HIGH COURT OF AUSTRALIA

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Details of Filing

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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

SECRETARY OF DEPARTMENT OF HOME AFFAIRS
Second Respondent

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

SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I: Form of Submissions

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

Part II: Basis of Intervention

2. The Attorney General for New South Wales (**NSW Attorney**) intervenes in these proceedings pursuant to s 78A of the Judiciary Act 1903 (Cth) in support of the respondents.

Part III: Argument

3. The NSW Attorney makes submissions only as to the principal question of law that arises out of these proceedings: the question of whether the exercises of non-statutory executive power under consideration in this case may be reviewed on the ground of reasonableness.

4. The respondents submit, correctly, that such review is unavailable. By way of supplementation of the respondents' submissions on that matter, the NSW Attorney submits that certain fundamental conceptions which underpin the Commonwealth Constitution – including the rule of law, parliamentary control of the executive through legislation, and the forms of accountability which attend our system of responsible government – stand against the expansion of judicial review on reasonableness grounds to powers of the type presently under consideration. To that end, the NSW Attorney advances the following propositions.

5. *First,* as Alfred Deakin observed, as Attorney-General, the executive power of the Commonwealth, including its non-statutory executive powers, must be "deduced from the Constitution as a whole"; see Brazil and Mitchell (eds) Opinions of Attorneys-General of the Commonwealth of Australia, Vol 1: 1901-14 (1981) at 131; see also Plaintiff M68/2015 v Minister for Immigration and Border Protection (2016) 257 CLR 42 at [129] per Gageler J. The non-statutory executive power in view in this case is an executive function incidental to the administration of an Act.

6. *Second,* the question in this case is best addressed with particularity: the question for this Court is whether steps taken by departmental officers ancillary to the exercise (or non-exercise) of a specific statutory power conferred on a responsible minister are amenable to review on the ground of unreasonableness. The principles applicable to the review of a particular type of non-statutory executive power are unlikely to be readily transposable outside of that specific context.

7. *Third,* judicial review, being constitutional in its nature, should not be understood as being available to frustrate the operation of the Constitution. The nature and scope of judicial review of the non-statutory executive power under consideration in this case must be calibrated by reference to Parliament's power to control the executive by legislation (and thus to make the law which is enforced by way of judicial review)

and by reference to the executive's constitutional function – namely, to administer the government for the welfare of the people. Seen in this light, the question in this case is not only one of 'interests' and 'potential rights'; the vindication of such is not the only, or even primary, purpose that judicial review serves. "The scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise": Attorney-General (NSW) v Quin (1990) 170 CLR 1 (**Quin**) at 36 per Brennan J.

8. *Fourth*, the primary purpose that judicial review serves is the maintenance of the rule of law. The rule of law is a contextually-sensitive notion, to be understood in Australia in light of the Constitution and its structure, the principles and practices of responsible government, and Anglo-Australian constitutional history. At the heart of the Anglo-Australian tradition of the rule of law is the subjection of executive power to parliamentary power, a power understood as being directed, in the absence of a contrary intention, to the preservation of the common law.

9. *Fifth*, it is the purpose just identified to which the concept of 'law and reason' is addressed. That concept supports an understanding of reasonableness which ties the imposition of a requirement of reasonableness to parliamentary control of the executive through legislation. To rely on the concept of 'law and reason' to justify subjecting the exercises of the non-statutory executive power at issue in this case to a condition of reasonableness would represent a substantial development of the common law, and one which would sit ill-at-ease with Anglo-Australian constitutional history. Taking that step might also be thought to sit uneasily with the Australian understanding of the proper bounds of judicial review – for to take that step would involve judicial creation of legal standards rather than judicial identification and enforcement of the limits of a power conferred by Parliament.

10. *Sixth*, in light of the preceding two points, the question of what is necessary to secure the 'rule of law' through judicial review involves consideration of the relationship of non-statutory power to statutory power. Statutory power, with some presently irrelevant exceptions, governs and enables the exercise of non-statutory power by producing the conditions for its operation and informing the controls which it is constitutionally appropriate to impose. That is so even in circumstances such as the present, where the non-statutory power does not have a source in statute.

11. *Seventh*, the statutory power presently at issue is properly read as reflecting a parliamentary intention to impose only political constraints upon the issue of whether the Minister should consider the exercise of the personal, non-compellable power conferred by s 351(1) of the Migration Act. In our system of responsible government, political constraints should not be understood as constitutionally second-class; they are essential to the traditional conceptions which underpin the Constitution.

