510 at [74] (Lindgren J).

24 *Victoria v Master Builders Association* [1995] 2 VR 121 at 137-138 (Tadgell J); Sapienza, *Judicial Review of Non-Statutory Executive Action* (Federation Press, 2020) at 94.

25 (2010) 243 CLR 319 at [76]. See also *SZSSJ* (2016) 259 CLR 180 at [54].

26 See J [85] (CAB 86).

22. Furthermore, whether the appellant had a <u>right</u> to be at liberty in the Australian community was dictated exclusively by the Act (as s 4 makes clear).[27] Sections 189, 196 and 198 of the Act require all non-citizens[28] to be detained and removed from Australia unless they hold a visa. The appellant's right to be at liberty in Australia therefore depended entirely on her bridging visa. Contrary to the reasoning of the Full Court (J [44]-[45] (Kenny J) (CAB 71-72); see also [85] (Griffiths J) (CAB 86), [118(b)], [119] (Mortimer J) (CAB 96, 97), [288] (Charlesworth J) (CAB 138), the Officer's conduct in applying the Guidelines had no effect on that bridging visa, and therefore upon her "right" to liberty. Indeed, the appellant apparently accepts as much.[29] While a <u>first request</u> for
10 Ministerial intervention under s 351 can satisfy one of the time of application criteria for one subclass of bridging visa,[30] even when a bridging visa is granted on that basis its duration turns on clause 050.517 of Sch 2 to the Regulations, which provides that the visa ceases on the date specified by the delegate (as opposed to upon lawful finalisation of a request for intervention).[31] Further, on the facts of this case the appellant had made <u>four requests</u> for intervention. As such, she plainly could not satisfy Sch 2, cl 050.212(6)(c) (quoted in J [10] (Kenny J), CAB 61). The reliance by some members of the Full Court on that visa criterion to support its conclusion that the Officer's conduct could affect a right to be in Australia was clearly wrong. The appellant's attempt to resuscitate this point, by submitting that the refusal of the <u>first request</u> curtails her "ongoing entitlement
20 to obtain a bridging visa" (AS [31(b)] and fn 24), goes nowhere, because that submission cannot assist her in establishing that the Officer's conduct in not referring her <u>fourth request</u> to the Minister had any effect on her visa status, and thus upon her "right" to be at liberty in the Australian community.

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27 *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at [184] (Kiefel and Keane JJ); *Commonwealth v AJL20* (2021) 95 ALJR 567 at [14], [35] (Kiefel CJ, Gageler, Keane and Steward JJ).

28 With the exception of the *sui generis* category of Aboriginal Austalians, identified according to the tripartite test in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 70: see *Love v Commonwealth* (2020) 270 CLR 152 at [81] (Bell J, speaking for the majority on this point).

29 The appellant does not embrace Kenny J's reasoning that the Officer's conducted affected her <u>rights</u> in this respect, only what she says are her <u>interests</u>: see AS [31]-[32].

30 See subclause 050.212(6) of Schedule 2 to the *Migration Regulations 1994* (the **Regulations**). Neither the appellant in these proceedings nor the appellant in the *Davis* appeal holds a subclause 050.212(6) bridging visa: J [11] (Kenny J) (CAB 61-62).

31 A similar flaw is apparent in the (briefer) analysis of Griffiths J (at J [85], CAB 86), Mortimer J (at J [118(b)], [119], CAB 96, 97) and Charlesworth J (at J [288], CAB 138).

23. Nor did the Guidelines create any rights in the appellant.[32] There is no principled basis upon which the Guidelines can be treated as equivalent to a law that creates limits on "power" that are susceptible to enforcement by the courts.[33] Still less can the Guidelines properly be described as "conferring power", in circumstances where they plainly could not, and did not purport to, delegate the Minister's power under s 351 (cf AS [44]). The Guidelines necessarily operated in the context of, and subject to, s 351(7), which is itself premised on a non-citizen's rights being governed by the Act unless and until such time as the Minister personally chose to "dispense" with the operation of particular provisions.

(iii) The Officer's conduct involved the exercise of a non-prerogative executive capacity

10 24. For the above reasons, the Officer's conduct was incapable of affecting legal rights. Her conduct involved nothing more than reviewing a request – which the Minister was not required to consider – to assist the Minister to decide whether he might want to consider it. Even if some inquiries needed to be made as part of that assessment, those inquiries did not involve any exercise of prerogative power.[34] As Stephen J explained in *R v Collins; Ex parte ACTU-Solo Enterprises Pty Ltd*, the conclusions of an executive inquiry:[35]

> no doubt serve to inform the mind of government and may, in consequence, to a greater or lesser extent, be instrumental in shaping the course of … executive initiatives but they neither directly determine, or of their own force affect, rights…

20 25. For the reasons French CJ and Kiefel J explained in *Plaintiff S10*,[36] the nature of the Officer's conduct here is analogous to the conduct of an interdepartmental committee considered in *Minister for Immigration and Ethnic Affairs v Mayer*.[37] That committee advised the Minister whether a particular person was a refugee within the meaning of the Refugees Convention (at a time when the Act contained no reference to a person having the status of a refugee). The functions of that committee were "without any identified

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32 See, eg, *Minister for Industry and Commerce v East West Trading Company Pty Ltd* (1986) 10 FCR 264 at 269-270 (Fox J); *Minister for Immigration and Ethnic Affairs v Conyngham* (1986) 11 FCR 528 at 540-541 (Sheppard J, Beaumont and Burchett JJ agreeing).

