IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S75 of 2016**

BETWEEN: **Minister for Immigration and Border Protection**
First Appellant

Secretary of the Department of Immigration and Border Protection
Second Appellant

and

SZSSJ
First Respondent

Administrative Appeals Tribunal
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES

2. This matter arises out of an extraordinary factual situation. The Appellants wrongfully published on the internet personal identifying data of some 9000 asylum seekers. That publication gave rise to a prospect that they could be made refugees *sur place*. The Appellants then invited the asylum seekers, including SZSSJ, to explain to them how the so-called "Data Breach" could have personally affected them but refused to provide full details of what the Data Breach actually entailed and refused to explain the procedure that would be followed in making the assessment or the criteria that would be applied in reaching a decision.

3. There are three principal issues raised by these appeals.

4. First, whether the Federal Circuit Court ("**FCC**") lacked jurisdiction to deal with the application. The Appellants contend that it did, due to the operation of s.476(2)(d) of the *Migration Act 1958* (Cth) ("**Act**") in excluding jurisdiction where there has been a decision by the Minister "not" to exercise certain discretionary powers. That section does not in terms apply to SZSSJ, as there has been no such decision. Moreover, SZSSJ's application was within jurisdiction as it was plainly brought in relation to a "migration decision", namely the prospective removal of SZSSJ pursuant to s.198(6) of the Act, as was found by the Full Court in the first appeal brought by SZSSJ on jurisdiction ("**first appeal**")[1] (which is not the subject of this appeal).

[1] *SZSSJ v Minister for Immigration and Border Protection* (2014) 231 FCR 285.

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5. Secondly, whether the Full Court was correct to conclude that SZSSJ was entitled to procedural fairness, which it did on three separate bases:

   (a) first, a right to procedural fairness prior to a s.198(6) removal (which was not extinguished by the enactment of s.197C of the Act, which did not operate to retrospectively destroy rights);

   (b) secondly, a right to procedural fairness in the course of the second stage of consideration of the Minister's personal intervention powers under ss.48B, 195A and 417 of the Act in accordance with this Court's decision in *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 ("***M61***"); and

   (c) thirdly, because of certain Departmental representations which affected his interests.

6. Thirdly, whether the Full Court was correct to conclude that procedural fairness had been denied in two separate ways:

   (a) first, by failing to put SZSSJ on notice of the process and criteria to be applied in the decisions to be made about him; and

   (b) secondly, by failing to disclose to SZSSJ appropriate details of the Data Breach.

7. To succeed on appeal, the Appellants need to show that all three "pathways" to procedural fairness were wrong or that the Full Court erred in both ways that it found procedural fairness was denied.

8. Additionally, the Appellants challenge the Full Court's discretionary grant of injunctive relief to SZSSJ.

PART III: *JUDICIARY ACT 1903*

9. SZSSJ does not consider that notice under s.78B of the *Judiciary Act 1903* (Cth) is required.

PART IV: FACTS

10. SZSSJ accepts, in general terms, the brief statement of the factual background in relation to him as set out in the Appellants' Written Submissions ("**AWS**"), but adds the following matters.

11. At all relevant times, SZSSJ has been in immigration detention. Throughout the process there was a lack of clarity regarding what decision was to be made, what procedure was to be followed and what criteria were to be applied.[2] Following the

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[2] *SZSSJ v Minister for Immigration and Border Protection (No 2)* (2015) 234 FCR 1 ("***SZSSJ (No 2)***") at 28-29 [97]-[100] and [105] [**AB 364-365**].

Data Breach, on 7 March 2014, SZSSJ commenced proceedings in the FCC relevantly claiming that the Data Breach had rendered him a refugee *sur place* and seeking an injunction restraining his removal.

12. The Secretary's 12 March 2014 letter said that implications of the Data Breach for SZSSJ personally would be assessed as part of the Department's "*normal processes*", but did not explain what they were.[3] This statement was repeated in a 27 June 2014 letter to SZSSJ.[4] Over three months later, SZSSJ was advised in a 1 October 2014 letter that an International Treaties Obligation Assessment ("**ITOA**") had been commenced only the previous day to examine *non-refoulement* obligations, but again, did not identify the decision to which that assessment would be directed.[5]

13. As the Appellants note (AWS at [10]), in the first appeal, the Full Court found the ITOA would produce one of two courses, depending on its outcome. If SZSSJ was found to be a person to whom protection obligations were owed, his case would be referred to the Minister for consideration of the Minister's personal intervention powers. If the assessment was negative, subject to any other impediment to removal, removal planning would begin.[6]

14. Thus, the ITOA (and whatever the process was that preceded it) performed a dual function, being first, to inform the Minister of matters relevant to the exercise of his personal intervention powers, and secondly, as a step in the process of deciding whether to effect removal under s.198(6) of the Act.[7]

15. The Full Court in the first appeal relevantly held that since 12 March 2014, the Department had been engaged in conduct preparatory to a decision to be made under the Act, namely, whether to remove SZSSJ under s.198(6) of the Act, and that the challenge was within jurisdiction by reason of s.474(3)(h) of the Act.[8] The Appellants did not appeal this finding.

16. In the course of the second appeal to the Full Court, on 22 July 2015, the Appellants belatedly served a Notice of Contention, alleging that the FCC had no jurisdiction by reason of s.476(2)(d) of the Act (so far as it referred to a decision in s.474(7)(a) of the Act). This contention had not been raised before the FCC. This jurisdiction objection is the subject of paragraph 3 of the Notice of Appeal.

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3 *SZSSJ (No 2)* (2015) 234 FCR 1 at 7 [12] **[AB 337]**.

4 *SZSSJ (No 2)* (2015) 234 FCR 1 at 8-9 [17] **[AB 338-339]**.

5 *SZSSJ (No 2)* (2015) 234 FCR 1 at 9-10 [21] **[AB 339-340]**.

6 *SZSSJ v Minister for Immigration and Border Protection* (2014) 231 FCR 285 at 295 [39].

7 The power to remove as soon as reasonably practicable under s.198(6) accommodates consideration of whether to exercise the Minister's personal intervention powers: *M61* (2010) 243 CLR 319 at 338 [25] and 341-342 [35] and 351 [71]. See also *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505 ("***SZQRB***") at 544 [200] per Lander and Gordon JJ.

8 *SZSSJ v Minister for Immigration and Border Protection* (2014) 231 FCR 285 at 295-296 [40]; *SZSSJ (No 2)* (2015) 234 FCR 1 at 10-11 [24] **[AB 341]**.

PART V: APPLICABLE STATUTES

17. SZSSJ supplements to the Appellants' statutes are set out in the Annexure.

PART VI: ARGUMENT

Jurisdiction (Ground 3)

18. The Full Court's finding at [64]-[65] [**AB 353-356**] that the FCC had jurisdiction was the only outcome consistent with the express terms of s.474(7)(a) of the Act. To the extent that s.474(7)(a) relates to ss.48B, 195A and 417 of the Act, it refers specifically to decisions of the Minister not to do certain things.

19. So far as the claim for declaratory relief relating to the Minister's personal intervention powers was concerned, there was no decision of the Minister not to do anything. On the contrary, the Full Court held that the Minister had positively decided to consider exercising those powers (step 1) (this finding was disputed before the Full Court, but is now accepted by the Appellants).[9] However, the Minister had not yet made any decision about the manner in which he would exercise those powers (step 2).