12. *Eighth*, in the circumstances just identified it is not constitutionally appropriate to interpose between the Minister and the department a requirement that the department act reasonably in carrying out functions in accordance with Guidelines issued by the Minister. Parliament did not intend to create 'interests' or 'rights' that are capable of enforcement through judicial review on this ground, and absent statutory force, executive power of the kind at hand in this case cannot create such 'interests' or 'rights'.

13. *Ninth*, and finally, as the respondents indicate at **DCM20 RS** [17], different rules may apply in this regard to the exercise of some of the ancient prerogatives. The NSW Attorney expresses no view on that issue, noting simply that the exercise of the ancient prerogatives has been at the heart of disputes about the relationship between Parliament and the executive and so raise very different constitutional questions to the one that arises in the present context.

The nature of the power

14. It may be accepted that the amenability of a power to review turns on its nature and subject-matter, as opposed to its source: Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (**CCSU**) at 410 per Lord Scarman.

15. The nature of the non-statutory executive power at issue in this case, being the working of departmental officers under Ministerial Guidelines, was described in S10/2011 v Minister for Immigration (2012) 246 CLR 636 (**S10**) by French CJ and Kiefel J at [51]. Their Honours described the power, "for the purposes of s 61 of the Constitution, as an executive function incidental to the administration of the Act and thus within that aspect of the executive power which 'extends to the execution and maintenance ... of the laws of the Commonwealth.'".

16. The power concerns, under s 61 of the Constitution, "the doing of all things which are necessary or reasonably incidental to the execution and maintenance of a valid law of the Commonwealth once that law has taken effect" and "the administration of departments of State under s 64 of the Constitution": Williams v Commonwealth (2012) 248 CLR 156 (**Williams**) at [33]-[34] per French CJ.

17. The exercise of the power facilitates what Sir Gerard Brennan, following Lord Denning, described as the "administrative machinery of government": See "The Anatomy of an Administrative Decision" (1980) 9(1) Sydney Law Review 1 at 10, quoting Lord Denning, The Discipline of Law (1979) at 83. It enables the operation of what Gageler J described in Comcare v Banerji (2019) 267 CLR 373 at [67] as the "human machinery to implement the exercise of executive power constitutionally vested in the Crown". That machinery operates "against the background of the inherent political accountability of Ministers for the administration of their departments to the House of Representatives and to the Senate".

18. In his work The Constitution of the Commonwealth of Australia (1902) at 212, W H Moore referred to powers enabling the "stewardship" or "management" of the business of government, and which derive from and support "the organization of the Government", this being one of the "very type of matters which are not under the continual direction of organic laws, but are freely organized as utility has suggested or may suggest within the ultimate bounds of law"; see also Pape v Federal Commissioner of Taxation (2009) 238 CLR 1 at [123] per French CJ.

19. As Moore observed in the context of discussing such powers (at 214), "[i]t is not to be assumed that every power and function, because it is provided for in the Constitution, is necessarily cognizable in some way by the Courts … In many matters the legislature, and in many others the executive, will be the final interpreters of their duties." There is no inconsistency between that observation and a commitment to the rule of law, so long as it is recognised that judicial review is not the only means by which power is constrained and made accountable in our constitutional system: see Chief Justice Murray Gleeson, "Courts and the Rule of Law" (7 November 2001), The Rule of Law Series, Melbourne University.

20. On the authority of S10, the non-statutory power at issue in this case is one that is incidental to the administration of the Act. It is enlivened by the need to execute and maintain an enactment. The enactment in this case is s 351 of the Migration Act, read in the context of the statutory scheme of which it forms a part and the nature of the power which it confers on the responsible Minister.

21. The appellants may therefore be right that it "cannot be said" that "Departmental assessments under the Guidelines … have no relationship at all to the laws of the Commonwealth" (**Davis AS** [26]), and that the Guidelines "derive their character from s 351(3)" (**Davis AS** [27]) or, more properly, s 351 read as a whole. However, that is not a point that assists the appellants.

Section 351 of the Migration Act

22. Section 351(1) of the Migration Act enables the responsible Minister, if he or she "thinks that it is in the public interest to do so", to "substitute for a decision of the Tribunal under section 349 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." Section 349 of the Migration Act confers upon the Administrative Appeals Tribunal powers of review in respect of decisions that are reviewable under Part 5 of the Migration Act.

23. Section 351(1) is a personal power (sub-s(3)). It is also a non-compellable power: "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" (sub-s (7)). The power, being a "dispensing provision", has a "distinctive function in its legislative scheme", and stands "apart from the scheme of tightly controlled powers and discretions" for the grant of visas: S10 at [30] per French CJ and Kiefel J.

