HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M32/2022
File Title:	Davis v. Minister for Immigration, Citizenship, Migrant Servic
Registry:	Melbourne
Document filed:	Form 27C - Intervener's submissions - SA
Filing party:	Interveners
Date filed:	15 Aug 2022

Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

MARTIN JOHN DAVIS
Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS
First Respondent

and

SECRETARY OF DEPARTMENT OF HOME AFFAIRS
Second Respondent

and

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

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

Part I: PUBLICATION OF SUBMISSIONS

1. This submission is in a form suitable for publication on the internet.

Part II: INTERVENTION

2. The Attorney-General for the State of South Australia (South Australia) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

Part III: LEAVE TO INTERVENE

3. Not applicable.

Part IV: SUBMISSIONS[1]

4. The Appellants, being the subject of adverse migration decisions,[2] requested intervention by the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (the **Minister**) pursuant to s 351 of the *Migration Act 1958* (Cth) (the **Act**).[3] Applying the Minister's guidelines on ministerial powers (s 351, s 417, s 501J) (the **Guidelines**), the Assistant Director, Ministerial Intervention, Department of Home Affairs (the **Officer**), finalised those requests without referring them to the Minister.[4] In doing so, the Officer was exercising a non-statutory, non-prerogative executive capacity of the Commonwealth.[5] The Appellants seek judicial review of the exercise of that executive capacity by the Officer, in applying the Guidelines, on grounds of legal unreasonableness.

5. The Appellants are correct to submit,[6] and the Commonwealth does not dispute,[7] that "all power of government is limited by law", and that "the function of the judicial branch of government is to declare and enforce the law that limits its own power and the power of other branches of government through the application of judicial process

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1 These submissions address common issues in this appeal (M32/2022) (**Davis**) and DCM20 v Secretary of Department of Home Affairs & Anor (S81/2022) (**DCM20**).

2 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 213 (**FC**), Davis Amended Core Appeal Book (**CAB**), 176; DCM20 CAB, 173.

3 FC, 55-56 [180] (Charlesworth J), Davis CAB 112-113; DCM20 CAB, 113-114.

4 FC, 56 [181] (Charlesworth J), Davis CAB,113; DCM20 CAB, 114.

5 The parties are agreed that the processes were non-statutory: Appellant's Davis submissions dated 30 June 2022 (**Davis AS**), [25] and Applicant's DCM20's submissions dated 30 June 2022 (**DCM20 AS**); First Respondent and Attorney-General for the Commonwealth of Australia submissions in DCM20 dated 1 August 2022 (**CS**), [12]-[14]. For the reasons given by the Commonwealth, the processes should also be understood not to have been an exercise of prerogative power: CS, [15]-[23].

6 Davis AS, [36]; DCM AS, [34].

7 CS, [29].

and through the grant, where appropriate, of judicial remedies."[8]

6. This principle, which may properly be understood as an essential attribute of the rule of law,[9] gives rise to two interrelated questions, each of which find reflection in the First Respondents' Notices of Contention.[10] First, what are the relevant legal rules that "determine the limits and govern the exercise"[11] of non-statutory, non-prerogative capacities of the Commonwealth.[12] Second, if there has been a transgression of those legal rules, what relief, if any, is available or appropriate.[13]

7. As to the first question, the Appellants contend that the exercise of the executive capacity by the Officer in applying the Guidelines was conditioned by an obligation of legal reasonableness sourced from the *Constitution*,[14] the common law[15] or the Guidelines.[16] For reasons that are developed below, South Australia submits that the Appellants' contention is inconsistent with the methodology by which this Court has discerned limitations on executive power, by a process of statutory construction, and that the sources proffered by the Appellants as founding such a limitation are unconvincing.

8. As to the second question, the Appellants and the Commonwealth have made detailed submissions about the effect, or absence thereof, of the finalisation by the Officer of the Appellants' requests on their rights and interests, and the related question of the relief that may be available, or appropriate, pursuant to s 75 of the *Constitution*. South Australia makes no submission about the scope of relief that is available, or appropriate, pursuant to s 75.[17]

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8 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 24 [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

9 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 23-25 [71]-[77] (McHugh and Gummow JJ); *Church of Scientology v Woodward* (1982) 154 CLR 25, 70-71 (Brennan J); *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135, 152-153 [43] (Gleeson CJ, Gummow, Kirby and Hayne JJ), 157-158 [56]-[59] (Gaudron J); *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441, 463-464 [91]-[95] (Gordon and Steward JJ); *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16, [18]-[20] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

10 Davis CAB, 176; DCM20 CAB, 173.

11 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36 (Brennan J).

