IN THE HIGH COURT OF AUSTRALIA No S244 of 2017

SYDNEY REGISTRY

BETWEEN:

**MINISTER FOR IMMIGRATION AND BORDER PROTECTION**

Appellant

and

**SZVFW**

First respondent

**SZVFX**

Second respondent

**ADMINISTRATIVE APPEALS TRIBUNAL**

Third respondent



# FIRST AND SECOND RESPONDENTS' SUBMISSIONS

## PART I CERTIFICATION

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

## PART II ISSUES ON APPEAL

2. The issue in this appeal is whether the Full Court of the Federal Court (**Full Court**) erred in requiring that the appellant identify error in the reasoning on the part of the primary judge in an appeal against the primary judge's conclusion that the decision of the then Refugee Review Tribunal (**Tribunal**) was legally unreasonable.[1]

3. There is no dispute between the parties that:

   a. *first*, there can only legally be one correct answer on the issue of legal unreasonableness, that is, a decision either is, or is not, legally unreasonable; and

   b. *secondly*, the determination that a decision is or is not legally unreasonable is not an exercise of discretion, nor should it be treated as such for the purposes of appellate review.

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[1] The Full Court decision is reported at (2017) FCAFC 33 and has the medium neutral citation [2017] FCAFC 33 (**FC**).

4. The appellant at [2] of his submissions (**AS**) state the issue on a wrong premise. The Full Court did not find that it must be satisfied of an error in the nature of that required by *House v The King* (1936) 55 CLR 499 ***(House v The King)***.

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

5. The first and second respondents (**respondents**) do not consider that any notice is required to be given under s78B of the *Judiciary Act 1903 (Cth)*.

## PART IV MATERIAL FACTS

6. The account of the facts in Part V of AS is not disputed. The following facts are also relevant.

### (a) Factual Background

7. The applicants were not represented nor did they have an authorised representative at the time when they made their application for review to the Tribunal.

8. The letter dated 15 August 2014 from the Tribunal sent to the respondents inviting them to a hearing, was sent by ordinary post, not by registered mail and was not tracked in any way.[2]

9. The Tribunal hearing was scheduled to take place on 10 September 2014, but the respondents did not attend.

10. The Tribunal made its decision on 12 September 2014.

11. There is no evidence that any inquiries were made, or consideration given, as to the reason for the respondents' non-attendance between 10 and 12 September 2014.

12. There is nothing in the reasons of the Tribunal to indicate that it considered whether or not the respondents had received the hearing invitation, nor whether it considered whether or not it should take any steps to contact the respondents. The Tribunal decided to make its decision on review without taking any further action to enable the applicants to appear before it (Tribunal decision (**TD**) at [17]).

13. Before the Federal Circuit Court and the Full Court the case was conducted on the basis that the respondents were absent from Sydney at the relevant time and, as at the date of

[2] *SZVFW v Minister for Immigration* [2016] FCCA 2083 (**PJ**) at [13], [76].

the Tribunal hearing, they were unaware of the contents of the invitation to attend the Tribunal hearing.[3]

14. The core reasoning of the Tribunal in rejecting the respondents claim for protection was reflected in the following extract:[4]

> *"...On the evidence provided, the Tribunal is not satisfied about significant aspects of the applicants' circumstances including: further detail of the process by which the land was resumed and compensation offered; further detail of the protests the applicants participated in including whether they were lawful or unlawful; further detail as to the detention of [the husband] including whether he was charged with an offence; further detail of the surveillance that is claimed; and, further detail as to the harm feared by the applicants on their return to China. .... It follows that, on the information before it, the Tribunal is not satisfied that the applicants face a real chance of persecution ...".*

15. As found by the Full Court, it is evident from this extract that the Tribunal considered that it needed further detail as to some key aspects of the respondents' claim for protection.[5]

**(b) Reasons of the primary judge**

16. The applicants were not represented before the primary judge.

17. The primary judge found that the evidence relied upon in support of the proposition that the hearing invitation was dispatched within three working days was not entirely satisfactory (reasons of the primary judge (2016) 311 FLR 459; [2016] FCCA 2083 (**PJ**) [51]). Ultimately, in the light of her Honour's finding as to legal unreasonableness, her Honour did not reach a conclusion as to whether or not she could be satisfied that the hearing invitation letter was dispatched on 15 August 2014 (PJ [52]) despite the absence of evidence from an appropriate Tribunal officer and having regard to the fact that the relevant form had not been completed in accordance with the printed instructions (PJ [50] – [51]). There is thus no determination of a court as to whether the requirements of s 441A(4) of the *Migration Act 1958* (Cth) (**the Act**) that the hearing invitation be dispatched by prepaid post within 3 working days have been satisfied.