24. Dispensing provisions are powers of "ministerial judgment" and "require the Minister to be personally accountable to the Parliament for decisions to grant visas made under them": S10 at [30]. The requirement of personal accountability to Parliament is set out in s 351(4), which requires that the Minister lay before each House of Parliament a statement setting out the decision of the Tribunal, the substituted decision of the Minister, and the reasons for the Minister's decision. The personal accountability mechanism in s 351(4) attaches to a positive decision to

exercise the power. Conversely, s 351(7) reflects Parliament's choice not to impose legal controls on the Minister in the consideration of requests for the exercise of the power.

The Minister's Guidelines

25. The Minister's Guidelines of 2016 were made in the absence of any legal control imposed by Parliament on the circumstances in which he or she would be required to consider a request to exercise s 351(1). That is, s 351(7) forms part of the legal context in which the character and effect of those Guidelines fall to be ascertained.

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26. In those circumstances, the Minister is under no legal duty or compulsion by Parliament to consider the exercise of the power. This is an aspect of the personal power that Parliament has conferred. So, "[i]f, on ministerial instructions, certain classes of request or case are not even to be submitted to him or her for consideration, the position in law is unchanged": S10 at [50] per French CJ and Kiefel J. Indeed, on that reasoning, the Minister might instruct the Department to *never* submit a request to him or her for consideration.

27. No 'delegation' of the Minister's personal statutory power has taken place by virtue
20 of the Guidelines. (See **Davis RS** [10].) The statutory power was not exercised. The Minister's Guidelines were themselves a form of non-statutory executive power incidental to the execution and maintenance of s 351. The Guidelines "did not have the force of law": **FC** at [14] per Kenny J. In that regard, the NSW Attorney submits that Griffiths and Charlesworth JJ (at **FC** [87] and [270]) cannot be right that the interest is one that derives from a statutory duty arising out of s 351 that requires the request to be brought to the Minister's attention and which may be enforceable through a mandamus. The flaw is apparent from Charlesworth J's understanding that Ministerial Guidelines impose, presumably by force of s 61 of the Constitution, "an exception to the statutory requirement that the existence of a request be brought to
30 the Minister's attention": **FC** at [270]. (See also **DCM20 RS** [20].)

28. Indeed, there is a fundamental constitutional reason that the Guidelines could not have the effect described by Charlesworth J: a Minister could not, through Guidelines issued in an exercise of non-statutory executive power, "prescribe or alter the law to be administered by Courts of law": The Zamora [1916] 2 AC 77 at 90; R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)

[2009] AC 453 at [44]; Corporate Affairs Commission v Bradley [1974] 1 NSWLR 391 at 403D per Hutley JA. Besanko J (at **FC** [52]) and Mortimer J (at **FC** [121]-[122]) were correct to express reservations.

29. Because the Ministerial Guidelines did not have the force of law, and were not capable of modifying 'interests' created by s 351, it must follow that the Guidelines are consistent with any 'interests' embodied in s 351. In other words, any 'interest' created by s 351 prior to the engagement of that power is one that is contingent upon the preferences of the Minister, who, consistently with s 64 of the Constitution, is permitted to act through his or her agents to establish the categories of persons whose requests for the exercise of s 351 are not to be referred.

The power is not amenable to judicial review

30. The appellants imply that judicial review of non-statutory executive powers of the type at issue here must be susceptible to review under s 75(v) of the Constitution in order to secure 'the rule of law': **Davis AS** [37]-[38]. They further claim that there is a requirement to exercise non-statutory executive powers by reference to the 'rules of reason and justice', by analogy to the rules of common law that apply to inform the construction of statutory powers conferred upon the executive by Parliament: **Davis AS** [39]-[47]. These propositions found favour in the Full Court, which accepted, to varying degrees, the reasoning of Robertson J in Jabbour v Secretary, Department of Home Affairs (2019) 269 FCR 438 (**Jabbour**): **FC** [3], [39], [51], [56]-[68], [118], [166]. The appellants rely on Jabbour: see **Davis AS** [19].

31. Neither proposition should be accepted by this Court; Jabbour is wrong. The use of s 75(v) in the way proposed by the appellants would frustrate the operation of government, and treats s 61 as though it defines, and does not simply describe, the executive power: Davis v Commonwealth (1988) 166 CLR 79 at 92 per Mason CJ, Deane and Gaudron JJ. And, as submitted below, the concept of 'law and reason', when placed in its proper historical context, does not support the imposition of a condition of reasonableness on the exercise of the species of non-statutory executive power at hand. The NSW Attorney submits that the appropriate form of control in the instant case – appropriate in the sense of consistent with our system of responsible government – is exercised by the supervisory authority a Minister has over departmental officers.