12 Notice of Contention, Ground 1, Davis CAB 176; DCM20 CAB, 173.

13 Notice of Contention, Ground 2, Davis CAB 176-177; DCM20 CAB, 173-174.

14 Davis AS, [42], [47]; DCM20 AS, [40]-[45].

15 Davis AS, [39]-[42]; DCM20 AS, [37]-[40].

16 Davis AS, [48]; DCM20 AS, [46].

17 South Australia's submissions are limited to the issue arising on Ground 1 of the Notices of Contention filed by the First Respondent, Davis CAB 176; DCM20 CAB, 173.

Statute is the source of the duty to act legally reasonably

9. The Appellants contend that the exercise of executive capacities by officers of the Executive Government of the Commonwealth, that do not derive their legal authority from a statutory source, are amenable to judicial review on the public law ground of legal unreasonableness.[18]

10. South Australia submits that the principal reason why the Court should not take this "very large step"[19] is that it would be inconsistent with the well-established methodology by which this Court has discerned the jurisdictional limits on executive action, namely by a process of statutory construction. That process requires the identification of conditions, express or implied, upon the grant of statutory power.[20] In this way, the grounds of judicial review are inextricably bound up with an appreciation of the text, context and purpose of the grant.

11. This method is readily apparent from the canonical statements by which the grounds of review have been articulated. For example, the foundation of the ground of procedural fairness was explained by Justice Brennan in *Kioa v West* in the following terms:[21]

> At base, the jurisdiction of a court judicially to review a decision made in the exercise of a statutory power on the ground that the decision-maker has not observed the principles of natural justice depends upon the legislature's intention that observance of the principles of natural justice is a condition of the valid exercise of the power… There is no free-standing common law right to be accorded natural justice by the repository of a statutory power.

Although Justice Mason notably put forward a contrary view,[22] the reasoning of Justice Brennan has authoritatively prevailed.[23]

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18 Davis AS, [42], [47]; DCM20 AS, [40]-[45].

19 *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439, 490 [124] (Edelman J).

20 *Minister for Immigration v Eshetu* (1999) 197 CLR 611, 650 [126]-[132] (Gummow J); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 89 [5] (Gleeson CJ), 99-101 [37]-[41] (Gaudron and Gummow JJ). This process is qualitatively different to the exercise that courts are sometimes called upon in determining the existence of a prerogative (as opposed judging the manner of its exercise): *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 221 (Mason J).

21 *Kioa v West* (1985) 159 CLR 550, 609-611.

22 *Kioa v West* (1985) 159 CLR 550, 584.

23 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 650 [126] (Gummow J); *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82, 99-101 [38]-[41] (Gaudron and Gummow JJ, Gleeson CJ agreeing); *Re Minister for Immigration and Multicultural Affairs; ex parte Miah* (2001) 206 CLR 57, 74-75 [52] (Gleeson CJ and Hayne J), 86-86 [100]-[101] (Gaudron J), 98 [144] (McHugh J); *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Palme* (2003) 216 CLR 212, 221 [30] (Gleeson CJ, Gummow and Heydon JJ); *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123, 1127 [15] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 258-259 [11]-[13] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Minister for Immigration and Border*

12. The basis for the relevancy grounds of review was explained by Justice Mason in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* in the following terms:[24]

> What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors … are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act.

13. The foundation of the ground of legal unreasonableness was explained in similar terms by Justice Brennan, and subsequently authoritatively endorsed by this Court.[25] In *Minister for Immigration v Li*, Chief Justice French said:[26]

> That limiting case [of *Wednesbury* unreasonableness] can be derived from the framework or rationality imposed by the statute. As explained by Lord Greene MR, it reflects a limitation imputed to the legislature on the basis of which courts can say that parliament never intended to authorise that kind of decision…

Similarly, in a joint judgment, Justices Hayne, Kiefel and Bell JJ said:[27]

> The legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably… The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.