33 Cf AS [27]; *Jabbour v Secretary, Department of Home Affairs* (2019) 269 FCR 438 at [91], [102].

34 See *Clough v Leahy* (1904) 2 CLR 139 at 156-157 (Griffith CJ). See also, e.g., *Murphy v Lush* (1986) 60 ALJR 523 at 526: "no-one requires special authority at law simply to make inquiries" (the Court).

35 (1976) 8 ALR 691 at 695. See also *Minister for Ars, Heritage & Environment v Peko Wallsend* (1987) 15 FCR 274 at 303, 306 (Wilcox J, Bowen CJ and Sheppard J agreeing).

36 (2012) 246 CLR 636 at [49].

37 (1985) 157 CLR 290.

statutory foundation, undefined by any identified statutory obligation or control and devoid of any direct statutory or legal effect".[38]

(c) Non-statutory executive capacities are not amenable to judicial review

26. The separation of powers under Ch III of the Constitution necessitates a more limited approach to judicial review in Australia than is taken in the United Kingdom.[39] The Australian position was captured by Brennan J in his frequently cited observations in *Attorney-General (NSW) v Quin* (***Quin***), where his Honour said:[40]

> Judicial review provides no remedies to protect interests, falling short of enforceable rights, which are apt to be affected by the lawful exercise of executive or administrative power … The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power.

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27. As is apparent, that passage ties judicial review of administrative action exclusively to the enforcement of legal constraints on the exercise of legal "powers" that are apt to effect "enforceable rights". In *Tang*, Gummow, Callinan and Heydon JJ referred to decisions affecting "legal rights and obligations".[41] Both formulations emphasise that judicial review is not concerned with decisions that affect interests falling short of such rights.

28. Identifying the function of judicial review in that way coheres with Brennan J's taxonomy of executive power in *Davis*, for it has the consequence that judicial review is concerned with statutory executive power and with some kinds of prerogative power[42] – both of which can affect legal rights – but not with non-statutory capacities. The difference arises because executive power of the latter kind by definition cannot alter legal rights or obligations without consent.[43] For that reason, the role of the courts in relation to non-

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38 *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 300 (Mason, Deane and Dawson JJ) (emphasis added). See also at 294 (Gibbs J).

39 See *Kirk v Industrial Court of NSW* (2010) 239 CLR 531 at [66] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Sue v Hill* (1999) 199 CLR 462 at [83]-[94] (Gleeson CJ, Gummow and Hayne JJ); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 (***Lam***) at [74]-[76] (McHugh and Gummow JJ).

40 (1990) 170 CLR 1 at 35-36 (emphasis added). See also *Church of Scientology v Woodward* (1982) 154 CLR 25 at 70 (Brennan J).

41 *Griffith University v Tang* (2005) 221 CLR 99 (***Tang***) at [80]. See also [89], [96].

42 See *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 (***Ainsworth***) at 585 (Brennan J).

43 See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 408-409 (Lord Diplock); *Tang* (2005) 221 CLR 99 at [82] (Gummow, Callinan and Heydon JJ). See further *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 307 (Brennan J); *Glasson v Parkes Rural Distributions Pty Ltd* (1984) 155 CLR 234 at 241; *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at [54], [58], [64] (but note [50]) (McHugh, Hayne and Callinan JJ).

statutory capacities is different to its role in proceedings brought to enforce the limitations on statutory and prerogative power.[44] The difference arises fundamentally from the fact that the exercise of non-statutory capacities (as opposed to the determination of whether or not such a capacity exists[45]) lack the hallmark of "power" that would make them an appropriate subject of judicial review.[46]

29. Thus, while it is true that "all power of government is limited by law", and that it is for the judiciary to enforce those limits,[47] neither proposition says anything about either the content of the relevant limits or the legal mechanism by which those limits may be enforced. The legal limits on the exercise of non-statutory capacities are the same as the
10 legal limits that apply to any other persons who engages in conduct of the same kind.[48] That is why "[l]egal processes other than judicial review are likely to be more suitable for the resolution of disputes in relation to the exercise of the non-prerogative capacities".[49] For example, where an act done in the exercise of a non-statutory executive capacity creates a valid contract, that contract will be enforceable under the general law in the ordinary way.[50] Similarly, if a report that is prepared in the exercise of such a capacity is prepared negligently, liability may follow under the law of tort. If a statement is made in a report that has an unjustified effect on a person's reputation, the law of defamation may

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[44] See *Kioa v West* (1985) 159 CLR 550 at 609-611 (Brennan J); *Ainsworth* (1992) 175 CLR 564 at 585; *Annetts v McCann* (1990) 170 CLR 596 at 604; *Quin* (1990) 170 CLR 1 at 35-37.