18. The primary Judge concluded that the Tribunal exercised its power under s 426A of the Act in a manner that was legally unreasonable and may have denied the respondents procedural fairness (PJ [83]). Her Honour's reasoning was as follows:

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[3] FC [22] and [50].
[4] TD [19] – [20]. FC [10]-[11].
[5] FC [11].

a. the discretion under s 426A of the Act to make a decision on the review without taking any further action to allow or to enable the applicant to appear before the Tribunal must be exercised reasonably (PJ [62]);

b. there was no previous pattern of communication between the respondents and the Tribunal in this case (PJ [64] & [78]);

c. the fact that, by reason of a deeming provision, an applicant may be deemed to have received a hearing invitation provides the occasion for the exercise of a discretion under s 426A but does not determine how the discretion should be exercised (PJ [65]);

d. the bare fulfilment of statutory obligations in s 441A of the Act does not negate the need to have regard to the particular circumstances to determine whether further steps should have been taken for the Tribunal to exercise its discretion under s 426A of the Act reasonably (PJ [76]);

e. section 425 of the Act imposes an obligation upon the Tribunal to give an applicant a meaningful opportunity to hear and present arguments in support of his or her review application (PJ [67] relying upon *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18 (***Li***) at [61]);

f. the manner in which the Tribunal exercises the discretion in s 426A of the Act must not frustrate the obligation in s 425 (PJ [68]);

g. in the particular circumstances of this case, it was unreasonable for the Tribunal to exercise its discretion under s 426A of the Act without attempting to communicate with the respondents by using a method of communication that had been provided to it by the respondents (PJ [80] & [84]). The factors to which the primary judge had regard in reaching this conclusion were:

    i. in the online application to the Tribunal the respondents gave both a postal address and a specified email address under the heading *Correspondence Details* (PJ [73]);

    ii. in addition the first respondent provided a mobile telephone number in the review application form (PJ [74]);

    iii. this was not a case in which the Tribunal was able on the evidence before it to be satisfied not only that the respondents had been formally advised of the hearing but also that they were, in a practical sense, aware of the hearing date and time. In contrast to the situation in many other cases, here the hearing invitation was sent by ordinary and not registered post. There was no evidence of delivery of the hearing invitation or of any attempted subsequent email or telephone

communication with the respondents. The Tribunal could not track the hearing invitation letter. The Tribunal was unable to determine the fate of the hearing invitation on the assumption that it was properly dispatched by ordinary post (PJ [75] – [76]);

iv. the respondents did not have a migration agent or solicitor acting for them as their authorised recipient so the hearing invitation was not sent to any such authorised recipient (PJ [77]);

v. there was a relatively short time between the lodgment of the review application and the invitation to the Tribunal hearing (PJ [78]) and there was not a lengthy period of time in which the respondents did nothing (PJ [77]); and

vi. her Honour also had regard to the significance of the hearing invitation to the respondents. They were applicants for protection visas. Also, the respondents' attendance at a hearing could have made a difference to the outcome on review, consistent with the Tribunal's acknowledgement that there were significant aspects of the respondent's circumstances about which it could not be satisfied in the absence of a hearing (PJ [79]).

**(c) Decision of the Full Court**

19. The appellant's contentions before the Full Court as to the errors in the primary judge's analysis are set out at FC [28]. In summary, the appellant submitted that the primary judge had erred in the significance that her Honour gave to various factors and circumstances and in her analysis by reference to the case of *Kaur v Minister for Immigration and Border Protection* [2014] FCA 915; 236 FCR 393 (***Kaur***).

20. The Full Court identified that the appeal turned on whether the primary judge correctly understood and applied the principles determined in *Li, Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; 231 FCR 437 (***Singh***) & *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1 (***Stretton***) (FC [37]).

21. The Full Court then identified that in an appeal by way of rehearing appealable error (whether of fact or law) must be shown and an approach which "*simply invites the Full Court to consider the matter afresh and come to its own view*" is incorrect (FC [42] – [43]). The Full Court relied upon the judgment of Allsop J (as his Honour then was) in *Branir v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; 117 FCR 424 (***Branir***) at [21] that there is a need to show error on appeal, that is, that the decision of the trial judge was wrong and should be corrected (FC [41]).