32. In developing the submissions as to why this Court should reject the two propositions identified above, it is convenient to organise the submissions around three themes: (i) the constitutional requirement that a responsible executive be able to administer the government; (ii) the history of the concept of 'law and reason' and the relevance of that history to an understanding of reasonableness in contemporary Australian law; and (iii) the need to understand the 'rule of law' in a contextually-sensitive way.

The duty of a responsible executive to administer the government

33. The first proposition identified at [30] above – that the non-statutory executive power in view in this case must be susceptible to judicial review under s 75(v) in order to secure the rule of law – takes insufficient account of two related constitutional considerations: the sufficiency and appropriateness of ministerial responsibility as a form of accountability for that form of power; and the constitutional function of the executive branch of government.

34. Beginning with ministerial responsibility; as Richard Mulgan has observed, the existence of individual ministerial responsibility is, practically, one of "personal responsibility" – it is a practical question of whether the action was "beyond the personal control or influence of the minister": 'On Ministerial Resignations (or the Lack Thereof)', (2002) 61 Australian Journal of Public Administration 121 at 123. However, when a Minister has "contributed to the outcome" – for example, by "setting a general policy direction" – it is possible to say that the Minister has exercised personal responsibility for the actions of his or her subordinates and the principles of individual ministerial responsibility are properly engaged: ibid at 123. (See further **DCM20 RS** [18]-[25].)

35. This case is not akin to the situation described by Bowen CJ in Minister of Arts, Heritage and Environment v Peko-Wallsend Ltd (1987) 15 FCR 274 (**Peko-Wallsend FC**) at 277. It is not a case where "ministerial responsibility is not able to reach down far enough to supervise the detailed dealings of government with members of the public." Nor is judicial oversight a superordinate principle that operates to displace other aspects of the constitutional structure. As Bowen CJ recognised at 278, "the question is how far the courts should properly go."

36. To subject departmental officers to legal scrutiny in the form of judicial review, for carrying out instructions from their Minister, in circumstances where Parliament has

seen fit not to impose legal controls anterior to the decision to consider the exercise of the power, would treat this form of executive power as though it needs to be constrained because it is capable of affecting legally cognizable interests. Setting prerogatives aside, this is not something such power can do in the absence of statutory backing.

37. Reinforcing that view of the fundamental but relative place of judicial review in our constitutional arrangements is consideration of the constitutional role of the executive: "to execute laws [and] … to effectively administer the whole Government"; see the opinion of Alfred Deakin referred to above in Brazil and Mitchell (eds) Opinions of Attorneys-General of the Commonwealth of Australia, Vol 1: 1901-14 (1981) at 131.

38. In this regard, it may be noted that Bowen CJ's comments in Peko-Wallsend FC appeared to be addressing the Administrative Decisions (Judicial Review) Act 1977 (Cth) (**ADJR Act**). The ADJR Act was enacted with regard to the workability of government – indeed, to the constitutional function of the executive, to effectively govern for the welfare of the people. It was enacted with the understanding that it was "essential to achieve a balance between the desirability of achieving justice to the individual and the preservation of the efficiency of the administrative process": Commonwealth Administrative Review Committee (1971) at [12].

39. While comments which it seems were principally directed to a particular statute must be treated accordingly, the NSW Attorney submits that consideration of the constitutional function of the executive, the efficiency of administrative process, and the workability of government is entirely appropriate when considering the proper scope of judicial review. It is submitted that the workings of government would be improperly hindered if actions incidental to the execution and maintenance of an Act, which are deliberately not subjected to statutory control, can be reviewed on the ground of reasonableness. "The law of judicial review cannot conflict with recognition of the legal effectiveness of the due exercise of power by the other branches of government": Quin at 38 per Brennan J.

40. If the workability of government cannot be maintained, then the Constitution, and laws made by Parliament under it, cannot be properly executed or maintained. The words 'execution and maintenance', as words of description, necessarily describe the

capacity of the executive government to effectively perform actions of execution and maintenance. The constitutional values associated with judicial review should not be invoked in a way that frustrates the Constitution's execution and maintenance.

41. While the administration of the Migration Act is ultimately a matter for the Commonwealth, it is submitted that subjecting actions taken by departmental officers under the Guidelines to judicial review on the ground of unreasonableness could substantially hinder the proper performance of the executive's constitutional functions in this domain. The sufficiency of ministerial responsibility as an accountability mechanism in the instant case, considered together with the nature of the power that is being exercised, counts against that expansion of the domain of judicial review.