[45] Cf *Williams v Commonwealth* (2012) 248 CLR 156.

[46] See the discussion of the different meanings of "power" in Harris, 'The "Third Source" of authority for government action' (1992) 109 *Law Quarterly Review* 626 at 628-629; Harris, 'The "Third Source" of authority for Government action revisited' (2007) 123 *LQR* 225 at 225-227; Harris, 'Government "Third-Source" Action and Common Law Constitutionalism' (2010) 126 *LQR* 373 at 373-376; Aronson, "Private Bodies, Public Power and Soft Law in the High Court" (2007) 35 *Fed LR* 1 at 20.

[47] AS [34], citing *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

[48] *Clough v Leahy* (1904) 2 CLR 139 at 156-157 (Griffith CJ); *A v Hayden [No 2]* (1984) 156 CLR 532 at 580-581 (Brennan J); *Commonwealth v Mewett* (1997) 191 CLR 471 at 546-551 (Gummow J). See also *Corporation of the City of Enfield v Development Assessment Commission* (1999) 199 CLR 135 - at [17], where the plurality observed that "[s]ignificant questions of public law, including those respecting ultra vires activities of public officers and authorities, are determined in litigation which does not answer the description of judicial review of administrative action by the medium of the prerogative writs", giving as examples "actions for recovery of moneys exacted color officii or paid by mistake, and those for trespass, detinue and conversion where the plaintiff challenges the validity of the authority relied upon by the defendant as answer to the allegedly tortious acts". See also Gaudron J at [56].

[49] Sapienza, *Judicial Review of Non-Statutory Executive Action* (Federation Press, 2020) at 92.

[50] In *L v South Australia* (2017) 129 SASR 180 at [153], Kourakis CJ (Parker and Doyle JJ agreeing) said: "In affecting rights and interests by exercising the common law power to contract, which the executive enjoys with all persons, the executive should not be burdened by procedural requirements which attend the exercise of public powers under statute or the prerogative."

supply a remedy.[51] There is no warrant for discerning <u>additional</u> limitations (including a duty to act "reasonably"), enforceable by way of judicial review, upon acts done in the exercise of non-statutory capacities where those acts are already subject to the same limits that apply to conduct of the same kind performed by any other actor. That is why the Australian cases concerning the justiciability of exercises of non-prerogative capacities indicate that the "exercise of such capacities is unlikely to be 'empowered by public law' such as to make it amenable to judicial review. Rather, general law provides the legal processes that provide legal accountability".[52] As Gageler J put it in *Plaintiff M68*:[53]

> Such effects as [an act done in the execution of a non-prerogative executive capacity] might have on legal or juridical relations result not from the act being uniquely that of the Executive Government but from the application to the act of the same substantive law as would be applicable in respect of the act had it been done by any other actor. In this respect, the Executive Government "is affected by the condition of the general law" …

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30. The above analysis is supported by *Stewart v Ronalds*,[54] in which the New South Wales Court of Appeal expressed doubts that a senior counsel at the private bar – who had been retained by the Premier to investigate allegations of misconduct about a Minister and to publish a report in Parliament – had a duty to afford procedural fairness to the Minister. Those doubts arose because, notwithstanding the clear potential for the report to harm the Minister's reputation, the barrister was "not exercising power (or at least public power)"[55] but instead was acting "under a bilateral retainer without any authority in statute, prerogative, or consensual compact and without any legally recognised power".[56]

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(i) "Potential rights" and "interests"

31. In light of the above, to characterise the Officer's conduct as affecting the appellant's "*potential rights*" (eg J [84] (Griffiths J), CAB 86) is of no assistance in determining whether judicial review is available. A "potential right" is a phrase that can refer only to a right that does not presently exist, and that may <u>never</u> exist. The fact that a person may

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[51] Eg *Ainsworth* (1992) 175 CLR 564 at 584 (Brennan J); *Stewart v Ronalds* (2009) 76 NSWLR 99 at [58], [71] (Allsop P) and [131] (Handley AJA).

[52] Sapienza, *Judicial Review of Non-Statutory Executive Action* (Federation Press, 2020) at 96.

[53] *Plaintiff M68* (2016) 257 CLR 42 at [135]. In *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at [96], Gordon and Steward JJ referred with approval to reasoning in this paragraph. See also *Minister for Immigration and Border Protection v DZU16* (2018) 253 FCR 526 at [154] (Full Court).

[54] (2009) 76 NSWLR 99.