22. The Full Court then made the observation that, here, the primary judge's finding that the Tribunal's decision under s 426A of the Act was unreasonable was "*fundamentally a decision which turned on her Honour's evaluative judgment*" (FC [44]). That is an observation about the nature of the analysis relied upon by the primary judge on the facts of this case.

23. The Full Court identified its role as being to assess the "*correctness*" of the primary judge's understanding and application of the principles as to legal reasonableness (FC [37]), and undertook that role. It did so having regard to its view that the primary judge's "*judgment on the legal unreasonableness ground was largely an evaluative one*" (FC [46]). However, the Full Court emphasised that it did not approach this task on the basis that her Honour's decision was a discretionary judgment (FC [46]) and made no reference to the cases discussed below at [52] to [53] in which appellate review is approached on the principles which apply to appellate review of discretionary judgments. Nor did the Full Court make any reference to *House v The King*. Thus, the Full Court manifestly did not approach its appellate task as if it were reviewing a discretionary judgment.

24. As to the question of demonstrating error in respect of the primary judge's conclusion on legal unreasonableness, the Full Court said that "*by broad analogy, helpful guidance*" could be obtained from well known authorities "*which emphasise the need for caution by an appellate court which is asked to disturb the outcome of a discretionary judgment, where evaluative issues are also necessarily involved*" (FC [45]). However, the Full Court reiterated "*lest there be any misunderstanding*" that their Honours were "*not suggesting that the primary judge's decision was a discretionary judgment*" (FC [46]).

25. The Full Court then considered "*each of the matters raised by the Minister in challenging this aspect of the primary judge's decision*" and found that none of the alleged errors were made out (FC [47] – [56]). In this analysis, the Full Court considered whether error was disclosed and where appropriate expressed its own conclusions as to the matters alleged to constitute error. By way of example, the Full Court found that there was no error in the finding that part of the circumstances of relevance to the assessment of legal unreasonableness was the fact that there was no evidence of any attempts to contact the respondents (FC [49]), the Full Court found that a "*one off event such as [the failure to attend an interview with the delegate] scarcely constitutes 'a pattern of conduct'*" (FC [51]), and the Full Court said that there was "*no explanation in the evidence as to why the respondents did not attend the interview before the delegate. We discern no appealable error in the weight accorded by the primary judge to the significance of the Tribunal's invitation at [79] of her Honor's reasons*" (FC [52]). The Full Court engaged in detail with

the appellant's contention that the primary judge fell into error in her Honour's reliance upon *Kaur* (FC [55]).

26. Contrary to AS [22] & [36], the Full Court did not conclude that an error had to be shown akin to that required to be established in appeals from discretionary judgments (nor, it would follow did any such error infect the Full Court's analysis, cf AS [37]). Rather, in a conventional approach, the Full Court identified the need for error to be shown, and ultimately considered for itself, and reached conclusions as to, each of the asserted errors in the primary judge's reasoning. The Full Court directly addressed and engaged with each contention by the appellant that the primary judge had given too much or too little weight to a particular factor or circumstance. Contrary to AS [27] there is nothing in the decision of the Full Court that is inconsistent with the statement of Allsop CJ in *Stretton* at [25].

27. There is no suggestion in the Full Court's reasoning at FC [47] – [57] that the Full Court approached such contentions as if the only possible basis upon which such a contention could succeed would be if the weight given by the primary judge really amounted to a failure by the primary judge to exercise jurisdiction at all (as was indicated as regards an appeal from an exercise of discretion in the judgment of Latham CJ in *Lovell v Lovell* [1950] HCA 52; 81 CLR 513 at [519] extracted at FC [45]). It is thus clear that the Full Court did not approach this appeal as if it were, or was akin to, an appeal against an exercise of discretion. Nor, contrary to AS [25], did the Full Court, in its analysis of the grounds upon which the primary judge's decision was criticised, "defer" to the weight to be given to competing considerations by the primary judge.

28. The appellant contends at AS [37] that the Full Court erred at FC [37] in identifying the question as being whether the primary judge correctly understood and applied the principles in *Li, Singh* and *Stretton.* However, if there was no error in the primary judge's understanding or application of those principles on the facts of the case it would follow that the primary judge's conclusion (which necessarily is the product of the application of those principles) would not be erroneous.