And, Justice Gageler said:[28]

> Brennan CJ cited [*Wednesbury*] for the proposition that 'when a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised.' He explained the application of '*Wednesbury* unreasonableness' as a court acting on the 'implied intention of the legislature that a [statutory] power be exercise reasonably'… That explanation accords with references in earlier High Court decisions to reasonableness as a condition of the exercise of a discretionary power. It has been approved in more recent decisions. It is an explanation that is well-understood… It explains the nature and scope of *Wednesbury* unreasonableness in Australia.

14. That explanation of the statutory foundation of the ground of legal unreasonableness was recently confirmed in the unanimous reasoning of Chief Justice Kiefel and Justices

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Protection v SZSSJ (2016) 259 CLR 180, 205 [75] (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ); *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439, 490 [125] (Edelman J); *Minister for Home Affairs v DUA16* (2020) 95 ALJR 54, 61 [26] (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ)*; MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441, 479 [168] (Edelman J).

24 (1986) 162 CLR 24, 39. See also, 30 (Gibbs CJ), 71 (Dawson J) agreeing; cf 55-56 (Brennan J).

25 *Attorney-General v Quin* (1990) 170 CLR 1, 36 (Brennan J); *Kruger v Commonwealth* (1997) 190 CLR 1, 36*; Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1, [71] (Gageler J); *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441, 479 [168]-[169] (Edelman J).

26 (2013) 249 CLR 332, 350-351 [28].

27 (2013) 249 CLR 332, 362-363 [63]-[67].

28 (2013) 249 CLR 332, 370 [88]-[90].

Bell, Keane, Gordon and Edelman in *Minister for Home Affairs v DUA16*.[29]

15. The commonality of the approach to the discernment of the particular grounds of review discussed in the above passages, is reflective of a more general proposition that jurisdictional error in Australian administrative law has been identified by way of a process of statutory construction. Consistent with this submission, in *Minister for Immigration v Yusuf*, Justices McHugh, Gummow and Hayne said that:[30]

> 'Jurisdictional error' can thus be seen to embrace a number of different kinds of error… Those different kinds of error may well overlap… [I]dentifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute.

To similar effect in *Minister for Home Affairs v DUA16,* Chief Justice Kiefel and Justices Bell, Keane, Gordon and Edelman said that, "grounds of judicial review arise by implication from the statute which provides the jurisdiction to make the decision".[31]

16. The Appellants fail to grapple with this considerable body of law. They fail to explain why legal unreasonableness should stand apart from the other grounds of review and take on a free-standing existence. By their silence, the Appellants appear to infer that the authorities referred to above are concerned only with limitations upon statutory powers and say nothing about the issue before the Court. South Australia submits that the consistency with which this Court has reiterated that the grounds of review are to be discerned by a process of statutory construction should be understood not only to speak to the manner by which limitations on statutory powers may be discerned, but also against the existence of free-standing limitations, analogous to those statutorily implied, that might condition the exercise of executive capacities.

17. This conclusion finds support from the absence of authority identifying a limitation of the kind contended for by the Appellants.[32] Whilst there are some intermediate Australian courts that have stated that non-statutory executive power may be amenable

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29 (2020) 95 ALJR 54, 59 [15], 61 [26]-[27].
30 (2001) 206 CLR 323, 351 [82].
31 95 ALJR 54, 59 [15], 61 [26]-[27].
32 Although Justice Kenny referred back to *Rooke's Case* (1597) 5 Co Rep 99b; 77 ER 209 to support the proposition that "it should be accepted that in principle the ground of legal unreasonableness may be relied on in challenging a decision made in exercise of executive power, irrespective of the source of that power" (FC, 9 [30], Davis CAB, 66; DCM20 CAB, 67), that decision concerned the exercise of a statutory power conferred on the Commissioners of Sewers to impose taxes on one land owner for repairs to a riverbank that would benefit other land owners.

to judicial review on grounds of unreasonableness as a matter of principle,[33] it is telling that the Appellants have not identified, and South Australia is not aware of, any Australian decision (including the decisions under challenge in the present appeals) in which the exercise of a non-statutory executive capacity has been successfully challenged by way of judicial review on grounds of unreasonableness.[34]

18. Furthermore, the only Australian authority that South Australia is aware of in which the exercise of a non-statutory executive capacity has been successfully judicially reviewed on any of the conventional grounds of review is the decision of *Victoria v Master Builders' Association.*[35] The reasoning in that case drew directly upon the views of Justice Mason, and doubted those of Justice Brennan, in *Kioa v West*.[36] It was decided prior to the authoritative endorsement of Justice Brennan's reasoning in *Saeed v Minister for Immigration and Citizenship*[37] and the cases that followed.[38] As the discussion of the Full Court of the South Australian Supreme Court in *L v South Australia* suggests, the correctness of *Victoria v Master Builders' Association* should be doubted.[39]

19. However, not only is there an absence of authority to support the limitation contended for by the Appellants, turning to consider the potential sources of the limitation contended for by the Appellants, it may be seen that they have failed to identify a plausible conceptual foundation to support it.