[55] See *Stewart v Ronalds* (2009) 76 NSWLR 99 at [71] (Allsop P). See also [74].

[56] See *Stewart v Ronalds* (2009) 76 NSWLR 99 at [137] (Handley AJA).

obtain a right in the event of some possible future exercise of statutory power provides no proper foundation to conclude that precursor conduct that is itself incapable of affecting rights, and that need not even be taken into account if the future exercise of statutory power occurs, is subject to judicial review. [57]

32. Nor is it of any assistance to speak of the Officer's conduct affecting the appellant's "interests" (cf J [43] (Kenny J) (CAB 71), [51] (Besanko J) (CAB 74), [84] (Griffiths J) (CAB 86), [119] (Mortimer J) (CAB 97). That is not to deny that an effect on "interests" can be sufficient to enliven a requirement of procedural fairness with respect to the exercise of statutory executive power.[58] So much is well established.[59] Critically,
10 however, the interest is not enforceable by itself. Instead, once a statutory power is interpreted in such a way that it is limited by the obligation to afford procedural fairness, that limit is enlivened by effects of the power on rights or interests. Failure to comply with that limit involves jurisdictional error.[60] For that reason, it can properly be said that the repository of the power is under a "duty" to provide procedural fairness, and that the beneficiary of that duty has a correlative "right". It is that right/duty that judicial review can enforce, not the "interest" that was one component of enlivening the limit on statutory power. Any protection of that "interest" is "incidental to the constraints imposed on the proposed manner of the performance of the statutory power".[61] That analysis is not available with respect to non-statutory executive power because, as Aronson has
20 recognised, "[i]n non-statutory settings … natural justice cannot exist by itself – it needs something 'substantive' to protect or enforce".[62] That "something" is the "restraint of power", which in the judicial review context means the "power unilaterally to alter (and perhaps even to create) legal right or obligations". [63]

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57 Compare *Apache Northwest Pty Ltd v Agostini (No 2)* [2009] WASCA 231 at [7], [12] (Wheeler and Newnes JJA); *L v South Australia* (2017) 129 SASR 180 at [179] (Kourakis CJ, Parker and Doyle JJ agreeing).

58 See, eg, Aronson, Weeks and Groves, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 7th ed, 2021) at 417 [7.90].

59 *Plaintiff S10* (2012) 246 CLR 636 at [66], [69] (Gummow, Hayne, Crennan and Bell JJ); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at [367] (Gageler J); *Ainsworth* (1992) 175 CLR 564 at 577-578; *Annetts v McCann* (1990) 170 CLR 596 at 608-609.

60 Subject to materiality, see eg *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421.

61 See *Ainsworth* (1992) 175 CLR 564 at 585 (Brennan J).

62 Aronson, "Private Bodies, Public Power and Soft Law in the High Court" (2007) 35 *Fed LR* 1 at 20, referring to the effect of the High Court's decision in *Tang*.

63 Aronson, "Private Bodies, Public Power and Soft Law in the High Court" (2007) 35 *Fed LR* 1 at 20.

33. Still less can an effect on "interests" enliven legal limits on a non-statutory capacity in the context of grounds of review that are unrelated to any effect on "interests". To hold otherwise would directly contradict Brennan J's recognition in *Quin* that "[j]udicial review provides no remedies to protect interests, falling short of enforceable rights, which are apt to be affected by the lawful exercise of administrative or executive power".[64] That would be a large and unjustified step.

34. In any event, the appellant cannot establish that the conduct of officers applying the Guidelines (as distinct from that of the Minister under s 351) has any effect on her "interests". To the contrary, as French CJ and Kiefel J held in *Plaintiff S10*, the anterior non-statutory conduct of officers is not "capable of affecting, defeating or prejudicing rights [or] interests".[65] The plurality in *Plaintiff S10* took the same view, approving Lindgren J's observation that such conduct "is not susceptible to judicial review".[66]

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35. The above analysis is not inconsistent with *Council of Civil Service Unions v Minister for the Civil Service*,[67] which is properly analysed as turning upon either an exercise of prerogative power having an effect on rights,[68] or as upon the proposition that an effect of a decision on "legitimate expectations" could attract procedural fairness (that being a proposition now rejected in Australia).[69] It is, however, inconsistent with *R v Panel on Take-overs and Mergers; Ex parte Datafin plc*,[70] the applicability of which in Australia has been regularly doubted,[71] although the point has not been determined by this Court.[72]

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64 (1990) 170 CLR 1 at 35. Brennan J plainly saw no inconsistency between that proposition and the fact that procedural fairness protects interests that do not amount to legal rights (that being a proposition that his Honour embraced in *Kioa v West* (1985) 159 CLR 550 at 616-617).

65 (2012) 246 CLR 636 at [3].

66 *Raikua* (2007) 158 FCR 510 at [64]. See also [70]-[74], where his Honour reiterated that the non-referral by the officer was "not subject to judicial review", including on grounds essentially similar to those advanced by the appellant here.