29. Further, to the extent that the appellant relies upon the absence of any consideration of the analysis of the primary judge in the reasoning of the plurality in *Li*, that absence must be seen in a context in which this Court significantly revised the approach to legal reasonableness from the *Wednesbury* standard which had been applied by the primary judge in that case. In those circumstances, it is readily explicable why the court did not approach the appeal by reference to the trial judge's analysis. Further, Gageler J at 379-380 [120] – [122] approached the question of unreasonableness, having identified the

applicable test, on the basis that it was "*difficult to disagree*" with the analysis of the Full Court of the Federal Court that the primary judge's analysis was "unremarkable".

## PART V RELEVANT LEGISLATION

30. Appended is a copy of statutory provisions additional to those appended to the appellant's submissions.

## PART VI ARGUMENT FOR THE RESPONDENTS

### (a) The nature of a conclusion as to legal reasonableness

31. The conclusion as to whether an administrative decision is or is not legally unreasonable is one which is either correct or not correct as a matter of legal principle. However, a conclusion as to legal unreasonableness rests, in part upon construction of the enabling statute (as set out by the plurality in *Li* at 363 [66]; see also French CJ at 350-1 [28] and Gageler J at [89] 370) and in part upon an evaluation of the circumstances in which the statutory power was exercised. As set out by the Full Court, and as held in *Singh* at 445 [42] legal unreasonableness is invariably fact dependent (FC [38]). For this reason, a conclusion as to legal unreasonableness is not directly analogous to a conclusion on a question of statutory construction in which such factual circumstances do not come into play (cf AS [34]) nor is it directly analogous to a factual conclusion or inference.

32. Given the inherent variation in the matters which may give rise to a conclusion of legal unreasonableness, there will be some cases where the conclusion rests upon a highly evaluative analysis of factual circumstances. In other cases, the matters relied upon may be less factual or evaluative. In this case, as set out above, the Full Court observed at FC [44] that the conclusion as to legal unreasonableness was "*fundamentally*" one which turned upon an evaluative judgment and a determination of what weight to give to relevant circumstances. Contrary to AS [36], this was a conclusion reached by reference to the circumstances of this particular case. The Full Court was not at FC [44] making a statement that all conclusions as to legal unreasonableness should necessarily be so characterised.

33. Moreover, whilst as recognised by the Full Court at FC [38] "*the concept of legal unreasonableness can be 'outcome focused'*", that is not to say that a conclusion as to the legal unreasonableness of an outcome will be reached without an analysis or appreciation of both the proper construction of the relevant statutory power and, if relevant, of the factual circumstances in which the power was exercised. The existence, and weight to be given to, the factual circumstances in which the discretion under review was exercised will, if

relevant, have to be evaluated for the purpose of the court determining whether or not the exercise of statutory power was, in those circumstances, outside the area "*in which a decision-maker has a genuinely free discretion*" (FC [38], citing *Li* at [66] and *Stretton* at [56]*)*. A conclusion as to legal unreasonableness will inevitably be supported by, and based upon, a process of reasoning which, in some cases, may be highly evaluative and in others less so. Unlike a question of statutory construction, a conclusion as to legal unreasonableness may in many cases involve a process of reasoning involving an evaluation of facts.

34. Justice Gageler in *Li* recognised that there is potential for legitimate disagreement in the judicial application of the standard of *Wednesbury* unreasonableness, and cited with apparent approval the statement from the judgment of Justice Frankfurter in *Universal Camera Corporation v National Labor Relations Board* (1951) 340 US 474 at 488-9 that "*A formula for judicial review of administrative action may afford grounds for certitiude but cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judgment or by using the formula as an instrument of futile casuistry*" (*Li* at 375-6 [107]). In an earlier passage in that case, Justice Frankfurter had identified that "*[w]ant of certainty in judicial review of Labor Board decisions partly reflects the intractability of any formula to furnish definiteness of content for all the impalpable factors involved in judicial review*". That observation has application also when considering review on the basis of legal reasonableness in this jurisdiction, and underscores the difficulty in requiring an appeal court, considering such a judgment, to adopt any one fixed approach to the task of identification of error.

35. Further, as recognised by Allsop CJ in *Stretton* at 5 [9], a conclusion as to whether a decision "*bespeaks an exercise of power beyond its source*" is necessarily to a degree evaluative. As his Honour observed the court's task is one of characterisation following from an evaluation of the decision (at 5-6 [11]).