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33 *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 278 (Bowen CJ), 304 (Wilcox J), 280 (Sheppard J, agreeing); *Blyth District Hospital Inc v South Australian Health Commission* (1988) 49 SASR 501, 509 (King CJ), 503 (Matheson J, agreeing); *Victoria v Master Builders' Association* [1995] 2 VR 121, 140 (Tadgell J), 147-148 (Ormiston J, agreeing), 158 (Eames J).

34 This may be contrasted to developments in the United Kingdom, and other jurisdictions, where review of executive capacities on grounds of unreasonableness is well established: Davis AS, [38] and footnote 31; DCM20 AS, [36] and footnote 30. The reason for the divergence in the jurisprudence of the United Kingdom and Australia has been said to have been influenced the separation of powers and the centrality of the notion of jurisdictional error: *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 25 [76]-[77] (McHugh and Gummow JJ); *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 618-621[16]-[27] (Gummow ACJ and Kiefel J); B Selway "The Principle Behind Common Law Judicial Review of Administrative Action – The Search continues", (2002) 30 *Federal Law Review* 217, 234.

35 *Victoria v Master Builders' Association* [1995] 2 VR 121.

36 [1995] 2 VR 121, 133, 139 (Tadgell J), 148 (Ormiston J) and 158 (Eames J).

37 (2010) 241 CLR 252, 258-259 [11]-[13] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

38 It was described as "settled" in *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, 205 [75] (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ). See also footnote [23] above recognising this approach in respect of procedural fairness and legal unreasonableness.

39 *L v South Australia* (2017) 129 SASR 180, 47 [152] (Kourakis CJ), 236, 198 (Parker J agreeing), 236 [199] (Doyle J agreeing). The reasoning in *Victoria v Master Builders' Association* [1995] 2 VR 121 proceeded expressly on the basis that the views of Justice Mason in *Kioa v West* (1985) 159 CLR 550, 584, were correct and those of Justice Brennan, 609-611 (and, in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 585), were incorrect: 133, 139 (Tadgell J), 148 (Ormiston J) and 158 (Eames J).

The *Constitution* is not the source of the duty to act legally reasonably

20. The Appellants contend that the obligation to act reasonably in the exercise of Commonwealth executive power may be an implied limitation on the power vested by s 61 of the *Constitution*.[40] South Australia submits that no decision of this Court supports such an approach[41] and that there are significant obstacles to its acceptance.

21. Section 61 of the *Constitution* encompasses not only the prerogative and other executive capacities attributable to the Commonwealth, but also powers and functions conferred by statute.[42] To identify s 61 itself as the source of obligations such as procedural fairness and legal reasonableness is to suggest that this Court's approach, that any given ground of review is "derived by implication from the statute",[43] is a work of supererogation at best. If a constitutional obligation already arises by virtue of s 61, it would not only be unnecessary but misguided to seek to derive an equivalent obligation from the relevant statute conferring the power.

22. Further, "constitutionalising" obligations giving rise to public law grounds of judicial review by sourcing them in s 61 immediately gives rise to the question of how such an approach can be reconciled with the position that the Federal Parliament may legislate to modify or exclude such obligations.[44] It is trite that Parliament cannot legislate inconsistently with express or implied requirements under the *Constitution*. The

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40 FC, 85 [306]-[307] (Charlesworth J), 152-154 [169], [174] (Mortimer J); AS [42]; DCM,[40] Davis CAB, 142; DCM20 CAB, 143 and Davis CAB 109-111,DCM20 CAB, 110-112.