67 [1985] AC 374.

68 Cf. *Minister for Arts v Peko-Wallsend Ltd* (1987) 15 FCR 274 at 306 (Wilcox J, with whom Bowen CJ and Sheppard J agreed); see also H W R Wade, "Procedure and Prerogative in Public Law" (1985) 101 *LQR* 180 at 190, 197 and 199 who characterised the decision in similar terms.

69 See, eg, *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [30] (Kiefel CJ, Bell and Keane JJ), [61] (Gageler and Gordon JJ).

70 [1987] QB 815.

71 As to NSW, see *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at [74]-[81] (Basten JA); *Agricultural Societies Council of NSW Ltd v Christie* (2016) 340 ALR 560 at [89]-[92] (Leeming JA); *Alajmi v Macquarie University* [2019] NSWSC 1026 at [165]-[169] (Payne J). As to South Australia, see: *Khuu & Lee Pty Ltd v Adelaide City Corporation* (2011) 110 SASR 235 at [30] (Vanstone J, Sulan and Peek JJ agreeing); *L v South Australia* (2017) 129 SASR 180 at [137]-[154] (Kourakis CJ, Parker and Doyle JJ agreeing). As to Victoria, see: *Mickovski v Financial Ombudsman Service Ltd* (2012) 36 VR 456 at [31]-[32] (Buchanan and Nettle JJA, Beach AJA); *Durney v Unison Housing Ltd* (2019) 57 VR 158 at [59] (Garde J); *Vergara v Chartered Accountants ANZ* [2021] VSC 34 at [174] (Digby J).

72 Aronson et al observe in *Judicial Review of Administrative Action and Government Liability* (7th ed., 2021)

It is also inconsistent with *Victoria v Master Builders' Association of Victoria*,[73] where declaratory relief was granted by the Supreme Court of Victoria with respect to the publication by the State of Victoria of a "black-list" on the ground of procedural unfairness. As Kourakis CJ (speaking for the Full Court) observed in *L v South Australia*, the decision in *Master Builders* "conflate[s] the question of practical economic and social power with a legal power".[74] As a result, it:[75]

> subjected the voluntary investigations of public servants in the Department of Justice and the communication of the results of those investigations to judicial review even though they had not exercised any legal power in doing so. They
10 were not acting in aid of an exercise of any true prerogative power.

36. Insofar as the Victorian Supreme Court in *Master Builders* sought to gain some support from *Ainsworth*,[76] it overlooked a fundamental point of distinction, being that the report in *Ainsworth* was issued pursuant to a statutory power. The statute in question was construed as requiring procedural fairness to be followed, and also as precluding the availability of relief for defamation.[77] As Brennan J's judgment demonstrates, the case is consistent with acceptance of the proposition that the "conduct of a person or body of persons acting without colour of statutory authority is not amenable to judicial review",[78] "unless, perhaps, they are purportedly acting with the authority derived from the prerogative"[79] or a "Royal Charter, franchise or custom".[80]

20 *(ii) Unavailability of judicial review remedies*

37. The conclusion that judicial review is unavailable with respect to non-statutory capacities, on the ground that such capacities cannot affect legal rights, coheres with established jurisprudence about the availability of judicial review remedies.

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at [4.150], "*Datafin*'s status remains uncertain in Australia", and that "all States are now trying to leave it to the High Court".

73 [1995] 2 VR 121.

74 (2017) 129 SASR 180 at [152] (Parker and Doyle JJ agreeing).

75 (2017) 129 SASR 180 at [152] (Parker and Doyle JJ agreeing).

76 [1995] 2 VR 121 at 157-158.

77 *Ainsworth* (1992) 175 CLR 564 at 570-571 (Mason CJ, Dawson, Toohey and Gaudron JJ).

78 *Ainsworth* (1992) 175 CLR 564 at 585.

79 *Ainsworth* (1992) 175 CLR 564 at 585 footnote 48: his Honour instanced *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 407.

80 (1992) 175 CLR 564, 585 footnote (48): his Honour instanced *Reg v Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 QB 864 at 884.

38. It is clear that mandamus is unavailable, because there is no legal duty of a public nature amenable to enforcement (cf AS [51]).[81] The unavailability of mandamus necessarily entails that there is no utility in granting certiorari to quash the Officer's "decision".[82] Certiorari is also unavailable for the further reason that the Officer's "decision" produced no legal consequence that is capable of being quashed or nullified (cf AS [51]).[83]