20. The Appellants' submission (AWS at [24]-[28], [35]) that the Full Court inappropriately disregarded three previous Federal Court authorities regarding statutory analogues to s.474(7) of the Act should be rejected. Each of those cases involved a situation where a Departmental official did not refer information to the Minister because the information was not within the relevant Ministerial guidelines requiring referral.

21. The first of those cases, *Minister for Immigration v Ozmanian* (1996) 71 FCR 1 ("***Ozmanian***"), did not raise the same question of interpretation as now presents to this Court. In *Ozmanian*, the Court construed s.485 of the Act (as it then was), which provided that the Federal Court did not have jurisdiction "in respect of ... decisions covered by subsection 475(2)" (emphasis added). It was s.475(2) that was the statutory analogue to s.474(7). At 15-16, Sackville J (with whom Jenkinson and Kiefel JJ agreed) said "[t]he question is therefore whether the words 'in respect of ... decisions covered by s.475(2)', as used in s.485(1), are wide enough to embrace conduct leading to a decision not to consider exercising the Minister's powers." His Honour concluded that they were.[10] That conclusion does not in any way assist in the construction of s.474(7) of the Act.

22. The same point applies equally to *S1083/2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1455 ("***S1083***") which concerned the construction of s.476(2) of the Act, which then provided that the courts therein identified "do not have any jurisdiction in respect of a decision of the Minister not to exercise [certain powers]..." (emphasis added).[11]

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9 *SZSSJ (No 2)* (2015) 234 FCR 1 at 22-26 [75]-[87] [**AB 356-361**].

10 *Ozmanian* (1996) 71 FCR 1 at 27.

11 *S1083* [2004] FCA 1455 at [18].

23. It follows that *Ozmanian* and *S1083* involved materially distinct issues of statutory construction. So understood, the incongruity spoken of in *Ozmanian* as identified in AWS at [35] does not arise in this case.

24. The third of the cases, *Raikua v Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 158 FCR 510 ("***Raikua***"), did concern s.474(7) of the Act. However, it is distinguishable: in *Raikua* it was found as a fact that the Minister had decided not to consider the exercise of his intervention powers. In this regard, Lindgren J said at 522 [64] that "it was permissible for the Minister [to] take the decision not to consider exercising his power under s.417(1) by laying down guidelines as to the classes of case that were not to be referred to him". At 523 [68], Lindgren J relied upon the Full Court's decision in *Bedlington v Chong* (1998) 87 FCR 75 at 80, in which it was held that it was competent of the Minister to lay down guidelines for determining a request for the exercise of a dispensing power. Lindgren J said that the Full Court held that the guidelines constituted "a determination by the Minister, in advance, of the circumstances in which he will consider exercising the power".[12]

25. As to the Appellant's argument (AWS at [28]) that "decision" within s.474(7) of the Act must be read in light of s.474(3)(h) as including conduct preparatory to a decision, that ignores the fact that the expressions "decision of the Minister not to exercise [particular powers]" and "decision of the Minister not to consider the exercise of [particular powers]" in s.474(7) are compound expressions. They identify decisions of a particular character, namely, decisions that have in fact been made. That necessarily excludes conduct preparatory to the making of a decision that has not yet been made. In other words, s.474(7) specifically identifies a particular kind of decision. It is the specific provision, to which the general provision in s.474(3)(h) must give way.[13]

26. Even if the above argument is rejected, the FCC still had jurisdiction. This is because SZSSJ sought an injunction restraining removal under s.198 of the Act. That is a decision "required to be made" under the Act within the meaning of the definition of a "privative clause decision" in s.474(2) of the Act, and the steps taken by the Department the subject of review constitute conduct "preparatory" to the making of such a decision, as was held in the first Full Court appeal.[14] That such conduct was also preparatory to the exercise of Ministerial discretion is not to the point. As in other contexts, it is an error to ascribe an exclusive character to conduct - it may be preparatory to more than one future exercise of power.

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12 For a similar characterisation, see also *S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 ("***S10***") at 665 [91].

13 See, eg, *Smith v R* (1994) 181 CLR 338 at 348 per Mason CJ, Dawson, Gaudron and McHugh JJ; *Goodwin v Phillips* (1908) 7 CLR 1 at 14 per O'Connor J.

14 *SZSSJ v Minister for Immigration and Border Protection* (2014) 231 FCR 285 at 295-296 [37]-[41]. At 296 [42], the Court further found that jurisdiction was attracted insofar as SZSSJ pleaded that a decision had been made pursuant to s.431 of the Act to publish the record of his proceedings for merits review before the RRT.

27. The Appellants submit that any removal decision under s.198 of the Act "could only follow" from a decision by the Minister not to exercise his relevant discretionary powers: AWS at [34]. This proposition may be doubted. The obligation to remove under s.198(1) is not suspended whilst the Minister is in the first step of the personal intervention powers.[15]

28. However, even if the Appellant's proposition is correct, the two decisions are nonetheless conceptually distinct. That is illustrated in the present case by the fact that SZSSJ commenced proceedings on 7 March 2014, prior to the commencement of the ITOA process and prior even to the 12 March 2014 letter being sent. At that time, he apprehended removal and claimed he was a refugee *sur place*.[16] Even by the time that the FCC first ruled on jurisdiction in SZSSJ's case, the primary relief he sought was an injunction against removal;[17] indeed the ITOA process had still not commenced at that time.[18]

29. If the Appellants' submission was accepted, it would mean that any time an asylum seeker sought an injunction against removal under s.198, the Minister could effectively oust the jurisdiction of the FCC by commencing consideration of the exercise of a dispensing power and announcing that removal would occur if and only if a decision was made not to favourably exercise the discretion. That should not be the preferred construction of the Act.

30. If the Appellants succeed on the jurisdiction point the First Respondent would be left to commence proceedings in this Court's original jurisdiction for the same relief he sought in the FCC.

Section 197C (Ground 2)

31. The Appellants do not challenge the Full Court's construction of s.197C of the Act,[19] but rather challenge the Full Court's conclusion that it did not apply to proceedings already on foot.[20]

32. The Appellants' contention that no right had arisen in the hands of SZSSJ by 15 December 2014 for the purposes of s.7(2)(c) and (e) of the *Acts Interpretation Act 1901* (Cth) ("**AIA**") (AWS at [38]-[42]) should be rejected. Prior to the enactment of s.197C of the Act on 16 December 2014, SZSSJ had a right not to be removed until a

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15 Cf *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 232 [27]. See also *M61* (2010) 243 CLR 319 at 338 [25] and 341-342 [35] and 351 [71]; *S10* (2012) 246 CLR 636 at 653 [44] per French CJ and Kiefel J.

16 Which, under the law in force at the time, would have justified restraining his removal: *SZQRB* (2013) 210 FCR 505.

17 See *SZSSJ v Minister for Immigration* [2014] FCCA 1379 and SZSSJ's Further Amended Application for Judicial Review dated 15 December 2014 **[AB 37]**.