41 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 665 [92]-[93] (Gummow, Hayne, Crennan and Bell JJ); *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 76-77 [177] (Edelman J) and authorities there cited. In *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 101 [42] (Gaudron and Gummow JJ), the question was adverted to but not addressed and the exception drawn with respect to federal courts may be thought to prove the rule: "Different considerations arise" in such cases on the basis that "procedural fairness is a concomitant of the vesting of the judicial power of the Commonwealth" in a federal court. Adherence to the requirements of procedural fairness is a defining characteristic of a court: *Condon v Pompano* (2013) 252 CLR 38, 71 [67] (French CJ), 103 [169] (Hayne, Crennan, Kiefel and Bell JJ), 105 [177]. (Gageler J). By contrast, it is not an immutable characteristic of executive power; many such powers are not subject to any such requirement (see [25] below).

42 *Davis v Commonwealth* (1988) 166 CLR 79, 107-110 (Brennan J); *Williams v Commonwealth* (2012) 248 CLR 156, [22] (French CJ); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 97 [132] (Gageler J).

43 *Minister for Home Affairs v DUA16; Minister for Home Affairs v CHK16* (2020) 95 ALJR 54, [26] (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ); *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 350-351 [26]-[29] (French CJ), 362 [63] (Hayne, Kiefel and Bell JJ), 370-371 [88]-[92] (Gageler J).

44 See the relevant authorities collected in *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 76-77 [177] (Edelman J). By way of further example, in a context of direct relevance to this matter, this Court has held that procedural fairness has been excluded in respect of Ministerial 'dispensing powers' such as s 351 of the *Migration Act 1958* (Cth): *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180199-200 [47]-[54] (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ).

Appellants have failed to explain how it is that legal reasonableness may be modified or excluded by statute if these obligations are to be sourced from s 61 of the *Constitution*.[45]

23. The scope of the power vested by s 61 of the *Constitution* raises yet further difficulties. It is well-established that, as for other grounds of review, the existence and content of obligations of legal reasonableness are to be ascertained by careful consideration of the text, context and purpose of the statute conferring the power.[46] No analogy is available to the generalised vesting of power effected by s 61.

24. Section 61 does not specify individual or particular powers, although it is clear that it encompasses those prerogative powers and other non-statutory powers and capacities appropriate to the position of the Commonwealth within the federation.[47] There is no clear statutory purpose or object that can be drawn from its sparce terms, other than a general vesting of unenumerated powers in a suitable repository for the purposes of the Commonwealth.[48]

25. A purported derivation of an obligation of legal reasonableness from s 61 is, therefore, immediately confronted by the multifarious nature of the powers that are encompassed by s 61. A generalised implication would seem to be excluded by the traditional recognition that a number of executive powers are not amenable to review on grounds of reasonableness.[49] There is no foundation in the text of s 61 or the structure of the

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45 *Kioa v West* (1985) 159 CLR 550, 609-611 (Brennan J); *Attorney-General v Quin* (1990) 170 CLR 1, 36 (Brennan J); *Kruger v Commonwealth* (1997) 190 CLR 1, 36; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 371 [92] (Gageler J); *FCT v Futuris Corporation Ltd* (2008) 237 CLR 146, 156-157 [23]-[24] (Gummow, Hayne, Heydon and Crennan JJ). There would be an even greater incongruity if any supposed implication under s 61 were to be limited to powers not conferred by statute. That would give rise to the unusual position in which Parliament could freely legislate to modify obligations in respect of statutory powers (many of which may have significant effects on individuals' rights or interests), but would be debarred from doing so in respect of other powers lacking a statutory source.

46 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 348 [23] (French CJ), 363-364 [67] (Hayne, Kiefel and Bell JJ), 370-371 [90], [92] (Gageler J).

47 *Davis v Commonwealth* (1988) 166 CLR 79, 92-93 (Mason CJ, Deane and Gaudron JJ), 107 (Brennan J).

48 Subject, of course, to limitations inherent in the federal structure of the *Constitution*: B Selway, *All at Sea - Constitutional Assumptions and 'The Executive Power of the Commonwealth'* (2003) 31(3) Federal Law Review 495. See also s 7 of the *Australia Acts 1986* (Cth and UK), which similarly provide for a general vesting of powers in respect of State Governors. Whether there is an ultimate implied limitation that the powers vested by s 61 must be exercised for the purposes of pursuing the interests of the Commonwealth, and not for private purposes, is not a question that needs to be considered in the context of the present case.