'Law and Reason'

42. In Jabbour at [99], Robertson J held that the "key" to understanding why non-statutory powers can be judicially reviewed on the ground of reasonableness "is to be found in s 75(v) of the Constitution". To similar effect, at **FC** [28] Kenny J held that "[t]he substance of the proposition that s 75(v) ensures that an unlawful exercise of executive power by an officer of the Commonwealth is capable of limitation, whether its source is constitutional, statutory or non-statutory, has been accepted for many years".

43. In the abstract, the correctness of these propositions cannot be doubted. Section 75(v) confers on this Court the jurisdiction and power to ensure that all public power is exercised in conformity with the law, including constitutional law: Victoria v Commonwealth (1975) 134 CLR 338 at 380-381 per Gibbs J. But s 75(v) does not itself provide the answer to the question of the law that is to apply to constrain the exercise of non-statutory executive power by departmental officers in the execution and maintenance of the laws of the Commonwealth. Judicial review ensures that public power is exercised in conformity with law. For there to be judicial review, there must be 'law'. The question is: "what is the law?": Quin at 37 per Brennan J. (See **DCM20 RS** [29].)

44. The Full Court found that answer, broadly, in what Kenny J described (at **FC** [30]) as the "rule of reason" embedded in the common law. Kenny J relied in this regard on Rooke's Case (1597) 5 Co Rep 99b at 100 (**Rooke's Case**). At **FC** [35], her Honour

considered Rooke's Case 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".

45. In the NSW Attorney's submission, that is not what is established by Rooke's Case. Indeed, close attention to the legal context in which Rooke's Case was decided shows that it, like other cases of the period, was addressed to the question of which entity possessed the sovereign law-making power; the answer, as a matter of English constitutional law, ultimately proved to be Parliament. This line of authority is not readily transposable to the proper bounds of judicial control of the power presently under consideration. As shown below, the better view of Rooke's Case is that it and the cases that follow it illustrate the difficulty in drawing useful propositions out of the concept of 'law and reason' without giving specific attention to the way power is arranged in Australia's constitutional system.

Rooke's Case and the struggle over 'law and reason'

46. The rule in Rooke's Case is: "Statutory power conferred for public purposes is conferred as it were upon trust": R v Tower Hamlets London Borough Council, Ex p Chetnik Developments Ltd [1988] AC 858 at 872, referring to Wade's Administrative Law (1982) 355-357. The case dealt with a statutory discretion. As Coke LJ observed in Rooke's Case at 100, "the said statutes require equality". It does not stand for the general proposition adverted to by Kenny J.

47. Further, Rooke's Case needs to be understood as an early expression of the principle ultimately endorsed by Coke LJ in the Case of Proclamations (1610) 12 Co Rep 74 (**Case of Proclamations**). In that case, Coke's "advised answer", given according to "law and reason" – that is, given with consideration of the existing positive law and the (then unsettled) principles which he considered should undergird the relationship between the King and the Commons – was that the King has no prerogative except that which the law of the land allows him and that the King had no power to change the common law without Parliament.

48. 'Law and reason' was more generally a constitutional concept applied in the course of the struggle that was then emerging between Commons and Crown; what Coke LJ described in the Case of Proclamations at 74 as "the answer of the King to the

Commons"; see also Phillip Hamburger, Law and Judicial Duty (Harvard 2008) (**Hamburger**) at 201-202. The sovereign law-maker – the identity of which was being contested – was able to determine what was within reason, but subordinate bodies were not: see ibid 184-185, 209-210, 238, 330, 332, 396-397.

49. So, at one stage in that contest, notoriously, 'law and reason' was invoked to hold that statutes could not constrain the King's prerogative: R v Hampden (Case of Ship-Money) (1637) 3 St Tr 826 at 1195, 1160, 1220, 1249-1250, 1264.

50. As an aspect of that contest, the statutes of Parliament came to be regarded by its supporters as declaring and expounding – and ultimately constituting – the "reason of the kingdom" as embodied in the common law: Jeffrey Goldsworthy, The Sovereignty of Parliament: History and Philosophy (Oxford 2001) (**Goldsworthy**) at 109-111. At the same time, what is best understood as a strong rule of 'equitable construction' was applied to "statutes … made against law and right, which those who made them [i.e. Parliament] perceiving, would not put them in execution": Bonham's Case (1610) 8 Co Rep 107a at 118a; see also Hamburger at Appendix I.

51. With Parliament's ultimate victory and the resulting constitutional settlement came the power to decide the law: Goldsworthy at 112-114, 188-192. But the exercise of that legislative power was continued to be assumed to preserve the requirement of reason (although it could also abrogate it). So, as Blackstone explained in the Commentaries on the Laws of England Vol 1 (1765) at 91:

> …where some collateral matter arises out of the general words and happens to be unreasonable; there the Judges are in decency to conclude that this consequence was not foreseen by the Parliament, and therefore they are at liberty to expound the statute by equity, and only quad hoc disregard it.

