IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No: S10, S43, S49 and S51 of 2011

BETWEEN

PLAINTIFF S10 OF 2011
Plaintiff

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP
Defendant

BETWEEN

JASVIR KAUR
Plaintiff

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP
Defendant

BETWEEN

PLAINTIFF S49 OF 2011
Plaintiff

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP
Defendant

BETWEEN

PLAINTIFF S51 OF 2011
Plaintiff

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP
Defendant

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

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PART I: CERTIFICATION

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

PART II: INTERVENTION

2. The Attorney-General for South Australia (**South Australia**) intervenes pursuant to s78A of the *Judiciary Act 1903* (Cth). South Australia's intervention is limited to the question of the obligation to afford natural justice in the exercise of executive power that does not have a statutory basis. In so doing, South Australia's intervention is in support of the defendant Minister.

PART III:

3. Not applicable.

PART IV: APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

4. Not applicable.

PART V: ARGUMENT

A: Summary

5. In summary, South Australia submits:

   5.1. the executive power vested in the Commonwealth under s61 of the Constitution includes the rights and capacities exercisable at common law;[1]

   5.2. the executive capacity includes the capacities enjoyed by juristic persons;[2]

   5.3. the capacity of government officers to undertake inquiries on behalf of the executive is a capacity shared with juristic persons;[3] and

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1 *Davis v Commonwealth* (1988) 166 CLR 79 at 108 (Brennan J); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 60, [126] (French CJ).

2 Despite some doubts expressed in *AG (Vic) v Commonwealth* (1935) 52 CLR 533 at 562 (Rich J); *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424 at 461 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ); and *Re KL Tractors Ltd* (1961) 106 CLR 318 at 337 (Fullagar J) it is clear that the personal capacity of the Crown extends to entering into contracts (*NSW v Bardolph* (1934) 52 CLR 455); appointing officers (*Coutts v Commonwealth* (1985) 157 CLR 91); formation of companies (*Davis v The Commonwealth* (1988) 166 CLR 79); and the building of works (*Johnson v Kent* (1975) 132 CLR 164 at 169-170 (Barwick CJ)).

3 See *Clough v Leahy* (1904) 2 CLR 139 at 156-7 (Griffith CJ); *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73; *Lockwood v Commonwealth* (1954) 90 CLR 177 at 186 (Fullagar J); *Victoria v Australian*

5.4. the limitation imposed on the exercise of the common law power of inquiry is derived from the common law and only arises where legal rights and interests are directly affected.[4]

B: Argument

6. Whether a particular exercise of executive power is amenable to judicial review and the grounds upon which it will be reviewable turns in each case on the nature of the power exercised and the direct affect of that exercise of power upon an ascertainable right, interest or privilege.

7. The nature of executive power may be understood by reference to Brennan J's analysis in *Davis v Commonwealth*[5] (***Davis***). In that case, his Honour identified three "capacities" through which the executive exercises power. The three capacities, reflecting alternate sources of power authorising the action, are (i) the prerogative, (ii) statutory and (iii) those shared by other "juristic persons".[6]

8. With respect to the first capacity, there is no attempt in the present case to argue that the power exercised by government officers was derived from a capacity unique to the executive.[7] Accordingly, the principles applicable to the review of this capacity, the prerogative, and the grounds upon which such powers may be reviewed, may be put to one side.

9. With respect to the second capacity, if the actions of the government officers in the present case were exercised pursuant to the *Migration Act 1958* (Cth) (***Migration Act***), the requirement of the obligation to afford procedural fairness will be determined by reference to the terms of that Act. Whether the power exercised by the officers in the present case is referable to an exercise of statutory power under the *Migration Act* is a controversy between the parties and about which South Australia makes no submission.

10. If the basis upon which the executive acted in this case is referable neither to unique powers belonging to the executive, nor statute, the capacity through which the executive acted is that belonging to the third category identified by Brennan J in *Davis:* namely, the common law capacity of juristic persons to undertake activities not otherwise forbidden or abridged by the law.