49 For example, appointment and dismissal of ministers: *R v Governor of South Australia* (1907) 4 CLR 1497, 1511-1513, *Stewart v Ronalds* (2009) 76 NSWLR 99; the appointment of judges: *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 18, 34; the entry into of treaties: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 398, 418; the grant of honours: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 398, 418; the prerogative relating to war

Constitution by which such obligations might have distributive application to some, but not other, powers. Distinguishing between powers that do, and powers that do not, attract such obligations in respect of their exercise would involve an attempt to find additional criteria outside s 61 itself to enable such a distinction to be drawn. Thus, reliance on s 61 as a basis for implication would seem to return ultimately to the proposition that the common law provides the basis for review.

The common law is not the source of the duty to act legally reasonably

26. The Appellants contend that an implication to act "within the bounds of legal reasonableness" derives from the common law, and that that obligation attaches equally to the exercise of statutory and non-statutory executive powers.[50] The primary argument advanced by the Appellants in support of this contention is that, "[i]t would be incongruous for the common law to imply a condition of reasonableness in the exercise of a statutory power, but not to extend such a limitation to the exercise of non-statutory executive powers."[51]

27. For the reasons advanced above, South Australia submits that the notion of a free-standing common law rule, that the exercise of executive capacities is conditioned by the doctrine of legal reasonableness, is inconsistent with the jurisprudential approach to the discernment of jurisdictional error developed by this Court.[52] Similar reasons to those advanced in rebuttal of the Appellants' reliance on s 61 of the *Constitution* also tell against an acceptance of the Appellants' attempt to draw upon the common law, in that each of these posited sources would give rise to an obligation the content of which is untethered from a grant of power.[53]

28. Of course, it must be readily accepted that the requirement to act legally reasonably does not operate exclusively in the context of statutory powers. Duties to act

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and defence: *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 398, 398, 418; exercises of prosecutorial discretion: *Likiardopoulos v The Queen* (2012) 247 CLR 265, [37]; the exercise of the prerogative of mercy: *Horwitz v Connor* (1908) 6 CLR 38, 40; *Von Einem v Griffin* (1998) 72 SASR 110. See generally *L v South Australia* (2017) 129 SASR 180, 208-210 [108]-[114], quoting *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 219-221.

50 Davis AS [39]-[42]; DCM20 [37]-[40].

51 Davis AS, 42; DCM20, [40]; *Jabbour v Secretary, Department of Home Affairs* (2019) 269 FCR 438, 460[101] (Robertson J); see also FC, 38 [118] (Mortimer J), Davis CAB, 95; DCM20 CAB, 96; 84 [305] (Charlesworth J), Davis CAB 141; DCM20 CAB, 142.

52 Paragraphs [9]-[19] above.

53 Paragraphs [22]-[25] above.

reasonably can also be implied from the terms of a trust, a will or a contract.[54] However, the fact that the duties of reasonableness can be seen to operate in particular diverse fields cannot be called in aid of a generalised common law obligation to behave reasonably. Indeed, the examples given above tend to support the orthodox view that legal reasonableness should be understood to be grafted to, and its content informed by, the terms of a particular grant of power.

29. As to the supposed "incongruence" identified by the Appellants, for reasons that are consistent with the submissions of the Commonwealth,[55] South Australia submits that the Appellants' argument fails to have regard to the true nature of executive capacities. Executive capacities include the capacity to enter contracts, employ people, transfer property, hold information, conduct investigations and make *ex gratia* payments.[56] As explained by Justice Gageler in *Plaintiff M68/2015 v Minister for Immigration and Border Protection*, such capacities "[involve] nothing more than the utilisation of a bare capacity or permission, which can also be described as ability to act or as a 'faculty'."[57] When the nature of the capacities is appreciated, and contrasted to that of statutory powers, then very sound reasons emerge for the conditioning of their exercise differently.

30. First, and foremost, the exercise of statutory powers will generally have a unilateral and direct effect on rights. By contrast, by virtue of the facultative nature of the executive capacities, their exercise will generally only affect rights in a consensual manner. To the extent that rights and interests may be affected, the exercise of statutory powers will frequently preclude private law remedies (this may be because the exercise of the power itself renders the action lawful, or by virtue of statutory protection). By contrast, the exercise of executive capacities is governed by the general law, such that private law remedies are available to address transgressions.[58]

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54 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 584 [132] (Edelman J). See also with respect to the duty to accord procedural fairness: *Stewart v Ronalds* (2009) 76 NSWLR 99, 127 [131] (Handley AJA) *Apache Northwest Pty Ltd v Agostini* [No 2] [2009] WASCA 231, [133] (Buss JA).