52. But the King did not unilaterally possess such power; he needed to be *given* it. So, as was observed by Lord Roskill in CCSU at 417 (albeit in drawing an analogy to certain prerogative powers):

> the right of the executive to do a lawful act affecting the rights of the citizen, whether adversely or beneficially, is founded upon the giving to the executive of a power enabling it to do that act. The giving of such a power usually carries with it legal sanctions to enable that power if necessary to be enforced by the courts. In most cases that power is derived from statute…

'Law and reason' in Australia

53. Put in context, and considered from the perspective of Australia's own constitutional context, the invocation of the concept of 'law and reason' in Jabbour and by the Full Court (and the appellants) is misconceived.

54. To the extent that concept is of relevance to our constitutional arrangements, its significance goes to the fact that, in Australia, "[t]he framers of the Constitution accepted, in accordance with prevailing English thinking, that the citizen's rights were best left to the protection of the common law in association with the doctrine of parliamentary supremacy": Australian Capital Television v Commonwealth (1992) 177 CLR 106 at 136 per Mason CJ; Strickland (A Pseudonym) v Commonwealth Director of Public Prosecutions (2018) 266 CLR 325 at [101] per Kiefel CJ, Bell and Nettle JJ.

55. Although it is clear that Australia's federal parliament is not 'sovereign' in the sense that its powers are constitutionally unconstrained, Australia's constitutional system is one which gives effect to "considerations as to the supremacy of Parliament which underlie the doctrine of responsible government", such doctrine anticipating a "relationship between the Executive and the Parliament" in which there is to be preserved the "dominant position of the Parliament": Williams at [581] per Kiefel J. This explains why Parliament has the legislative power to alter or abrogate the requirement of reasonableness: see below at **NSW** [78].

56. The true significance of 'law and reason' in our constitutional context, limited in its application to the kind of powers presently under consideration, being powers activated by and incidental to the execution and maintenance of a statute, is submitted to be as follows.

57. Parliament creates enforceable rights and liabilities, and commands the executive as to how they are to be enforced. The power conferred by the command in the form of law carries with it an assumption as to reason; reason is not a free-floating constraint on power; it is tied to the power conferred by law. The assumption arises out of what the common law assumes are Parliament's motivations. The courts ensure that Parliament's commands are enforced as a matter of law and reason. And in interpreting those commands the requirements of 'law and reason' will be ascertained by the courts through the rules of construction and of constitutional

validity in application of its role as the guardian of the Constitution and of the common law. In that way, as has long been the case, the common law will often (but not invariably) inform the substance of Parliament's command.

58. In other words, the requirements of 'law and reason' apply as an aspect of Parliament's power to harness the executive in the execution of Parliament's goals. Application of those requirements by the courts reflects an assumption about *how* Parliament intends its goals to be achieved when it invests the power of the law into the executive. The application of the techniques of statutory construction are directed to that end. This is why it is not generally 'incongruous', as Robertson J reasoned in Jabbour at [101], "to have in the common law a principle of statutory interpretation implying reasonableness as a condition of the exercise of a discretionary power conferred by statute, but not to have in the common law any such principle existing outside statutory interpretation."

59. It is also why Robertson J was incorrect in Jabbour to say that the 'incongruity' would produce "islands of power immune from supervision and restraint" or "distorted positions" (citations omitted). So to reason treats the executive power here being exercised – as one that must of its nature leave unchanged the appellants' position in law – as if it were a statutory power exercised in the course of the execution of a statutory scheme. It is not a power of that kind, because its exercise leaves the position of the appellants unchanged in law.

60. On that view, it is also misconceived to apply the requirements of 'law and reason' to the Minister's Guidelines. The Guidelines are not law.

61. Put differently, the analysis in Jabbour – as endorsed by the Full Court – proceeds on the assumption that all public power is essentially the same and must be subjected to the same kind of control. But, as the NSW Attorney has endeavoured to explain, all public power is *not* the same. The word 'power', like 'jurisdiction', "is a word of many meanings", and can be "'elusive', 'uncertain' and 'slippery'": cf PT Bayan Resources v BCBC Singapore Pte Ltd (2015) 258 CLR 1 at [38] per French CJ, Kiefel, Bell, Gageler and Gordon JJ. (See **DCM20 RS** [28].)

62. The executive power at issue in this case cannot be understood otherwise than by reference to the subordinate nature of departmental officers as agents of the Minister and vehicles of the Minister's will. The powers exercised by departmental officers "derive their character from what the Minister personally has or has not done": Minister for Immigration v SZSSJ (2016) 259 CLR 180 at [54].