18 The ITOA process did not commence until 30 September 2014: *SZSSJ (No 2)* (2015) 234 FCR 1 at 22 [75] **[AB 356]**.

19 *SZSSJ (No 2)* (2015) 234 FCR 1 at 16-17 [48]-[49] **[AB 349-350]**.

20 *SZSSJ (No 2)* (2015) 234 FCR 1 at 18 **[54]** **[AB 351]**.

procedurally fair assessment of his *non-refoulement* claim had been made. As noted by the Full Court at [54] [**AB 351**], *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505 ("***SZQRB***") established that a detainee could not be removed under s.198 until his or her claims to be entitled to protection had been assessed, and that assessment would only be according to law if the detainee had been afforded procedural fairness.[21]

33. By 15 December 2014, the denial of procedural fairness had already occurred, since by this time, SZSSJ had not been appropriately informed of the process and had been denied access to information necessary to give him a fair opportunity to be heard. The Appellants at that time proposed to bring that procedurally unfair process to completion without remedying the defects, and as at that time, SZSSJ was entitled to restrain his removal until a procedurally fair process had taken place.

34. The Appellants also submit that any accrued right of SZSSJ not to be removed was only a right not to be removed unlawfully, and s.197C does no more than "alter the content" of that right: AWS at [43]. There is some circularity in this argument since it is premised on the proposition that s.197C could retrospectively alter the content of the right. The presumption against retrospectivity is equally applicable to a legislative provision which "alters the content" of an accrued right as it is to one which extinguishes it.[22]

35. The Appellants seek to displace s.7(2)(c) and (e) of the AIA by reference to the transitional provisions in item 27 of Sch.5 to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth): AWS at [44]. However, those provisions do not disclose a contrary intention within the meaning of s.2(2) of the AIA. Item 27 does not expressly provide that s.197C of the Act is to operate retrospectively or that the amendments are to destroy accrued rights or affect legal proceedings in respect of such rights. Nor is that a necessary implication of item 27. Item 27 does no more than restate the ordinary position.

36. The Court should be slow to attribute a retrospective operation to item 27 as it applies to s.197C of the Act. As this Court has recently held in *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1 at 15 [27], the protection of accrued rights provided by statutes such as s.7(2)(c) and (e) of the AIA mirrors the common law as enunciated by Dixon CJ in *Maxwell v Murphy* (1957) 96 CLR 261 at 267 and *Chang Jeeng v Nuffield (Australia) Pty Ltd* (1959) 101 CLR 629 at 637-638, in which his Honour said that:

> "The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer

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21 *SZQRB* (2013) 210 FCR 505 at 533 [142] and 549 [229].

22 Section 7(2)(c) and (e) of the AIA apply to provisions which "affect" any accrued right or legal proceeding in respect of such a right. The same position obtains at common law: see, eg, *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1 at 20 [45] per Gageler J (referring to laws which "alter rights or liabilities").

or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events" (emphasis added).

37. Had it been Parliament's intention that s.197C have operation regardless of whether or not a person had, prior to the enactment of the section, claimed that Australia owed *non-refoulement* obligations to him or her, it would have been simple enough for it to have said so.

38. For the same reason, the suggestion that s.197C has retrospective operation because the amending Act includes the words "*Resolving the Asylum Legacy Caseload*" in its title should be rejected. That is far from the certain language required to displace the presumption against retrospectivity. The suggestion to the contrary bears some similarity to that rejected by French CJ in *Kuczborski v Queensland* (2014) 254 CLR 51 at 64-65 [14].[23]

39. The Appellants also submit that the Full Court was wrong to assume the reasoning in *SZQRB* applied to persons in SZSSJ's position whose claims were being considered in the context of the possible exercise of the dispensing powers: AWS at [45]-[46]. That submission was not put to the Full Court.

40. In any event, the submission should be rejected. It proceeds on the basis that in *SZQRB*, "the right to a procedurally fair assessment of the applicant's claims flowed from an application of *M61*" and not from "any feature of s.198": AWS at [46]. That is incorrect. In *SZQRB,* the Court based the right to a procedurally fair assessment not on *M61* but on this Court's decision in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 ("***M70***").[24] One of the issues in *M70* was the scope of the removal power in s.198(2), which this Court held could not be read as a power to remove a person who claimed to be owed protection obligations by Australia, but whose claims had not been assessed.[25] This was based on a consideration by the Court of the proper construction of s.198 read in the context of the Act as a whole.[26]

41. In *SZQRB,* the Court took this to mean that any such assessment would need to take place in a process which accords the person procedural fairness and addresses the correct question by reference to Australian law.[27] That, of course, accords with orthodox principle; once it is concluded that an assessment is required which will

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23 "The term 'vicious lawless association', which appears in the title to the VLAD Act, is not defined and appears nowhere in the body of the act. It is a piece of rhetoric which is at best meaningless and at worst misleads as to the scope and substance of the law".

24 *SZQRB* (2013) 210 FCR 505 at 544-546 [200], especially at point 21.3 per Lander and Gordon JJ (with whom Flick J agreed).

25 *M70* (2011) 244 CLR 144 at 178 [54] per French CJ, 192 [98] per Gummow, Hayne, Crennan and Bell JJ, 230 [233] and 231 [237] per Kiefel J.

26 See, for example, *M70* (2011) 244 CLR 144 at 191-192 [95]-[98] per Gummow, Hayne, Crennan and Bell JJ.

27 *SZQRB* (2013) 210 FCR 505 at 545-546 [200], point 21.3 per Lander and Gordon JJ (with whom Flick J agreed).

affect removal, such an assessment must be procedurally fair, unless excluded by unmistakable statutory language or necessary intendment.

42. The reasoning in *M70* (and *SZQRB*) concerned s.198(2), but there is no reason in principle why it would not apply equally to s.198(6) - the relevant removal provision in the present case. Accordingly, the suggestion that SZSSJ did not have an accrued right not to be removed from the moment his new protection claims arose as a result of the Data Breach should be rejected.

43. Lastly, even if s.197C of the Act is found to displace accrued rights to procedural fairness in the context of making a removal decision under s.198(6), s.197C has no application in so far as the ITOA was for the purpose of the Minister's personal intervention powers. On the construction of s.197C adopted by the Full Court (which is not challenged by the Appellants),[28] s.197C cannot displace the obligation of procedural fairness that arises on the basis of the reasoning in *M61* (see paragraph 44 below). Accordingly, even if the Appellants were to succeed in establishing this ground of appeal, it would not be dispositive of the proceedings.

Application of *S10* (Ground 4)

44. The Full Court did not err in distinguishing *S10*. The Full Court correctly held that this case was on all fours with *M61*, where an obligation of procedural fairness was found to arise,[29] and could be distinguished from *S10*, where no obligation of procedural fairness arose.[30] The Full Court's conclusion turned on its finding of fact, not challenged on appeal, that the Minister had determined to consider exercising his personal intervention powers and had passed to the second stage of the process.[31] In view of the Appellants' claim that SZSSJ was not eligible for removal, his detention could only be lawful if the Minister had passed through to the second stage of the process.[32] In considering whether or not to "lift the bar", the Minister was (lawfully) prolonging the detention of SZSSJ.