36. Moreover, as is clear from the discussion in the judgment of the plurality in *Li* at 364-367 [68] – [76], there are various grounds and bases upon which an exercise of discretion may be found to have gone beyond its permitted ambit. Some of those grounds may involve a detailed evaluative analysis of competing considerations before the decision-maker, others may require little more than a process of statutory construction. Some may involve the drawing of inferences from the facts. Inevitably, the approach of an appellate court reviewing such a finding will be shaped by the character of the analysis below, and by the nature of the contentions as to error.

**(b) Appellate review**

37. On an appeal against a conclusion as to legal unreasonableness the question will always be whether or not error in the conclusion, or reasoning, of the primary judge has been demonstrated. The Full Court's reasoning in this regard at FC [43] is consistent with well-established authority that a successful appeal by way of rehearing requires the demonstration of error.

38. Such an approach is entirely consistent with the judgment of this Court (Gaudron, McHugh, Gummow and Hayne JJ) in *Allesch v Maunz* (2000) 203 CLR 172 at [23] (and affirmed in *Minister for* Immigration *and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 (***Jia***) at 533 [75] *per* Gleeson CJ and Gummow J with whom Hayne J agreed at 561 [176]):

10 *For present purposes, the critical difference between an appeal by way of rehearing and a hearing de novo is that, in the former case, the powers of the appellate court are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error, whereas, in the latter case, those powers may be exercised regardless of error.*

39. Similarly, in *Jia* at 547 [128] Kirby J stated (in the context of an appeal by way of hearing against a finding in relation to an allegation of actual bias) *"[i]t was necessary for Mr Jia to show error in the primary judge's conclusion before the Full Court would be authorised to disturb French J's conclusion.*"

20 40. Contrary to AS [31], in *Branir* at [21] Allsop J was stating the general principle that there is a need to show error in an appeal by way of rehearing, and that if the appeal court is persuaded of error that should be corrected it must not shrink from giving effect to its own conclusion. That conclusion, as is clear from *Branir* at [25] (referred to in the extract from *Mesa Minerals Limited v Mighty River International Limited* [2016] FCAFC 16; 241 FLR 241 at [85] cited at FC [42]), was not limited to appeals against findings of fact. Equally, the statement in *Branir* at [30] (also cited at FC [42]) that "*The views and conclusions of the trial judge ultimately have to be shown to be wrong. They should not be laid to one side and a simple reargument of the case take place*" is of broad application to appeals by way of rehearing.

30 41. It follows that an appellate court, in considering whether or not there was appealable error in a conclusion of a primary judge as to legal unreasonableness, must, inevitably, focus attention upon the process of reasoning by which that conclusion was reached and assess that process of reasoning to ascertain whether or not an alleged ground of error is made out. This is because a conclusion as to legal unreasonableness is one which reflects a process of reasoning to examine whether, in the particular circumstances, an exercise of discretion goes beyond the area of genuinely free discretion. If the primary judge made no error in his or her analysis or application of legal principle, it would necessarily follow that

there would be no error in the conclusion reached as a direct consequence of that analysis. That is not to say that a *House v The King* error must be established. Rather, it recognises that a conclusion as to legal reasonableness will not be reached in a vacuum, but will be the product of a process of analysis which, in some cases, as in the present, involves the making of evaluative judgments as to the weight to be given to the individual circumstances as found.

42. There is, thus, no error in the Full Court's implicit rejection at FC [43] of the appellant's submission, set out at FC [29], that *"it's not necessary for your Honours to say that the primary judge made a legal error in the course of her Honour's analysis"*. Whilst legal unreasonableness is a conclusion which either is or is not correct, contrary to the submission at AS [32]-[33], in an appeal by way of rehearing there is nonetheless a need to demonstrate that the primary judge erred in the analysis or application of principle and fact that lead to his or her conclusion.

43. Further, a challenge to a conclusion of legal unreasonableness by a primary judge may involve a range of contentions, including error as to fact finding by the primary judge, error as to the weight given to particular facts or circumstances by the primary judge (as was in part the case here: FC [28]), error as to the approach to previous authority (as was also in part the case here: FC [28]), and error as to statutory construction. As was implicit in the analysis of Allsop J in *Branir* at [21] – [30] the correct approach on appeal may depend upon the nature of the finding, or step in analysis, in respect of which error is alleged.

44. The significance of the nature of the judgment being challenged on appeal, and the relevant legislative or jurisprudential context, is, as set out below, of significance as regards the approach on appeal by way of rehearing. However, the requirement that respect and weight must be given to the conclusion of the primary judge, does not vary. Contrary to AS [36] there is no error in giving weight to the analysis of a primary judge on appeal.