Building Construction Employees' and Builders Labourers' Federation (1982) 152 CLR 25; Bradley Selway, *The Constitution of South Australia* (1997) at 95-6.

4 *Annetts v McCann* (1990) 170 CLR 596 at 598 (Mason CJ, Deane and McHugh JJ); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 576 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Jarrett v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 61 [51] (McHugh, Gummow and Hayne JJ); *Saeed v Minister* (2010) 241 CLR 252 at 258 [11] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

5 *Davis v The Commonwealth* (1988) 166 CLR 79 at 108 (Brennan J).

6 Leslie Zines, "The Inherent Executive Power of the Commonwealth" (2005) 16 *Public Law Review* 279 at 283.

7 Cf *Ruddock v Vardalis* (2001) 110 FCR 491 at 543 (French J).

11. With respect to the third category, the focus of inquiry concerns the locus of any limit attaching to an exercise of a power of that kind.[8] Put differently, the question is whether the exercise of a non-coercive power exercised by a person is subject to judicial review and, if so, the grounds upon which such an exercise of power may be reviewed. When considered from the perspective of government action, the question is whether non-coercive administrative action by the executive is amenable to review and, if so, the grounds upon which it may be reviewed.

12. In the present case, the relevant administrative action taken by government officers involved the conduct of inquiries for the purpose of gathering information that may have been relevant to the exercise of a non-compellable statutory power. Such a power of inquiry is a power shared with other juristic persons. As Griffith CJ made plain in *Clough v Leahy*:

> It is quite unnecessary, indeed, to call in aid what are called the "prerogative" powers of the Crown. That term is generally used as an epithet to describe some special powers, greater than those possessed by individuals, which the Crown can exercise by virtue of the Royal authority. There are some such powers exercised under the law, but the power of inquiry is not a prerogative right. The power of inquiry, of asking questions, is a power which every individual citizen possesses, and, provided that in asking these questions he does not violate any law, what Court can prohibit him from asking them?
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> ...
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> We start, then, with the principle that every man is free to do any act that does not unlawfully interfere with the liberty or reputation of his neighbour or interfere with the course of justice. That is the general principle. The liberty of another can only be interfered with according to law, but, subject to that limitation, every person is free to make any inquiry he chooses; and that which is lawful to an individual can surely not be denied to the Crown, when the advisers of the Crown think it desirable in the public interest to get information on any topic. And it seems impossible, from this point of view, to draw a line beyond which an inquiry will be necessarily unlawful.[9]

13. Irrespective of the accuracy of the analogy to inquiries by individuals drawn by Griffith CJ in the above citation,[10] the critical point is that the executive capacity to conduct inquiries has long been accepted.[11] As Harrison Moore observed, the subsequent development of modern government has meant that the reliance upon special

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8 *Re Refugee Tribunal; Ex parte Aala* (2002) 204 CLR 82 at 101 [42] (Gaudron and Gummow JJ).

9 *Clough v Leahy* (1904) 2 CLR 139 at 156-7 (Griffith CJ).

10 See *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 88-9 (Mason J), 155-6 (Brennan J).

11 Andrew Inglis Clark, *Studies in Australian Constitutional Law* (1901) Ch 12 "The Power of the Crown to Appoint Commissions of Inquiry" esp at 236; Harrison Moore "Executive Commissions of Inquiry" (1913) 13 *Columbia Law Review* 500 at 520; *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73; *Lockwood v Commonwealth* (1954) 90 CLR 177 at 186 (Fullagar J); *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25; Bradley Selway, *The Constitution of South Australia* (1997) at 95-6.

commissions "is now diminished by the number, the powers and the efficiency of the departments of central governments".[12]

14. Accordingly, the relevant question in the present case is whether the capacity to undertake inquiries attracts a legal obligation the breach of which would give rise to review by a court. That is, is there any legal limitation at all attaching to the conduct of an inquiry – the asking of questions, the collation of answers, the furnishing of that information – for the purpose of informing Ministers with particular responsibilities. The answer to that question must be that no such limitation arises, for natural persons or government officers, unless the act of inquiring itself has a direct affect on a right, interest or privilege protected by the common law.