45. In *M61*, this Court held that the exercise of the Minister's personal intervention powers under ss.46A(2) and 195A involved two distinct steps, the first step being a decision to consider exercising the power and the second step being a decision to exercise the power or not exercise it.[33] An obligation to afford procedural fairness arose at the second step because the decision to consider exercising the power prolonged the detainees' detention, thereby directly affecting their rights and interests.[34]

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28 *SZSSJ (No 2)* (2015) 234 FCR 1 at 16-17 [48]-[49] [**AB 349-350**].

29 *SZSSJ (No 2)* (2015) 234 FCR 1 at 20 [68], 21 [71], 22 [74]-[75] [**AB 355-357**].

30 *SZSSJ (No 2)* (2015) 234 FCR 1 at 20 [69] and 22 [74]-[75] [**AB 354-357**].

31 *SZSSJ (No 2)* (2015) 234 FCR 1 at 22-23 [75], 25-26 [85] and 26 [87] [**AB 356-361**].

32 *S4* (2014) 253 CLR 219 at 231-232 [26]-[27].

33 *M61* (2010) 243 CLR 319 at 350 [70].

34 *M61* (2010) 243 CLR 319 at 353-354 [76]-[78]. See also *S10* (2012) 246 CLR 636 at 652-653 [44] per French CJ and Kiefel J.

46. In *M61*, this Court found that the Minister had taken the first step.[35] In contrast, in *S10*, the Minister had not decided to consider the exercise of his powers.[36]

47. In *M61*, this Court discerned no intention on the part of the Legislature to exclude procedural fairness where such an interest identified as arising at the second step was affected.

48. The Appellants in their submissions do not explain why this Court's reasoning in *M61* does not apply to the present case. The only submission made (albeit in the context of ground 3, not ground 4) is that the "statutory context" was different in *M61*, as the dispensing powers in question there arose under ss.46A(2) and 195A whereas the dispensing powers under consideration in *S10* and the present case (ss.48B, 195A and 417) are different: AWS at [46].

49. That is no basis to distinguish *M61*. First, one of the provisions under consideration in *M61*, namely s.195A, was also at issue in *S10*, as it is in the present case.

50. Secondly, the Appellants' reliance upon the fact that in *M61*, the relevant asylum seekers had not had an opportunity to apply for protection visas (AWS at [49]) is misplaced. The Appellants seem to be contending that the criterion of distinction between *M61* and *S10* is whether there has already been an opportunity for a merits assessment. In that respect, the present case bears more similarity to *M61* than *S10*. In the present case, a supervening event – the Data Breach – occurred after avenues of merits review had been exhausted. SZSSJ has not had any merits assessment made of his protection claims arising from the Data Breach. By contrast, in *S10* the plaintiffs had had their protection claims assessed through the protection visa process and there had been no change in circumstances.

51. The Appellants criticise the Full Court for its reliance on the reasons of French CJ and Kiefel J, rather than the plurality, in *S10*: AWS at [48]. However, the Full Court was correct to conclude that, carefully analysed, the reasoning of French CJ and Kiefel J as well as that of the plurality in *S10* hinged upon the fact that there had been no decision to consider the exercise of the dispensing powers by the Minister.

52. French CJ and Kiefel J held that prior to any decision to consider the exercise of the dispensing powers, there was no right or interest to which procedural fairness could attach.[37]

53. By contrast, the plurality in *S10* found that even at the first stage, persons have a sufficient interest to attract the principle of procedural fairness. However, the nature of the interest identified is important; it was a person's interest in obtaining "a measure of relaxation of what otherwise would be the operation upon non-citizens of

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35 *M61* (2010) 243 CLR 319 at 349 [66].

36 *S10* (2012) 246 CLR 636 at 652 [41] per French CJ and Kiefel J.

37 *S10* (2012) 246 CLR 636 at 659 at 653 [44]-[46] and 654-655 [50]-[51].

the visa system".[38] That interest is different to the interest identified by the Court in *M61*, namely the effect on a person's rights and interests by the prolongation of detention.[39] The latter interest only arises at the second stage; detention cannot lawfully be prolonged simply because the Minister is "considering whether to consider" the exercise of a dispensation power.[40]

54. Importantly, the plurality, after setting out a series of statutory characteristics of the dispensing powers, concluded that "[u]pon their proper construction and in their application to the present cases, the dispensing provisions are not conditioned on observance of the principles of procedural fairness" (emphasis added).[41]

55. Further, one of the particular statutory characteristics relied upon by the plurality in *S10* was that "[t]he exercise of the powers is not preconditioned by the making of any request by any other person, and if a request be made there is no requirement to consider it."[42] That is a characteristic which, of necessity, only applies prior to any decision being made to consider the exercise of the powers.

56. This Court's decisions in *M61* and *S10* are most harmoniously reconciled if *M61* is construed to operate at the second stage of the exercise of the dispensing powers (when the powers carry with them the prolongation of a person's detention) while *S10* is construed to apply only at the first stage. The Full Court was correct to so hold.

57. In this case, the personal intervention provisions involve two distinct powers – a power to decide whether to consider; and then a power of actual consideration. Different types of interests are affected at each stage. There is no reason in principle why the legislature cannot determine to exclude the obligation of procedural fairness with respect to the first power (which affects certain interests), but determine to retain it with respect to the second power (which affects different interests).

Representations (Ground 5)

58. The Appellant's fifth ground of appeal challenges an *obiter* view which the Full Court said was "not strictly necessary to answer".[43] The starting point with respect to this ground of appeal is that nowhere did the Full Court say that representations made to SZSSJ could ground an obligation of procedural fairness even if procedural fairness had been wholly excluded by statute. Such a proposition is obviously incorrect.

59. As the Full Court found, three Departmental letters to SZSSJ suggested that the Department would hear from him prior to making a decision and there were written statements in both the PAM 3 and the solicitor's letter of 12 February 2015 that the

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38 *S10* (2012) 246 CLR 636 at 659 [69] per Gummow, Hayne, Crennan and Bell JJ.

39 *M61* (2010) 243 CLR 319 at 353 [76].

40 *M61* (2010) 243 CLR 319 at 348-349 [64]-[66].

41 *S10* (2012) 246 CLR 636 at 668 [100].

42 *S10* (2012) 246 CLR 636 at 667 [99(iii)].

43 *SZSSJ (No 2)* (2015) 234 FCR 1 at 26 [88] **[AB 361]**.

rules of procedural fairness would be applied.[44] The better reading of the Full Court's reasons for its conclusion that these representations provided an "independent basis" for concluding that there was an obligation of procedural fairness[45] is that the representations generated an additional interest of SZSSJ liable to be affected by the exercise of statutory power, thereby rendering it appropriate for the Court to consider whether Parliament had intended to abrogate procedural fairness *qua* the particular interests held by SZSSJ which include the additional interest enlivened by the representations. The distinct character of that interest enlivened distinct considerations in ascertaining Parliament's intent to exclude procedural fairness.

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60. To the extent that it is not accepted that this is what the Full Court meant, the First Respondent seeks leave to rely upon a Notice of Contention to contend that the Full Court's conclusion should be upheld on this basis.[46]

61. The statutory implication of an obligation to afford procedural fairness is an aspect of the principle of legality.[47] The principle of legality does not apply in a binary fashion: it is not either "off" or "on". Thus, in the context of retroactivity, this Court has said that it is "important to identify the statutory provisions which are said to be being given 'retrospective' effect and to identify precisely the respect or respects in which they are
20 being given that effect".[48]

62. As such, a law may be intended to interfere with an interest protected by the principle of legality only in some respects. The extent to which a law is intended to interfere with protected interests is a question of construction. The same point was made (again in the context of retroactivity) by Griffith J in *Moss v Donohue* (1915) 20 CLR 615 at 621: "It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."