45. In this case, consistent with the judgment of Allsop CJ in *Stretton* at 9 [25], the respondents do not contend that an appeal court should conduct its review by reference to the standard established in *House v The King*. However, the respondents do contend, consistent with the approach taken by this court, that the starting point on appeal must always be the need to show error in the findings of the primary judge, that respect must always be given to such findings. There was no error in the Full Court approaching its task with a degree of appellate caution given the nature of the evaluative judgments upon which the primary judge's conclusion rested.

46. As regards appellate review of inferences of fact, in *Warren v Coombes* (1979) 142 CLR 531 (***Warren v Coombes***) at 551 [18], this court observed that:

> *"in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but once having reached its own conclusion it will not shrink from giving effect to it."*

47. The requirement that respect and weight should be given to the conclusion of the primary judge is consistent with the approach taken by the Full Court to appellate review of a finding of legal unreasonableness in this case, albeit that a review of such a finding here involved matters of evaluation and analysis and was thus relevantly different from the drawing of an inference of fact.

48. Similarly, in *Warren v Coombes*, in considering the proper approach on appellate review of a finding of negligence (which their Honours found required no particular deference to the views of the trial judge), their Honours considered the trial judge's analysis, and found that, "*having given due weight to the conclusion reached by the learned trial judge*", (at 553 [20]) their honours were unable to agree with his conclusion because the trial judge had erred in concluding that the respondent's car was being driven "*as near as practicable to the correct side of the roadway*" (at 553 [20]). That analysis is consistent with that of the Full Court in this case in which it approached the appellate task by analysing whether the asserted errors in the reasoning of the primary judge were made out. This court's finding in *Warren v Coombes* that the "*duty of the appellate court is to decide the case – the facts as well as the law – for itself*" (at 552 [19]) should not in that context be regarded as indicating that the appeal court should approach its role as if it were a court of first instance. Rather, it should be seen as reflecting the principle that the appeal court must give effect to their own judgment if, having considered and given due respect to the trial judge's conclusion, it considers it to be erroneous.

49. Where the question before the court requires a broad evaluative judgment, the case law suggests that a degree of appellate caution may be appropriate. By way of example in *Miller v Jennings* (1954) 92 CLR 190 at 196 Dixon CJ and Kitto J held that where the award of damages is that of a judge alone the assessment of damages is more like an exercise

of discretion,[6] given that there is so much room for individual choice albeit that it "is difficult to lay down any precise rule which will cover all cases".[7]

50. In *White v Barron* (1980) 144 CLR 431 (***White v Barron***), the issue before this court related to the jurisdictional question under s 3 of the *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW), namely whether "*adequate*" provision for proper maintenance had been made for a widow. This court held that the decision on that question did not involve "*the exercise of discretionary judgment*" (Mason J at 442A-B, Aickin J at 449A-B, Wilson J at 456E-F). Mason J approached the task of appellate review by considering the correctness of the reasoning below, without expressly in that analysis distinguishing between the jurisdictional question and the exercise of discretion thereafter, holding that the primary judge's provision "*reflected an erroneous standard*" (at 444A) and that (at 445B-C) "*the standard applied by the Court of Appeal fell short of a correct appreciation of "proper maintenance" for a widow in the appellant's situation*".

51. In *White v Baron* Aickin J & Wilson J both approached the jurisdictional question by considering the correctness of the reasoning of the primary judge (at 450 and 458). Aickin J (dissenting as to the outcome) at 450B-C considered the primary judge's reasoning and concluded that "*on the whole*" it was right to conclude as the trial judge had that the testator had failed to make adequate provision by reason of inadequate provision having been made for inflation. Wilson J, at 458A, found that "*Waddell J was fully justified in finding ...*". Stephen J agreed with the reasons of Wilson J in this regard. Barwick CJ, dissenting as to the outcome on appeal, at 435A-B similarly held that the jurisdictional question was one which did not depend "*entirely on the discretion of the primary judge*". Thus, his Honour held, a court on appeal "*is entitled itself closely to examine the circumstances and for itself answer the question whether it could reasonably be held that the available maintenance was in all the circumstances inadequate. If such a view is reasonably open great weight must be given to the view of the primary judge which in general should only be overturned, in my opinion, if it is erroneous*".

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[6] Whilst in some cases the analysis of the appellate role is focussed upon characterisation of the decision under appeal as to "*discretionary*", as recognised by this Court in *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 at 138[37], the term "*discretion*" is used in a variety of different ways and thus creates "*a legal category of indeterminate reference*". The proper approach on appeal has been determined not by reference to such categorisation, but by analysis of the characteristics of the decision under appeal.