39. Declaratory relief is likewise unavailable in cases where such assessments have no statutory foundation (unlike *Ainsworth* and *Plaintiff M61*) and no effect on rights. The point was explained by a Full Court of the Federal Court in *Minister for Immigration and Multicultural Affairs v Ozmanian*,[84] where the Full Court allowed an appeal against a
10 declaration that conduct of Departmental officers connected with a possible exercise of a dispensing power by the Minister involved procedural unfairness. Justice Kiefel (Sackville J agreeing) held that it was not appropriate to issue "a bare declaration, not declaratory of any present right, and amounting only to an acknowledgment of past infringement of a right to procedural fairness".[85] That was so because a declaration "must be productive of some effect before it could be said to be warranted", and on the facts "any consequences could not be brought about by the declaration itself, as might occur where there is a pronouncement of the parties' rights".[86] While the Full Court in *Ozmanian* accepted that the trial judge had been correct to observe that the consequences "of the processes followed by the Department were drastic" (the consequence being that
20 there was no referral of the request for the exercise of dispensing powers to the Minister), the Court held that a declaration "could in no way redress [the decision] save for some ill-defined prospect that the Minister might be moved to consider it", the trial judge having "put it no more highly than a possibility that a valid decision might be made at some time in the future".[87] The Full Court's recognition that declaratory relief should not be granted in *Ozmanian* is entirely consistent with Brennan J's statement in *Quin* that "[t]he duty and jurisdiction of the court to review administrative action do not go beyond

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81 *Plaintiff M61* (2010) 243 CLR 319 at [99]. See also *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

82 *S134/2002* (2003) 211 CLR 441 at [48] (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ), [100] (Gaudron and Kirby JJ); *Plaintiff M61* (2010) 243 CLR 319 at [100].

83 See, e.g., *Ainsworth* (1992) 175 CLR 564 at 580 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 159 (Brennan CJ, Gaudron and Gummow JJ), 178 (Dawson and Toohey JJ).

84 (1996) 71 FCR 1.

85 (1996) 71 FCR 1 at 31 (emphasis added).

86 (1996) 71 FCR 1 at 32.

87 See also *AVN20 v Federal Circuit Court of Australia* [2020] FCA 584 at [115]-[117] (Kenny J).

the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power", with the consequence that "[j]udicial review provides no remedies to protect interests, falling short of enforceable rights".[88]

(iii) Conclusion on amenability of Officer's exercise of a non-statutory capacity to judicial review

40. For the above reasons, the conduct of the Officer in not referring a request for the favourable exercise of a dispensing provision to the Minister is not amenable to judicial review. That conduct, performed in the exercise of a non-statutory capacity, is incapable of affecting rights. It involves performance of a routine task in the conduct of public administration, akin to that performed by thousands of public servants every day, being the determination of which of the many matters vying for Ministerial attention should be brought to the attention of Ministers. Such conduct is not properly the subject of judicial review simply because, if a matter is brought to the Minister's attention, the Minister might then make a decision that affects rights. It is only if that actually occurs that review is available, the proper subject of that review being the Minister's decision.

41. None of that is to deny that, as a matter of good public administration, Departmental officers should comply with instructions or directions issued by the Minister (as is asserted in AS [27]-[28], [46]-[50]). However, it does not follow from the proposition that officers of the Department should comply with the Minister's instructions that the courts should supervise the extent to which that occurs. That is a matter for the proper management of the Department, for which the Minister is ultimately responsible to Parliament.[89] It becomes the province of judicial review only where it involves an exercise of power that can affect rights.

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[88] (1990) 170 CLR 1 at 35-36 (emphasis added). See also *Church of Scientology v Woodward* (1982) 154 CLR 25 at 70 (Brennan J).

[89] See *L v South Australia* (2017) 129 SASR 180 at [103] (Kourakis CJ, Parker and Doyle JJ agreeing). The public service is a significant "constituent part of the system of representative and responsible government mandated by the Constitution": *Comcare v Banerji* (2019) 267 CLR 373 at [31] (Kiefel CJ, Keane, Bell and Nettle JJ). In addition to supervision by the Secretary of the Department (e.g., under the *Public Service Act* 1999), and ultimately by the Minister, there are also other potential accountability mechanisms. These include scrutiny in accordance with the discharge of the functions of the Auditor-General and Ombudsman, respectively, and parliamentary scrutiny through the committee process and Senate Estimates.

(c) Alternatively, the Officer's conduct is not amenable to review on the ground of unreasonableness

42. If, contrary to the submissions above, the Court finds that the Officer's conduct is amenable to judicial review on some grounds, it should nevertheless find that unreasonableness is not such a ground.

43. This Court has repeatedly held that legal reasonableness is a constraint that derives by implication from statute, and that the existence and content of any applicable standard of reasonableness varies depending on the terms of the statute.[90] That holding is not reconcilable with the proposition that there is some single, uniform requirement of "reasonableness" deriving from the common law that governs the exercise of non-statutory executive power. For that reason, recognition of a ground of review of unreasonableness unmoored from statute would represent a "a very large step".[91]

44. Contrary to the reasoning of Charlesworth J (J [306]-[307], CAB 143), and the appellant's submissions (AS [40]), s 61 of the Constitution cannot be the source of an obligation to act reasonably in the exercise of Commonwealth executive power. Section 61 describes, but does not define, Commonwealth executive power.[92] The range of matters that it embraces (including statutory powers, prerogative powers and non-statutory non-prerogative capacities) cannot accommodate a uniform requirement of "reasonableness". It is not "incongruous" to recognise a common law principle of statutory construction on the one hand, without accepting that it operates on the Constitution itself, or that it results in the same principle applying to *all* exercises of executive power (cf AS [38], [40]).