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63. The relevant principle of construction is that the Court should make constructional choices which "avoid or minimise encroachment upon the interest in procedural fairness."[49] Even where a statute in some respects abrogates procedural fairness, the Court should nevertheless adopt a construction that minimises the extent of abrogation. Put another way, the Court should adopt a construction which minimises interference with the interests protected by a particular aspect of the principle of legality; and a law may be intended to interfere with some interests or combination of interests, but not others.

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44 *SZSSJ (No 2)* (2015) 234 FCR 1 at 27 [93] [**AB 363**].

45 *SZSSJ (No 2)* (2015) 234 FCR 1 at 26 [88] [**AB 361**].

46 The proposed Notice of Contention is exhibited to the affidavit of SZSSJ dated 14 April 2016 and requires a grant of leave, having been served after the time permitted by r.42.08.05 of the High Court Rules.

47 *Momcilovic v The Queen* (2011) 245 CLR 1 ("***Momcilovic***") at 46-47 [43] per French CJ.

48 *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 156 [94] per Gummow, Hayne and Bell JJ.

49 *Momcilovic* (2011) 245 CLR 1 at 46-47 [43] per French CJ (emphasis added).

64. There was no occasion for the Court in *S10* to consider whether the Act, properly construed, disclosed a necessary intendment to exclude procedural fairness where an interest of the present kind exists. *S10* did not involve express representations by the Department and the Minister that procedural fairness would be afforded or that there would be an opportunity to make submissions.

65. The express representations of the kind made in the present case are apt to give rise to a sufficient interest of a different kind than that which the plurality found to exist in *S10*.[50] The interest is that which individuals have in government not departing from a conventionally-assumed state of affairs arising from repeated, express representations by government. Put more generally, the interests are those reliance interests which the law recognises and protects in areas such as estoppel, the principles of *stare decisis*[51] and the presumption against retroactivity.[52]

66. That interest is powerful, and is sufficient to attract the protection of procedural fairness. It is an interest of SZSSJ which may be affected by the exercise of statutory power in a manner substantially different from the manner in which the interests of the public at large are affected, and thus meets the test for standing to seek a public law remedy,[53] which, it is now accepted, is equivalent to the test to attract procedural fairness.[54]

67. Normative considerations, illuminated by the matters which underpin the ordinary requirement of procedural fairness, support that proposition. Those matters are that:

    (a) procedural fairness leads to more accurate decision-making and better administration;[55]

    (b) unfair decision-making undermines the legitimacy of the exercise of public power, undermines confidence in the repositories of the power, and undermines the rule of law;[56]

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50 Namely, the interest in obtaining "a measure of relaxation of what otherwise would be the operation upon non-citizens of the visa system". See paragraph 53 above.

51 See *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 536 [75] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

52 See, eg, *R v Dineley* [2012] 3 SCR 272 at [46] per Cromwell J, for McLachlin CJ, Rothstein and Cromwell JJ.

53 *Kioa v West* (1985) 159 CLR 550 at 620 per Brennan J.

54 *S10* (2012) 246 CLR 636 at 659 [68] per Gummow, Hayne, Crennan and Bell JJ, referring to *Kioa v West* (1985) 159 CLR 550 at 621 per Brennan J.

55 See *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 107 [186] per Gageler J; *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700 at [32] per Lord Sumption; *Osborn v The Parole Board* [2014] AC 1115 at [67], [76]; *A-G (Hong Kong) v Ng Yuen Shiu* (1983) 2 AC 629 at 638.

56 See *SZRMQ v Minister for Immigration and Border Protection* (2013) 219 FCR 212 at 215 [8] per Allsop CJ (and cases there cited); *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 107 [186] per Gageler J; *Osborn v The Parole Board* [2014] AC 1115 at [71].

(c) unfair decision-making is liable "to generate justified feelings of resentment in those to whom fairness is denied".[57]

68. Departure from previous, express representations engages each of these interests. To recognise as such is not to resuscitate the superfluous concept of legitimate expectation.[58] It is instead simply to articulate the interest or interests apt to be affected by the exercise of statutory power. The statutory powers at issue in the present case were, of course, apt adversely to affect that interest: they carried within them power to, ultimately, depart from prior representations.

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69. The critical point is this: merely because a statute manifests an intention to abrogate the duty to afford procedural fairness which would arise because of a person's interest in engaging the dispensing provision does not mean that the statute also manifests an intention to abrogate that duty which would arise because of the public and private interest in the government being held to its promises. That is particularly so where those promises are connected to the potential removal of a person to a place where the person fears a significant risk of harm. The relevant provisions of the Act do not, by unmistakable language or necessary intendment, disclose an intention to abrogate the duty so far as it would arise from those interests.

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70. Nothing in the characteristics of the dispensing powers identified by the plurality in *S10*[59] suggests a necessary legislative intendment to exclude procedural fairness in the particular circumstances of the present case. That the powers are to be exercised in the "public interest" underscores, rather than detracts from, the need for procedural fairness, as the public interest itself incorporates an element of fairness which is engaged by the making of representations by government.[60] Unlike the situation in *S10*, the present is not a case in which persons who have already had an opportunity to seek a protection visa simply seek reconsideration by the Minister. Rather, this is an unusual case, in which:

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(a) the Minister has already decided of his own motion to consider the exercise of the powers;[61]

(b) the circumstances giving rise to that decision have not been the subject of a protection visa application or any other form of merits review;[62] and

(c) the Minister has already decided, or at least represented, that the personal circumstances of each affected person are to be taken into account.[63]

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57 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 107 [186] per Gageler J. See also *Osborn v The Parole Board* [2014] AC 1115 at [68]-[70], [82].

58 *Minister for Immigration and Border Protection v WZARH* (2015) 90 ALJR 25 ("***WZARH***") at 31-32 [28]-[30] per Kiefel, Bell and Keane JJ.

59 *S10* (2012) 246 CLR 636 at 667-668 [99]-[100] per Gummow, Hayne, Crennan and Bell JJ.

60 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 18 per Mason CJ.

61 Thus the considerations in *S10* (2012) 246 CLR 636 at 667 [99(iii)] and [99(iv)] are not applicable.

62 Thus the considerations in *S10* (2012) 246 CLR 636 at 667-668 [99(vii)] and [99(viii)] are not applicable. See paragraph 50 above.

71. In these circumstances, there is no analogy with *South Australia v O'Shea* (1987) 163 CLR 378 at 410.[64] In that case it was held that procedural fairness may not be necessary at the ultimate stage of a multi-stage decision-making process where there has been a hearing at an earlier stage and there has been no material change in circumstances. The very premise of the current case is that there was a material change in circumstances between the anterior decision-making and the potential decision by the Minister; it was that material change which led to the promise of procedural fairness.