[7] In *Batistatos v Road Traffic Authority* (NSW) (2006) 226 CLR 256 this court cited with approval the statement of Gaudron and Gummow JJ in *R v Carroll* (2002) 213 CLR 635 at 657 [73] that the use of the term discretion to describe the exercise of the power to prevent abuse of process indicates no more than that the circumstances in which proceedings will constitute an abuse of process cannot be exhaustively defined and in some cases minds may differ as to whether they do constitute an abuse.

52. As observed at AS [39] – [50] there are also cases in which this court has found that an evaluative judgment should be approached by an appeal court by reference to the same principles as would be applied to appellate review of a discretionary decision. Thus, when considering the proper test for appellate review in an appeal by way of rehearing in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 (***Coal and Allied***) at 204-205 [19] this Court held that a judgment as to whether or not the court was satisfied that industrial action being pursued involved a threat for the purposes of the then s 170MW(3) of the *Workplace Relations Act 1996* (Cth) was "*discretionary*" because it involved a degree of subjectivity (at 205 [20]).

53. Similarly this court in *Norbis v Norbis* (1986) 161 CLR 513 held that the question under s 79(4) of the *Family Law Act 1975* (Cth), whether the court is satisfied that the order is "*just and equitable*" having regard to a number of identified factors, should be described as discretionary because "*these assessments call for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right*" as opposed to "*the application of a fixed rule to the facts on which its operation depends*" (at 518C-E *per* Mason and Deane JJ). In *Singer v Berghouse* (1994) 181 CLR 201, the decision under appeal concerned (in part) the determination of whether an applicant for provision under the *Family Provision Act 1982* had been left without adequate provision. This court (at 210-212) found that that question was strictly a question of fact, however that it was one to which the principles governing appellate review of discretionary decisions should apply.

54. The significance of this is that it recognises that the approach on appellate review may properly be shaped by reference to the nature of the judgments under appeal. That supports an approach such as that taken by the Full Court in this case of identifying the fact that the decision in this case was one which fundamentally turned on evaluative judgments as being relevant to its appreciation of its appellate function of the identification of error.

55. Intermediate courts have similarly approached the appellate task by reference to the nature of the judgment being appealed. Thus, in an appeal against a conclusion that particular conduct is misleading or deceptive for the purpose of then s 52 of the *Trade Practices Act 1974* (Cth), it has been recognised that the proper approach may depend upon the nature of the process of reasoning upon which the conclusion is based. In *Poulet Frais Pty Ltd v The Silver Fox Company Pty Ltd (as trustee for the Baker Family Trust)* [2005] FCAFC 131; (2005) 220 ALR 211 at [45] Branson, Nicholson and Jacobson JJ observed that, as recognised by *Branir*, "*an appeal by way of rehearing is not simply a rehearing of, or second go at, the trial*". Rather, at [46] the Court held:

*"... Where the determination of whether particular conduct was misleading or deceptive is not straight-forward, but rather involves elements of degree, opinion or judgment, a simple preference in the appellate court for a view different from that taken by the trial judge may not carry with it the conclusion of error. The appeal court might conclude either that there could not be said to be only one possible correct determination or that the trial judge had a particular advantage, not shared by the appellate court, in assessing critical matters of nuance and judgment. In such a case, in determining whether or not the trial judge fell into appealable error, the appeal court should not proceed as though on a hearing de novo in which the views of the trial judge carry no weight."*

**(c) The Full Court did not err**

56. Contrary to AS [36] there was no error in the Full Court requiring the identification of error by the primary judge in this appeal by way of rehearing. That is entirely consistent with established authority, as set out above. The Full Court did not require that such error be in the nature of a *House v The King* error or that the primary judge's conclusions not be disturbed except on very strong grounds. Contrary to AS [37] there is nothing indicative of error in the Full Court's observation at FC [53] that "*[t]he primary judge's analysis turned very much on her evaluation of the relevant circumstances in this particular case*". That observation was in response to a submission by the appellant that the conclusion of the primary judge in this case had the effect of imposing an obligation on the Tribunal in all cases to seek to communicate with an applicant for review by email or by phone if they fail to attend a hearing. It did not in any sense betray a failure by the Full Court to consider whether or not the primary judge's evaluative judgments were erroneous. The appellant's criticism in this regard is misplaced.