55 CS, [15], [28], [29].

56 HWR Wade, *Procedure and Prerogative in Public Law* (1985), 101 LQR 180 at p 191; G Winterton, Parliament, *The Executive and the Governor General* (Melbourne University Press, 1983), 49; *BV Harris, The Third Source" of Authority for Government Action* (1992) 108 LQR 626, 627-628; *A Twomey, Pushing the Boundaries of Executive Power – Pape, the Prerogative and Nationhood Powers* (2010) 32 MULR 313, 316-317. Different principles govern the expenditure of public money by the Commonwealth pursuant to s 61 of the *Constitution*: *Williams v The Commonwealth* (2012) 248 CLR 156 (Williams No 1); *Williams v The Commonwealth* [No 2] (2014) 252 CLR 416.

57 (2016) 257 CLR 42, 198 [35].

58 CS, [29].

31. Second, the exercise of statutory powers are generally more readily susceptible to review because they are "conferred for a specific or ascertainable purpose" and "exercisable by reference to criteria of considerations express or implied."[59] By contrast, there is often no equivalent frame of reference by which the exercise of executive capacities may be adjudged.[60]

32. Third, where Parliament confers a statutory power its exercise is generally not subjected to direct parliamentary oversight such that there is a greater imperative that conditions govern the exercise of power. By contrast, the exercise of executive capacities is generally subject to ministerial, and ultimately, parliamentary oversight for its exercise, in accordance with the usual principles of ministerial responsibility; where dissatisfaction emerges in relation to the exercise of executive capacities they can frequently be rectified by ministerial direction.

33. For these reasons, not only have the Appellants failed to lay a sound conceptual foundation for their contention, there is also no incongruity consequent upon the application of the orthodox administrative law principles explained above, with the result that the grounds of review are generally understood to condition the exercise of statutory powers but not executive capacities.

34. Moreover, and again consistent with the submissions of the Commonwealth,[61] South Australia submits that it is acceptance of the Appellants' contention that would generate incongruity. The Appellants' submission would have the result that in the

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59 *The Queen v Toohey; Ex parte Northern Land Council* (1980) 151 CLR 170, 219-221 (Mason J); referred to in *L v South Australia* (2017) 129 SASR 180, 32-33 [114] (Kourakis CJ) , 236, 198 (Parker J agreeing), 236 [199] (Doyle J agreeing).

60 Attempts to source criteria to ground review on the basis of non-binding policies that may be made by the executive are unconvincing. Cf *Jabbour v Secretary, Department of Home Affairs* (2019) 269 FCR 438, 457 [89] (noted by Griffith J in FC at [61], Davis CAB,76-77; DCM20 CAB, 77-78) where it was asserted that misconstruing a non-statutory executive policy could give rise to an error of law justifying the setting aside of a decision, even where the policy was *not* bound to be applied by the decision-maker, and that this might be an instance of illogicality in reasoning. *Jabbour* suggested that that proposition was derived from *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189, 208 (French and Gummow JJ). That is to read too much into *Gray*. As identified by French and Gummow JJ at 205-208, while the policy was not one that was bound *to be followed*, it was one that the Administrative Appeals Tribunal was bound *to take into account* on review, citing Brennan J in *Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634. As this constituted a mandatory relevant consideration under the statute, misinterpreting and misapplying it "may constitute a failure to take into account a relevant factor and for that reason may result in an improper exercise of the statutory power": 208 (French and Gummow JJ). Depending on the circumstances, a departure from such a policy (whether deliberately or through misapplication) might also potentially lead to denial of procedural fairness if a person lost opportunity to have relevant matters considered. See generally *Save Beeliar Wetlands (Inc) v Jacob* [2015] WASC 482, 56-61 [142]-[151] (Martin CJ) (on appeal: [2016] WASCA 126).