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Departure from Representation (Ground 6)

72. There is some incongruity between the submissions made by the Appellants at AWS at [62]-[64] and the terms of Ground 6 of the Notice of Appeal [**AB 392**]. While Ground 6 in the Notice of Appeal is clearly directed to the question of whether there was an obligation of procedural fairness, the AWS deal with Ground 6 under the heading "Content of procedural fairness" and strays into questions of the content of the obligation. In any event, the following submissions are made.

20 73. At AWS at [62], the Appellants, relying on *Day v Harness Racing NSW* (2014) 88 NSWLR 594, submit that whether there is a duty to accord procedural fairness does not turn upon its content. While that is correct as a general proposition, this does not mean that practical unfairness is always irrelevant to the question of whether a duty to accord procedural fairness arises, for the reasons set out above at paragraphs 58 to 71 above.

74. The Appellants submit that the Full Court erred in drawing inferences about the content of the information SZSSJ had sought, including the unabridged KPMG report which was not before the Full Court: AWS at [63]. That submission should be
30 rejected.

75. Contrary to the Appellants' submission, it was not incumbent on SZSSJ to show what outcome was "likely" if he had had the unabridged KPMG report. All that he needed to show was that access to the unabridged report "might have made a difference to the outcome".[65] The concern of procedural fairness is with procedures rather than outcomes.[66] It was open to the Full Court to infer, as it did, that the unabridged KPMG report contained information as to the dissemination of SZSSJ's personal details which might assist him in making submissions as to the impact of the Data Breach on him.[67] It was not necessary for the unabridged report itself to be in
40 evidence.

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63 Thus the consideration in *S10* (2012) 246 CLR 636 at 667 [99(vi)] is not applicable.

64 Cf *S10* (2012) 246 CLR 636 at 668 [100].

65 *WZARH* (2015) 90 ALJR 25 at 34 [43] per Kiefel, Bell and Keane JJ (emphasis in original).

66 *WZARH* (2015) 90 ALJR 25 at 35 [55] per Gageler and Gordon JJ.

67 *SZSSJ (No 2)* (2015) 234 FCR 1 at 31-32 [113]-[114] [**AB 367-368**].

76. The Appellants further submit that the Full Court did not give consideration to what the extent of distribution meant for the assessment of Australia's *non-refoulement* obligations as a result of the Data Breach, or for the usefulness of the submissions SZSSJ might have made: AWS at [63]. That submission is wrong. The Full Court drew inferences, which are not challenged, that SZSSJ has not been told who accessed his information and that there is further information of which he is not being informed because, although it affects him, it is considered not in his interests to know it.[68] The Full Court reasoned that the individuals, such as SZSSJ, affected by the Department's conduct could not know or ascertain anything as to its potential to affect their interests which the Department did not disclose to them.[69] In these circumstances, the proposition that access to information as to the extent of dissemination "might" make a difference to the outcome of the ITOA is obvious.

Disclosure of Information (Ground 7)

77. The Full Court found that the obligation to afford procedural fairness had been breached in two respects: firstly, in the past SZSSJ had not been informed about the decision-making process that was being followed,[70] and secondly, SZSSJ had not been provided information about the impact of the Data Breach, including the unredacted KPMG report.[71]

Disclosure as to process (Ground 7(a))

78. The Appellants' submissions (and Ground 7(a) of the Notice of Appeal itself) proceed on the misapprehension that the only ways in which the Full Court found that there had been a relevant lack of disclosure as to the process were the three matters identified by the Full Court at [98] [**AB 364**]. That is not so. The Full Court gave separate and careful consideration to breaches of procedural fairness in relation to each of the relevant communications made by the Department to SZSSJ.[72]

79. Starting with the 12 March 2014 letter: the Full Court found that it was procedurally unfair because it did not tell SZSSJ "anything as to the precise content of [the 'normal'] processes, more than that some unidentified activity would occur in which he could express concerns."[73] It found that SZSSJ could not be expected to explain his concerns if he did not know what the Department was looking at with its as yet unspecified "processes".[74]

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68 *SZSSJ (No 2)* (2015) 234 FCR 1 at 31-32 [113]-[114] [**AB 367-368**].

69 *SZSSJ (No 2)* (2015) 234 FCR 1 at 32 [120] [**AB 369**].

70 *SZSSJ (No 2)* (2015) 234 FCR 1 at 28-29 [97]-[106] [**AB 364-366**].

71 *SZSSJ (No 2)* (2015) 234 FCR 1 at 31-32 [116]-[121] [**AB 368-370**] and 33 [124] [**AB 371**].

72 *SZSSJ (No 2)* (2015) 234 FCR 1 at 29 [101]-[105] [**AB 365**].

73 *SZSSJ (No 2)* (2015) 234 FCR 1 at 29 [101] [**AB 365**].

74 *SZSSJ (No 2)* (2015) 234 FCR 1 at 29 [101] [**AB 365**].

80. The Full Court found that the letter of 27 June 2014 was no better. It invited submissions within 14 days on "an unidentified subject of inquiry, through an unidentified process by an unidentified decision-maker."[75]

81. As the Full Court found, it was only by the letter of 1 October 2014 that SZSSJ was informed that an ITOA had been commenced which would look at *non-refoulement*.[76] Nonetheless, the Full Court found that the letter did not explain "what the process was." That was in addition to non-disclosure of the ultimate decision-maker (the Minister) and criterion for decision (the public interest). The Full Court reasoned similarly with respect to the 12 February 2015 letter.[77]

82. The gravamen of the Appellants' submissions is that in a multi-stage decision making process wherein the first stage is an assessment of *non-refoulement* obligations, there was no need to tell SZSSJ "more than was required to pass through the officer's assessment of *non-refoulement* obligations": AWS at [66]. Even if that proposition was accepted, it would not justify overturning the Full Court's conclusion that the process adopted to 12 February 2015 was procedurally unfair.[78] As at 12 March 2014 and 27 June 2014, SZSSJ was not even told that the subject of the enquiry was an assessment of *non-refoulement* obligations, and at the latter date he was required to make submissions within 14 days. No error has been identified with the reasoning of the Full Court referred to at paragraphs 79 to 81 above.

83. In any event, the Appellants' proposition should not be accepted. The logic of the submission is that the Minister and Department may conduct a process and expect an asylum seeker to participate meaningfully in that process without telling the asylum seeker why the process is being conducted and where it might lead. That submission was not put to the Full Court; it is easy to see why it would have been rejected if it had been put. Procedural fairness requires SZSSJ to be put fairly on notice of the procedure to be adopted so as to tailor submissions and evidence accordingly.[79]

84. Further, the Appellants' submission proceeds on the basis that consideration of the public interest is outside the remit of the ITOA officers conducting the assessment. There was, however, no evidence to establish that this was so.[80] If that were the case, one would have expected Ms Russack to say so in her affidavit of 20 March 2015 [**AB 97-101**], but she did not. The PAM3 manual [**AB 133-149**] also does not say this. Rather, the relevant portion of the manual (set out by the Full Court at [77] [**AB 357-358**]) states that if an ITOA officer finds that *non-refoulement* obligations are engaged, an option for resolving that person's status includes "considering whether to

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75 *SZSSJ (No 2)* (2015) 234 FCR 1 at 29 [102] [**AB 365**].

76 *SZSSJ (No 2)* (2015) 234 FCR 1 at 29 [103] [**AB 365**].