15. The obligation to afford procedural fairness has been described as emanating from the common law or statute.[13] This Court observed in *M61 v Commonwealth*[14] that it was unnecessary to resolve the source of the obligation in light of the decision in *Annetts v McCann*[15] which held "that the principles of procedural fairness may be excluded only by 'plain words of necessary intendment'".[16] Consequently, in the absence of a statutory abridgment of the principles of procedural fairness, the principles will apply to an exercise of executive power if that power has a direct affect on a right, interest or privilege.

16. The requirement that there be a "direct affect" on a right, interest or privilege is necessary to demarcate decisions of an administrative character that have the potential to adversely affect interests at large from those decisions which have a direct and immediate effect upon an individual right, interest or privilege. As Wilcox J explained in *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd*:

> The point is that the law has not yet reached the stage of applying the obligation of natural justice to every decision which disadvantages individuals. To do so would be to ignore the warning given by Megarry VC in *McInness v Onslow-Fane* [1978] 1 WLR 1520 at 1535: "the concepts of natural justice and the duty to be fair must not be allowed to discredit themselves by making unreasonable requirements and imposing undue burdens". Government, at all levels, would become unworkable if there were an obligation, before making any decision which may be financially disadvantageous to an individual, to seek out and to hear all affected persons. It was for this reason that both Lord Diplock and Mason J carefully defined the types of decisions to which the obligation applies. They did so by reference to the *direct and immediate effects of those decisions. For them it was not*

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12 Harrison Moore "Executive Commissions of Inquiry" (1913) 13 *Columbia Law Review* 500 at 504; Bradley Selway, "Of Kings and Officers – the Judicial Development of Public Law" (2005) 33 *Federal Law Review* 187 at 208 - 215.

13 *Kioa v West* (1985) 159 CLR 550 at 584 (Mason J), 615 (Brennan J); *M61 v Commonwealth* (2010) 85 ALJR 133 at [74] (the Court); see also Bradley Selway, "The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues" (2002) 30 *Federal Law Review* 217 at 226-8.

14 *M61 v Commonwealth* (2010) 85 ALJR 133 at [74] (the Court).

15 *Annetts v McCann* (1990) 170 CLR 596.

16 *M61 v Commonwealth* (2010) 85 ALJR 133 at [74] (the Court).

> *enough that the instant decision might lead to some future decision or action which would have the specified effect.*[17] (emphasis added)

17. Explained in terms related to the present case, unless the inquiry itself, or the decision made by a government officer following the inquiry, has directly affected the rights, interests or privileges of the plaintiffs, the principles of procedural fairness are not enlivened precisely because there is no affect upon a right, interest or privilege.

18. As noted in *Hot Holdings Pty Ltd v Creasy*[18] inquiries undertaken by government officers as a step in the process of informing a decision-maker may attract review if the inquiry "sufficiently 'determines' or is connected with"[19] the ultimate decision and the ultimate decision has the requisite direct affect on a right, interest or privilege. The reference in *Hot Holdings*[20] to Stephen J's reasons in *R v Collins; ex parte ACTU-Solo Enterprises Pty Ltd*[21] is apposite. In *ACTU-Solo*, where relief by way of certiorari was sought to quash a report of a Royal Commission, Stephen J noted:

> The reported conclusions of the Commission 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 future legislative or executive initiatives, but they neither directly determine, or of their own force affect, rights nor does the reporting of particular conclusions satisfy some condition precedent to the exercise of power which will in turn affect rights or otherwise give rise to legal consequences.[22]

19. Accordingly, where information is gathered in the course of an inquiry undertaken in the execution of executive power, and the information is relied upon in the making of a decision that has the requisite direct affect on rights, interests or privileges, the obligations of procedural fairness will crystallise at the point of the execution of the final decision. If procedural fairness has not been afforded, the decision will be reviewable. Similarly, where information is gathered, a report is furnished, and the report is a condition precedent[23] to the exercise of a power, the report may be the subject of judicial review on the basis of procedural fairness.