61 CS, [29].

exercise of the executive capacities the Executive Government is more constrained than a private citizen. Contrary to basal rule of law considerations, acceptance of this contention would lead to the development of different common law rules governing the activity of the state than those applicable to private citizens. Such an outcome would represent an unattractive shift in Australian public law.[62]

The Guideline is not the source of the duty to act legally reasonably

35. Finally, the Appellants contend that the Guidelines, operating as an instruction from the Minister to his departmental officers, impose an obligation of legal reasonableness on those officers when undertaking assessments of requests under the Guidelines. The Appellants proffer no reasoning in support of this construction; it is simply asserted to be "necessarily implicit".[63]

36. South Australia submits that there are a number of features of the Guidelines that tell against this conclusion. By reference to factors, similar to those identified above as bases on which to generally distinguish between statutory and non-statutory powers, it may be doubted that the Minister intended, by the issuing of the Guidelines, to impose a legally enforceable reasonableness condition on the authority of the officers to assess requests.

37. First, the assessment made by departmental officers under the Guidelines do not alter legal rights.[64] The legal rights of requestors may only be affected by a positive exercise of the power reposed in the Minister by s 351 of the Act. Further, to the extent that the interests of requestors may be affected, it is critical feature of the scheme created by the Act, that the dispensing power is only enlivened after an unsuccessful visa applicant has exhausted all other statutory review processes (including appeal rights).[65]

38. Second, the criteria contained in the Guidelines are open textured and give rise to value judgments that are not readily susceptible to objective assessment. For example, the

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62 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135, 157 [56] (Gaudron J); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 24-24 [65]-[77] (McHugh and Gummow JJ); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 98 [135] (Gageler J); *L v South Australia* (2017) 129 SASR 180, 47 [153] (Kourakis CJ), 236 [198], (Parker J agreeing), 236 [199] (Doyle J agreeing); AV Dicey *Introduction to the Study of the Law of the Constitution* (8th edition, 1915), 202-203.

63 Davis AS, [48]; DCM20 AS, [46].

64 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 641-642 [2]-[3] (French CJ and Kiefel J).

65 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 647-649 [24]-[30] (French CJ Kiefel J), 666 [96], 667-668 [99] (Gummow, Hayne Crennan and Bell JJ).

Guidelines require assessments to be made against criterion of "strong compassionate circumstances", "compassionate circumstances regarding the age and/or health and/or psychological state of the person" and "exceptional economic, scientific, cultural or other benefit".[66] Criteria of these kinds are not suggestive of the importation by the Guidelines of legal limitations on the power of departmental officers to assess requests.

39. Third, the administration of the processes that support the Minister's decision making pursuant to s 351 of the Act is a matter for which the Minister is responsible to Parliament. In the event that the Guidelines are inadequate or are administered in a manner that is too strict or too lenient, then any perceived defect may readily be rectified. As observed by the Commonwealth, the Guidelines are internally focussed.[67] Errors in the application of the Guidelines is, of course, a matter that may be the subject of disciplinary action.[68]

40. The above analysis does not go so far as to assert that there may never be instances where the executive branch may self-impose a limitation on the authority of its officers or agents that is intended to mark a limit on power. The instruction issued in *R v Criminal Injuries Compensation Board; Ex parte Lain* presents an example of an instrument of that kind.[69] However, for the reasons advanced above, by contrast to the constraints imposed by legislatures on the grant of statutory powers, courts should be slow to conclude that the executive branch has intended to impose analogous justiciable conditions on the exercise of executive capacities by its own officers and agents.

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66 Guidelines, cl 4.
67 CS, [20].
68 CS, [41]; *L v South Australia* (2017) 129 SASR 180, 30 [103] (Kourakis CJ), 236, 198 (Parker J agreeing), 236 [199] (Doyle J agreeing).
69 [1967] 2 QB 864.

Part V: TIME ESTIMATE

41. It is estimated that 20 minutes will be required for the presentation of South Australia's oral argument.

Dated 15 August 2022

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

MARTIN JOHN DAVIS
Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS
First Respondent

and

SECRETARY OF DEPARTMENT OF HOME AFFAIRS
Second Respondent

and

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

ANNEXURE
PROVISIONS REFERRED TO IN THE SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

No.	Description	Date in Force	Provision
Constitutional Provisions			
1.	*Commonwealth Constitution*	Current	61, 75

Statutes			
2.	*Australia Act 1986* (Cth)	Current	7
3.	*Australia Act 1986* (UK)	Current	7
4.	*Migration Act 1958* (Cth)	Compilation No. 147 (5 December 2019 to 10 August 2020)	351