77 *SZSSJ (No 2)* (2015) 234 FCR 1 at 29 [104] [**AB 365**].

78 *SZSSJ (No 2)* (2015) 234 FCR 1 at 29 [105] [**AB 365**].

79 See *WZARH* (2015) 90 ALJR 25 at 37 [63] per Gageler and Gordon JJ; see also at 34-35 [46] per Kiefel, Bell and Keane JJ.

80 *Cf* AWS at [66] where it is submitted that there was "no evidence to suggest that the officer's role included consideration of public interest matters or reporting on them to the Minister."

refer the case to the Minister for a decision under one of the other ministerial intervention powers" (emphasis added). Officers are to "consult with their supervisor if they are unsure how to proceed." The implication is that the officers (or their supervisors) have discretion to take into account more than the fact of the engagement of *non-refoulement* obligations in deciding whether to make a submission to the Minister (in contrast to *M61* where there was no apparent discretion[81]).

Disclosure as to circumstances of the Data Breach (Ground 7(b))

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85. The Full Court held that it would undermine fairness for the Department not to disclose the full circumstances of the Data Breach so that SZSSJ could assess, with full information, whether some adverse impact occurred or may have occurred on which he wished to be heard.[82]

86. The Appellants describe this as a "new principle of procedural fairness" (AWS at [72]). That is perhaps not surprising as the Full Court's reasoning was expressly confined to the rare circumstances of the present case where a decision-maker asks a claimant to make submissions about what should happen in consequence of a failure to
20 adhere to statutory safeguards of confidentiality committed by the decision-maker affecting the claimant. In any event, novelty is not a badge of invalidity in view of the underlying principle that the content of the obligation to afford procedural fairness turns on the particular circumstances of the case.[83]

87. It is, however, not a new proposition that the circumstances may require wider disclosure than the usual obligation as to adverse, credible, relevant and significant information.[84] In particular, where the decision-maker has exclusive knowledge of information which a claimant will otherwise be unable to take account of in his or her natural justice response, greater disclosure may be required.[85] The Full Court simply
30 extended this principle to the present case where there is an inherent conflict in the Department assessing the consequences of its own breach of duty. Contrary to the Appellants' submission at AWS at [73], this was expressly raised by the Full Court during the course of argument.[86]

88. The Appellants submit that the Full Court was wrong to attribute responsibility for the Data Breach to "the Department as a whole" (AWS at [74]) and that there was no evidence that any ITOA officer was involved in the Data Breach (AWS at [75]). The

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81 *M61* (2010) 243 CLR 319 at 343 [44], 344 [49].

82 *SZSSJ (No 2)* (2015) 234 FCR 1 at 32 [121] **[AB 369]**.

83 *Isbester v Knox City Council* (2015) 255 CLR 135 at 146 [23] per Kiefel, Bell, Keane and Nettle JJ; *Lam* (2003) 214 CLR 1 at 14 [37] per Gleeson CJ. See also *Haoucher v Minister of State for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 660 per Dawson J.

84 *Applicant VEAL of 2002 v Minister for Immigration* (2005) 225 CLR 88.

85 *Coutts v Close* [2014] FCA 19 at [116] (Griffiths J); *Shields v Overland* (2009) 26 VR 303 at 332 [109] (Kyrou J); *Gondarra v Minister for Families, Housing, Community Services and Indigenous Affairs* (2014) 220 FCR 202 at 249 [146] (Kenny J).

86 Transcript 07.08.15 at p. 101, line 4 – p. 102, line 25 and p. 112, line 27 – p. 113, line 24.

Full Court's reasoning, however, did not involve a finding that the Department "as a whole" was responsible for the Data Breach or that any individual ITOA officer was involved in it.

89. Rather, the Full Court's reasoning was that in circumstances where (i) the Data Breach occurred in the Department on or through its computer equipment; (ii) the individuals, such as SZSSJ, affected by the Department's conduct could not know or ascertain anything as to its potential to affect their interests which the Department did not disclose to them; and (iii) accordingly, such individuals cannot evaluate the Department's assertion that it has disclosed all information that might adversely affect them, then the Department is required to show its full hand.[87] That is because, as the Full Court found, the above state of affairs would undermine fairness in that the affected individuals, such as SZSSJ, would have to accept the word of the Department, who had caused the Data Breach, as to the sufficiency of the information they had been provided.

90. That conclusion was correct and open to the Full Court, particularly in circumstances where, as here, SZSSJ was invited to put in writing any concerns he may have regarding the impact of the Data Breach to him "personally" and to provide the department with "specific reasons and details" for those concerns.[88]

Injunctive Relief (Ground 8)

91. The grant of injunctive relief to SZSSJ was a discretionary decision. Accordingly, to succeed on appeal the Appellants must demonstrate an error of the kind outlined in *House v The King* (1936) 55 CLR 499.

92. The Appellants' submission that there is an "inconsistency" between the injunctive relief and the Full Court's finding that there was no power to remove SZSSJ while the dispensing powers were being considered and/or if s.197C did not apply (AWS at [78]) should not be accepted. The mere fact that the Appellants lacked power under the Act to remove SZSSJ is not a guarantee that he would not be removed.

93. As to the Appellants' submission that there is an "inconsistency" between the injunctive relief and the FCC's finding that the Appellants would not attempt to remove SZSSJ before the ITOA process was concluded (AWS at [78]), it is accepted that there was "unchallenged sworn evidence" to that effect (AWS at [79]). However, the key point – not addressed by the sworn evidence – was whether the ITOA would be conducted lawfully.

94. The Full Court reasoned that, in the "somewhat unusual circumstances" of this case, two factors justified a grant of injunctive relief.[89] First, there was no explanation as to what had been happening in the course of the "normal processes" prior to 1 October

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87 *SZSSJ (No 2)* (2015) 234 FCR 1 at 32 [120]-[121] **[AB 369]**.

88 *SZSSJ (No 2)* (2015) 234 FCR 1 at 8-9 [17] **[AB 338-339]**.

89 *SZSSJ (No 2)* (2015) 234 FCR 1 at 34 [129] **[AB 372]**.

2014.[90] On that date, whatever process had previously been conducted was apparently scrapped and replaced by the ITOA. Secondly, the process had been sufficiently unfair that SZSSJ "could not be expected to trust ... the reliability of the Department's own assessment of what is fair".[91] The Appellants have identified no error of the Full Court in this fact-finding process. Even now, no effort has been made to justify the Department's past conduct (e.g. repeatedly requiring SZSSJ to make submissions within 14 days at a time when no information at all had been given to him about the decision making process).[92]

10 95. As to the Appellants' reliance on *M61* (AWS at [79]), the full context bears repeating. In *M61*, the Court said no injunction was required because there was no threat to remove the plaintiffs with a further RSA being undertaken "in which the law would be correctly applied and procedural fairness afforded."[93]

96. Ultimately, the Full Court was not satisfied that there was no threat of removal of SZSSJ prior to the completion of a lawful (procedurally fair) ITOA. No justification has been shown for the Court to overturn that exercise of judgment and discretion on the part of the Full Court.