45. Nor can the Act be identified as the source of a constraint of reasonableness on the Officer's conduct. To submit that s 351 is the source of such a constraint is in irreconcilable tension with the appellant's acceptance that the Minister has made no procedural decision (AS [23]), with the consequence that the Officer's conduct was not under the Act. Accordingly, contrary to the reasoning in *Jabbour*,[93] and the appellant's submissions (AS [42]-[43]), in determining the limits on the Officer's non-statutory

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[90] See *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [24]-[29] (French CJ), [63] (Hayne, Kiefel and Bell JJ) and [88]-[90] (Gageler J); *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at [53] (Gageler J), [89] (Nettle and Gordon JJ) and [134] (Edelman J); *Minister for Home Affairs v DUA16* (2020) 95 ALJR 54 at [26].

[91] *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439 at [124]-[125] (Edelman J), citing *Quin* (1990) 170 CLR 1 at 35-36 (Brennan J).

[92] *Plaintiff M68* (2016) 257 CLR 42 at [129] (Gageler J).

[93] (2019) 269 FCR 438 at [81], [92].

conduct it is irrelevant whether the Minister's personal statutory power in s 351(1) is subject to a constraint of reasonableness.[94] Otherwise, the constraints on a statutory power are implicitly equated with those on a non-statutory capacity.

46. Finally, the undoubted importance of the rule of law provides no foundation whatsoever for courts to review the reasonableness of non-statutory conduct of Departmental officers when applying Ministerial guidelines that plainly do not have the force of law (cf AS [45]). As Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ said in *Palmer v Western Australia*:[95]

> [T]he rule of law supports neither expansion of judicial power nor contraction of legislative or executive power beyond those limits that inhere in the text and structure of the Constitution. Of the rule of law, no less than of "representative democracy", it "is logically impermissible to treat [the term] as though it were contained in the Constitution, to attribute to the term a meaning or content derived from sources extrinsic to the Constitution and then to invalidate a law for inconsistency with the meaning or content so attributed"

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(d) If amenable to judicial review, the Officer's conduct was not unreasonable

47. Even if this Court finds that the "decision" of the Officer is reviewable on the ground of unreasonableness, the Full Court did not err in dismissing the appellant's arguments as to the "unreasonableness" of that "decision".

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(i) Applicable principles

48. The Guidelines call upon officers to make evaluative assessments that have an inescapably subjective element.[96] That being so, in attempting to show unreasonableness, as this Court explained in *Plaintiff M64* by reference to similarly evaluative criteria, the appellant confronts a "virtually insuperable hurdle".[97] That is particularly true here given that, unlike the visa criteria at issue in that case , the Guidelines do not have the status of law, are not to be applied "with the nicety of a statute", and only a "radical"

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94 In any case, it is to be doubted that a *procedural* decision under s 351(1) is subject to a constraint of reasonableness. Adapting the reasoning of Heydon J in *Plaintiff S10* (2012) 246 CLR 636 at [119] (cited with apparent approval by the Court in *SZSSJ* (2016) 259 CLR 180 at [51]), "[i]t would be strange if the activities of officials of the Minister's Department preparatory to the Minister either deciding whether to consider exercising those powers or deciding to exercise them would have to comply with [legal reasonableness]".

95 (2021) 95 ALJR 868 at [8]. See also *Lam* (2003) 214 CLR 1 at [72] (McHugh and Gummow JJ).

96 See, by analogy, *McNamara v Minister for Immigration* [2004] FCA 1096 at [10]; *Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* (2008) 166 FCR 428.

97 *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 (***Plaintiff M64***) at [56] (French CJ, Bell, Keane and Gordon JJ); Gageler J agreeing at [62].

misconstruction of them could give rise to legal error.[98] Compounding the difficulties faced by the appellant in demonstrating unreasonableness is that the Officer was not required to produce a statement of reasons, for "it is difficult to draw an inference that the decision has been attended by an error of law from what has *not* been said".[99]