63. That is how powers of this nature are generally understood in the judicial review of statutory powers by a Minister. So, when a personal power is exercised by the Minister with the assistance of departmental staff, the actions of those staff will inform whether the power was exercised unreasonably: Carrascalao v Minister for Immigration and Border Protection (2017) 252 FCR 352 at [61(a)], [145]. This example may be comprehended as an expression of the analysis in Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 (**Peko-Wallsend**) at 37 per Mason J.

64. The analysis in Peko-Wallsend reflects the classic exposition of the legal dimension of individual ministerial responsibility by Dicey. He observed that a Minister has "legal responsibility … for every act of the Crown in which he" or she "takes part": An Introduction to the Study of the Law of the Constitution (1885, 1979 reprint) at 325. This follows from the proposition that for an Act to have legal effect there must be a Minister "who will be responsible for it".

65. Although that principle is not strictly engaged in these circumstances – there is, by Parliament's design, no discrete requirement of 'law' being executed and for which the Minister must take legal responsibility – it speaks to the difficulty in conceiving of the actions undertaken by departmental staff as something that are separately constrained through judicial review. The Minister is the accountable fountainhead of the power that is being exercised in execution and maintenance of the statute.

Implications from the rule of law

66. Against the propositions noted at [30] above, the NSW Attorney would say more about the concept of the 'rule of law' as understood in Australia and the relevance of that concept to the ascertainment by this Court of the applicable legal constraints to the non-statutory powers presently at issue.

67. In enforcing conditions imposed on the exercise of executive power, the minimum entrenched provision of judicial review in s 75(v) of the Constitution "secures a basic element of the rule of law": Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476 (**Plaintiff S157**) at [5].

68. The 'rule of law' – one of the traditional conceptions underpinning Australia's constitutional framework, as Dixon J observed in Australian Communist Party v Commonwealth (1951) 83 CLR 1 at 163 – concerns the "relationship of the executive to the law … [it] provides that the executive may do nothing without clear legal authority first permitting its actions": Adam Tomkins, Public Law (2003) at 78, quoted by Duncan Kerr and George Williams, 'Review of Executive Action and the Rule of Law under the Australian Constitution' (2003) 14 Public Law Review 219 at 228. It requires, as Kerr and Williams went on to observe, that "decision-makers exercising public power are constrained by law."

69. As the late Joseph Raz observed, the rule of law "means literally what it says … that people should obey the law and be ruled by it", and "that the government shall be ruled by the law and subject to it." But that requirement necessarily "varies with the nature of the power": "The Rule of Law and its Virtue" (1977) 93 Law Quarterly Review 195 at 209-212, 219.

70. Care must be taken before the rule of law is deployed to identify a constraint on power. As Edelman J observed in Palmer v Western Australia (2021) 95 ALJR 868 (**Palmer**) at [24], when the 'rule of law' is invoked as having some operation on the Constitution it

> is necessary (i) to identify precisely the aspect of the highly contested and abstract notion of the rule of law that is relied upon, and (ii) to identify why that aspect is necessary for the meaning or effective operation of the Constitution or its provisions. The identification of these matters may ultimately reveal that assertions that the aspect relied upon is part of the "rule of law" are, in this respect, no more than magniloquence.

71. As Charlesworth J noted at **FC** [167], Gleeson CJ identified in Plaintiff S157 at [6] what may be fairly characterised as two aspects of the court's "constitutional function" of securing the rule of law in exercise of s 75(v). The first is the protection of the subject against any violation of the Constitution, and the second is the protection of the subject against any law made under the Constitution.

72. Charlesworth J reasoned at **FC** [167]-[169] that Gleeson CJ's observation in Plaintiff S157 at [6] supports the proposition that judicial review of non-statutory executive power on the reasonableness ground would serve the "constitutional function of protecting the subject against any violation of the Constitution." That passage should be taken, however, to refer to what was described by Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [104] as a dimension of the court's constitutional authority to ensure that executive actions are taken under "propounded laws [which] are constitutionally valid"; cf Palmer at [24] per Edelman J. M32/2022

Statutory construction and the rule of law

73. Consistently with the rule of law, and within the limits of its legislative power, "Parliament may enact the law to which officers of the Commonwealth must conform … Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed": Plaintiff S157 at [5] per Gleeson CJ.

74. As submitted at **NSW** [57]-[58], the role of the courts is to enforce the duty, power or jurisdiction as created and defined with regard to the assumptions embedded in the common law about the relationship between Parliament and the executive. In that regard, embodied in the common law are assumptions about what it is Parliament intends to allow the executive to do, and how the executive is to do it, when the executive is harnessed to execute statutory powers.