20 **PART VII: NOTICE OF CONTENTION**

97. See the argument in relation to Ground 5 of appeal above.

PART VIII: ORAL ARGUMENT

98. SZSSJ estimates that he will require approximately 1.5 hours for presentation of his oral argument.

Dated: 5 May 2016

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90 *SZSSJ (No 2)* (2015) 234 FCR 1 at 34 [128] **[AB 371-372]**.

91 *SZSSJ (No 2)* (2015) 234 FCR 1 at 34 [128] **[AB 371-372]**.

92 *SZSSJ (No 2)* (2015) 234 FCR 1 at 8-9 [17]-[18] and 9-10 [21-22] **[AB 338-340]**

93 *M61* (2010) 243 CLR 319 at 334 [8].

Annexure

***Acts Interpretation Act 1901* (Cth) (electronic compilation no. 28, dated 25 March 2015, registered 25 March 2015)**

2 Application of Act

(1) This Act applies to all Acts (including this Act).

Note: This Act also applies to legislative instruments and other instruments made under an Act: see subsection 13(1) of the *Legislative Instruments Act 2003* and subsection 46(1) of this Act.

(2) However, the application of this Act or a provision of this Act to an Act or a provision of an Act is subject to a contrary intention.

***Migration Act 1958* (Cth) (electronic compilation no. 118, dated 11 December 2014, registered 24 December 2014)**

48B Minister may determine that section 48A does not apply to non-citizen

(1) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a particular non-citizen, determine that section 48A does not apply to prevent an application for a protection visa made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day after the day on which the notice is given.

(2) The power under subsection (1) may only be exercised by the Minister personally.

(3) If the Minister makes a determination under subsection (1), he or she is to cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination; and

(b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.

(4) A statement under subsection (3) is not to include:

(a) the name of the non-citizen; or

(b) any information that may identify the non-citizen; or

(c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person or any information that may identify that other person.

(5) A statement under subsection (3) is to laid before each House of the Parliament within 15 sitting days of that House after:

(a) if the determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or

(b) if the determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

(6) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or by any other person, or in any other circumstances.

195A Minister may grant detainee visa (whether or not on application)

Persons to whom section applies

(1) This section applies to a person who is in detention under section 189.

Minister may grant visa

(2) If the Minister thinks that it is in the public interest to do so, the Minister may grant a person to whom this section applies a visa of a particular class (whether or not the person has applied for the visa).

(3) In exercising the power under subsection (2), the Minister is not bound by Subdivision AA, AC or AF of Division 3 of this Part or by the regulations, but is bound by all other provisions of this Act.

Minister not under duty to consider whether to exercise power

(4) The Minister does not have a duty to consider whether to exercise the power under subsection (2), whether he or she is requested to do so by any person, or in any other circumstances.

Minister to exercise power personally

(5) The power under subsection (2) may only be exercised by the Minister personally.

Tabling of information relating to the granting of visas

(6) If the Minister grants a visa under subsection (2), he or she must cause to be laid before each House of the Parliament a statement that (subject to subsection (7)):

(a) states that the Minister has granted a visa under this section; and

(b) sets out the Minister's reasons for granting the visa, referring in particular to the Minister's reasons for thinking that the grant is in the public interest.

(7) A statement under subsection (6) in relation to a decision to grant a visa is not to include:

(a) the name of the person to whom the visa is granted; or

(b) any information that may identify the person to whom the visa is granted; or

(c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the grant of the visa—the name of that other person or any information that may identify that other person.

(8) A statement under subsection (6) is to be laid before each House of the Parliament within 15 sitting days of that House after:

(a) if the decision to grant the visa is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or

(b) if the decision to grant the visa is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

417 Minister may substitute more favourable decision

(1) If the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Tribunal under section 415 another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision.

(2) In exercising the power under subsection (1) on or after 1 September 1994, the Minister is not bound by Subdivision AA or AC of Division 3 of Part 2 or by the regulations, but is bound by all other provisions of this Act.

(3) The power under subsection (1) may only be exercised by the Minister personally.

(4) If the Minister substitutes a decision under subsection (1), he or she must cause to be laid before each House of the Parliament a statement that:
(a) sets out the decision of the Tribunal; and
(b) sets out the decision substituted by the Minister; and
(c) sets out the reasons for the Minister's decision, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.

(5) A statement made under subsection (4) is not to include:
(a) the name of the applicant; or
(b) any information that may identify the applicant; or
(c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person or any information that may identify that other person.

(6) A statement under subsection (4) is to be laid before each House of the Parliament within 15 sitting days of that House after:
(a) if the decision is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or
(b) if a decision is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any decision, whether he or she is requested to do so by the applicant or by any other person, or in any other circumstances.

***Migration Act 1958* (Cth) (compilation dated 27 August 2004)**

476 Federal Court and Federal Magistrates Court do not have any other jurisdiction in relation to certain privative clause decisions

(1) Despite any other law (including section 483A, sections 39B and 44 of the *Judiciary Act 1903*, section 32AB of the *Federal Court of Australia Act 1976* and section 39 of the *Federal Magistrates Act 1999*), the Federal Court and the Federal Magistrates Court do not have any jurisdiction in relation to a primary decision.

(2) Despite any other law (including section 483A, sections 39B and 44 of the *Judiciary Act 1903*, section 32AB of the *Federal Court of Australia Act 1976* and section 39 of the *Federal Magistrates Act 1999*), the Federal Court and

the Federal Magistrates Court do not have any jurisdiction in respect of a decision of the Minister not to exercise, or not to consider the exercise, of the Minister's power under subsection 37A(2) or (3), section 48B, paragraph 72(1)(c), section 91F, 91L, 91Q, 345, 351, 391, 417 or 454 or subsection 503A(3).

(2A) Despite any other law (including section 483A, sections 39B and 44 of the *Judiciary Act 1903*, section 32AB of the *Federal Court of Australia Act 1976* and section 39 of the *Federal Magistrates Act 1999*), the Federal Court and the Federal Magistrates Court do not have any jurisdiction in respect of:

(a) a decision of the Principal Member of the Migration Review Tribunal or of the Principal Member of the Refugee Review Tribunal to refer a matter to the Administrative Appeals Tribunal; or

(b) a decision of the President of the Administrative Appeals Tribunal to accept, or not to accept, the referral of a decision under section 382 or 444.

(2B) Despite any other law (including section 483A, sections 39B and 44 of the *Judiciary Act 1903*, section 32AB of the *Federal Court of Australia Act 1976* and section 39 of the *Federal Magistrates Act 1999*), the Federal Court and the Federal Magistrates Court do not have any jurisdiction in respect of a decision of the Minister under Division 13A of Part 2 to order that a thing is not to be condemned as forfeited.

(4) Despite section 44 of the *Judiciary Act 1903*, the High Court must not remit a matter to the Federal Court or the Federal Magistrates Court if it relates to a decision or matter in respect of which the Federal Court or the Federal Magistrates Court would not have jurisdiction because of this section.

(5) The reference in subsection (2) to section 345 is a reference to section 345 of this Act as in force before the commencement of Schedule 1 to the *Migration Legislation Amendment Act (No. 1) 1998*.

(6) In this section:

primary decision means a privative clause decision:

(a) that is reviewable, or has been reviewed, under Part 5 or 7 or section 500; or

(b) that would have been so reviewable if an application for such review had been made within a specified period.