20. The well-known category of administrative inquiries which are amenable to judicial review are those inquiries where a report is produced affecting reputation. In those cases it is clear that the publication of a report following the conduct of an executive inquiry may be subject to review for a breach of procedural fairness where the publication directly affects an individual's reputation.[24] However, where the report is

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17 *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 at 306 (Wilcox J).

18 *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 159 (Brennan CJ, Gaudron and Gummow JJ).

19 *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 159 (Brennan CJ, Gaudron and Gummow JJ).

20 *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 161 (Brennan CJ, Gaudron and Gummow JJ).

21 *R v Collins; ex parte ACTU-Solo Enterprises Pty Ltd* (1976) 50 ALJR 471.

22 *R v Collins; ex parte ACTU-Solo* Enterprises Pty Ltd (1976) 50 ALJR 471 at 473 (Stephen J).

23 *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 163 (Brennan CJ, Gaudron and Gummow JJ); *Brettingham-Moore v St Leonards Municipality* (1969) 121 CLR 509 at 522 (Barwick CJ).

24 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564. Justice Brennan's reference to *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 407 and *Reg v Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 QB 864 at 884 in *Ainsworth* at 585, footnote (48), is not to

not published, but is furnished to the Minister for the purposes of informing the Minister about matters for which the Minister is accountable to Parliament, judicial review on the ground of damage to reputation will not be available.[25]

21. Accordingly, the making of inquiries by government officers and the provision of a report for the purpose of informing Ministers about matters that may be no more than relevant to a possible exercise of a discretionary power cannot, of itself, attract the obligation to afford procedural fairness.

22. Much of executive decision-making about matters of general public policy will be informed by information obtained by government officers following general inquiries.[26] However, many public policy decisions about matters affecting the public welfare generally will not possess the necessary quality of a having a direct affect on a right, interest or privilege (eg, the imposition of a tax, the relocation of a road, alterations of a threshold applying to a welfare benefit) by government officers following general inquiries using tools and processes open to any natural person.

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the effect that inquiries undertaken on the part of government officers in the exercise of executive power is always subject to judicial review. Rather, the reference must be understood in the context of his Honour's earlier distinction at 584 between the right of an individual (Richard Roe) to have recourse to the law of defamation to protect legal rights affected by another individual's (John Doe's) publication, contrasted with the rights of the same individual whose rights may be affected by the publication of a report in purported performance of a statutory power. Thus, the reference to *CCSU* and *Lain* is to be understood as meaning that a distinction drawn for one purpose, defining the respective roles of the law of defamation upon exercises of private power in contrast to judicial review of statutory power, is not to be applied when considering the limits of judicial review to non-statutory functions of government.

[25] *Apache Northwest Pty Ltd v Agostini (No. 2)* [2009] WASCA 231 at [36]. Other categories of administrative actions undertaken in the exercise of executive power other than those involving inquiries may give rise to complex questions concerning their amenability to judicial review and the grounds upon which review may be conducted. Such cases turn on the subject matter of the decision and the nature of the decision-maker. These issues were canvassed in the context of a cabinet decision by Wilcox J in *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 at 303-7. However, the present case does not involve the making of "high-level" administrative decisions requiring consideration of those questions.

[26] Matters of general public policy are subject to review through political and associated processes such as periodic elections, parliamentary scrutiny, legislative negotiation, inquiries by the Auditor-General and Ombudsman, and freedom of information requests.