(ii) No unreasonableness

49. Ground one:[100] Charlesworth J (with the concurrence of the other members of the Court)[101] was correct to conclude: (a) that the Officer was "aware of the claim that DCM20 has become the full-time carer for her mother"; (b) that the Officer "in fact evaluated" that claim; and (c) that it was implicit in the Officer's conclusion that that circumstance did not fulfil the criteria in the Guidelines (J [358], CAB 157-158). Further, her Honour correctly adopted the primary judge's reasons for rejecting the appellant's submission that the Officer otherwise erred in finding that the appellant's circumstances did not satisfy the requirements of the Guidelines for referral to the Minister (J [359], CAB 158). A "proposal" that the Minister grant a visitor visa cannot sensibly be regarded as a change in "circumstances" (let alone "significant", "unique" or "exceptional") (cf AS [57], [59]). There is no basis upon which the Court could properly infer that the Officer failed to consider what the appellant characterises as a "reasonable and sensible proposal" that a visitor visa be granted (cf AS [58], [60], [61]). Nor should the Court accept the appellant's implicit invitation to consider for itself the merits of the appellant's request for intervention (including whether it thinks the appellant's claimed change in circumstances was "significant", "substantive", "unique" or "exceptional": AS [59]).

50. Ground two: Charlesworth J (with the concurrence of the other members of the Court)[102] did not err in holding that the Officer had not misconstrued the Guidelines when

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98 See, e.g., *Minister for Foreign Affairs v Lee* (2014) 227 FCR 279 at [59]-[60] (Robertson J), discussing *Minister for Immigration and Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189. These propositions were applied by Perry J at trial in *DCM20 v Secretary, Department of Home Affairs* [2020] FCA 1022 at [21], and neither DCM20 nor Mr Davis have questioned the applicability of these principles assuming that judicial review on a ground of unreasonableness is available.

99 *Plaintiff M64* (2015) 258 CLR 173 at [25] (French CJ, Bell, Keane and Gordon JJ) (emphasis original); see also *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 397 ALR 1 at [103] (Allsop CJ, Besanko and O'Callaghan JJ).

100 While there is only one ground of appeal to this Court (CAB 170), the appellant has advanced her submissions by reference to the two grounds in the Full Federal Court.

101 J [3] (Kenny J) (CAB 59), [55] (Besanko J) (CAB 75), [97] (Griffiths J) (CAB 91), [118(e)] (Mortimer J) (CAB 96).

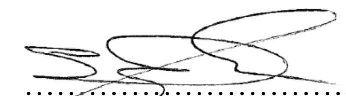
102 J [3] (Kenny J) (CAB 59), [55] (Besanko J) (CAB 75), [97] (Griffiths J) (CAB 91), [118(e)] (Mortimer J) (CAB 96).

considering whether the appellant faced the risk of sexual assault if required to return to Fiji (J [363], CAB 159). As her Honour found, the appellant's "claims were clearly of a kind that (if accepted) would fulfil one or both of the alternate criteria for a protection visa".[103] That is so irrespective of the contrary assertion by the appellant's agent (cf AS [62]-[63], [67]-[68]). Given one aspect of the Guidelines was that the claimed mistreatment did not meet the criteria for the grant of a protection visa, it was open to the Officer to conclude that (a) "these claims do not fall within the ambit of the section 351 or section 417 guidelines" and (b) "it remains open to [the appellant] to make a request under section 48B". Charlesworth J did not err in so finding (J [363], CAB 159).

10 **PART VI ESTIMATED TIME**

51. The Commonwealth parties estimate that up to 3 hours in total will be required for oral argument in this appeal and in the *Davis* appeal to be heard at the same time.

Dated: 1 August 2022



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Stephen Donaghue	**Nick Wood**	**Megan Caristo**
Solicitor-General of the Commonwealth	T: (03) 9225 6392	T: (02) 9376 0685
T: (02) 6141 4139	nick.wood@vicbar.com.au	megan.caristo@banco.net.au

Counsel for the Commonwealth parties

[103] J [364] (Charlesworth J), CAB 159. Neither *Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565 at 568 nor *CRU18 v Minister for Home Affairs* (2020) 277 FCR 493 hold that a claim of fear of sexual assault cannot satisfy the criteria for the grant of a protection visa.

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **DCM20**
Appellant

SECRETARY OF DEPARTMENT OF HOME AFFAIRS
First Respondent

ASSISTANT DIRECTOR, MINISTERIAL INTERVENTION, DEPARTMENT OF HOME AFFAIRS
Second Respondent

ANNEXURE TO THE SUBMISSIONS OF THE COMMONWEALTH PARTIES

Pursuant to Practice Direction No.1 of 2019, the Commonwealth parties set out below a list of the constitutional provisions, statutes and statutory instruments referred to in these
10 submissions.

No.	Description	Version	Provisions
Constitutional provisions			
1.	*Constitution*	Current	64, 67, Ch III
Statutory provisions			
2.	*Migration Act 1958* (Cth)	Compilation No. 147 (5 December 2019 to 10 August 2020)	4, 48B, 36(2A),189, 195A, 196, 198, 351, 417, 501J
Statutory instruments			
3.	*Migration Regulations 1994* (Cth)	Compilation No. 203 (19 December 2019 to 28 February 2020)	050.212, 050.517 of Schedule 2