75. As Lisa Burton Crawford has observed, "the purpose of judicial review is to enforce the limits on executive power expressed or implied in the empowering statute, no less and no more": "Immaterial Errors, Jurisdictional Errors and the Presumptive Limits of Executive Power", (2019) 30 Public Law Review 281 at 282. In that way, "the rule of law affirms parliament's supremacy while at the same time denying it sovereignty over the Constitution": Keith Mason, "The Rule of Law" in Paul Finn (ed), Essays on Law and Government Vol 1: Principles and Values (1995) at 123.

76. In that regard, the requirement of reasonableness – as a ground for jurisdictional error capable of correction under s 75(v) of the Constitution – is understood to be an interpretative implication arising out of the "framework of rationality imposed by the statute"; that is, a "limitation imputed to the legislature on the basis of which courts can say that parliament never intended to authorise that kind of decision": Minister

for Immigration v Li (2013) 249 CLR 332 (**Li**) at [28] per French CJ; see also [63] per Hayne, Kiefel and Bell JJ and [88] per Gageler J.

77. As Gageler J described the implication in Li at [90], it is a "principle of construction that such decision-making authority as is conferred by statute must be exercised according to law and to reason within limits set by the subject-matter, scope and purposes of the statute".

78. This description is consistent with the analysis that has been offered by the NSW Attorney. Reasonableness is a means of affirming Parliament's supremacy over the executive under the rule of law, which is why Parliament may alter or abrogate the requirement: Minister for Immigration and Border Protection v Singh (2014) 231 FCR 437 at [43]-[44].

79. In this way, common law principles of construction "reflect the operation of the constitutional structure": S10 at [97] per Gummow, Hayne, Crennan and Bell JJ, which, consistently with the preceding analysis, is submitted by the NSW Attorney to refer to the structural relationship the Constitution establishes between Parliament and the executive government as embodied in the concept of responsible government. As has been submitted, the common law principles of construction are embedded in, and arose out of, the discrete position Parliament has historically occupied as the dominant entity in forms of government arising out of the Westminster system.

80. It is as such mistaken for the appellants to object at **Davis AS** [39]-[41] that because reasonableness is 'deeply rooted' in the common law, and is derived from the 'rules of reason and justice', it follows that "any debate about whether the limit is regarded as a common law duty or an implication from statute 'proceeds upon a false dichotomy and is unproductive": citing S10 at [97].

81. Those observations in S10 were relevantly made by the Court in the course of considering the "principles and presumptions of statutory construction": [97]. In other words, the Court in S10 was seeking to avoid having to locate in common law or statute the ultimate source of the constraints that apply, as a matter of statutory construction, to the exercise by the executive of a statutory power.

82. The reasoning of the Court in S10 is therefore entirely consistent with the analysis and explanation that has been given by the NSW Attorney of the operation of the requirement of reasonableness as an implication of statutory construction in this context. They are not observations that would lead this Court to abandon the principled basis for the imposition of the requirement of reasonableness, being to constrain the carrying out by the executive of Parliament's commands and thereby refuse to the executive a means by which a statutory capacity to interfere with enforceable rights and interests can become unmoored from its foundation in law.

83. Considered in that light, in understanding the content of the non-statutory executive power at hand, the NSW Attorney submits that this Court would have regard to the fact that, by design, Parliament has chosen not to constrain, in 'law and reason', the Minister in his or her preferences as to whether to consider requests for the exercise of the power conferred upon the Minister by s 351.

84. Parliament having expressed no rule as to the internal arrangements between a responsible Minister and his or her department, and having vested in the appellants no enforceable rights, and having rendered any interests of the appellants as subject to the personal preferences of the Minister in exercise of non-statutory executive power, this is no occasion, it is submitted, to intervene in that field of non-statutory action through judicial review.

Part IV: Estimated Length of Oral Argument

85. It is estimated that oral argument on behalf of the NSW Attorney will take 15 minutes.

Dated 15 August 2022

M G Sexton SC SG
Ph: (02) 8688 5502
Michael.Sexton@justice.nsw.gov.au

M W R Adams
Ph: (02) 8688 5504
Michael.Adams@justice.nsw.gov.au

ANNEXURE

Constitutional provisions, statutes and statutory instruments referred to in the intervener's submissions

	Provision	Version
1.	Constitution of Australia, ss 61, 64, 75(v)	Version currently in force
2.	Administrative Decisions (Judicial Review) Act 1977 (Cth)	Version currently in force
3.	Migration Act 1958 (Cth) ss 349, 351	Compilation No 199 (17 April 2019 to 30 June 2019)