57. Nor was there any error in the Full Court identifying the primary judge's decision in this case as one which fundamentally turned on her Honour's evaluative judgment which necessarily involved determining what weight was to be given to individual relevant circumstances (FC [44]).

58. As to the individual grounds relied upon by the appellant in support of his contention that the primary judge erred, the Full Court at FC [47] – [57] assessed each contention relied upon by the appellant, engaged with the substance of the contention, and found that the asserted errors were not established. The Full Court clearly approached its appellate role, consistent with the authority set out above, on the basis that it should ask itself whether or not the primary judge had erred. That approach accorded with established authority.

59. Contrary to AS [32]- [33], there is nothing in *Branir* at [25] which obviates the need to show error on the part of the trial judge merely because the ultimate conclusion as to legal unreasonableness is one which either is, or is not, correct as a matter of legal principle. *First*, Allsop J did not suggest that, even in a case where there is only one available

answer, the appeal court should necessarily put the primary judge's decision to one side and start again. *Second*, as set out above, there is a clear distinction between a process of statutory construction and one which involves evaluative judgments as to weight to be given to matters of fact in respect of which there may well be more than one permissible view or conclusion. The correctness of a conclusion which rests on evaluative judgments as to individual circumstances will, on appeal, require focus on the correctness or otherwise of that process of reasoning.

60. It is correct that, as contended at AS [38], the Full Court did not independently assess for itself, afresh, whether or not the Tribunal's decision was legally unreasonable. However, contrary to AS [38] there was no error in it not doing so. *First*, this was an appeal not a hearing de novo. *Second*, the Full Court engaged with the criticisms relied upon. *Third*, it is artificial to suggest that the correctness of a conclusion as to legal unreasonableness in this case could be divorced from the process of reasoning leading to that conclusion. Manifestly, in this case, the question of legal unreasonableness required an evaluation of the factual circumstances facing the Tribunal at the time of the decision. Any assessment of whether or not the decision of the Tribunal was legally unreasonable had to engage with those circumstances. There was no error in the Full Court doing so by asking whether or not the primary judge's evaluation of those circumstances was erroneous as alleged.

**(d) The conclusion as to legal unreasonableness is not erroneous**

61. AS [52]-[63] sets out the appellant's contention that this court should find that the primary judge erred in concluding that the Tribunal's decision under s 426A of the Act was legally unreasonable. That contention should be rejected.

62. Under s 425A(2) of the Act the hearing invitation had to be given to an applicant by one of the methods set out in s 441A of the Act, and under 441A(4) of the Act, one prescribed method was dispatch by prepaid post within 3 working days of the date of the document. Subsection 441C(4) provided that a person was taken to have received a document within a set time period if it was given by the method in ss 441A(4). Subsection 426A(1) of the Act, as it was at the time of the Tribunal's decision, conferred a discretion upon the Tribunal to make a decision on the review without taking any further action to allow or enable the applicant to appear before it if the applicant for review had been invited under s 425 of the Act to appear before it but did not appear. Subsection 426A(2) provided, however, that "*[t]his section does not prevent the Tribunal from rescheduling the applicant's appearance*

*before it, or from delaying its decision on the review in order to enable the applicant's appearance before it as rescheduled*".

63. The context for the exercise of the Tribunal's powers is s 420(1) of the Act which requires the Tribunal to pursue the objective of providing a mechanism of review that is "fair, just, economical, informal and quick". As held by this court in *Minister for Immigration and Citizenship v SZGUR* (2010) 241 CLR 594 at 601-2 [19] per French and Kiefel JJ, this is a "*requirement imposed on the Tribunal in the discharge of its core function ...*".

64. Under s 425 of the Act the Tribunal is obliged to invite an application to appear before it. As held in *Li* the purpose of such a provision is to provide an applicant with the opportunity to present evidence and argument relating to the issues arising in connection with the decision under review, at 361 [60] *per* Hayne, Kiefel and Bell JJ. As their Honours observed, "*the sub-section contemplates that such a hearing will take place before the Tribunal makes its decision. The Tribunal's duty therefore extends further than merely issuing an invitation to an applicant to appear*". Moreover, the sub-section requires that the invitation must be meaningful "*in the sense that it must provide the applicant for review with a real chance to present his or her case*".[8]

65. It is thus clear that, if a hearing invitation is shown to have been sent by prepaid post within 3 working days as required by s 441A(4), the Tribunal has a discretion to determine an application for review in the absence of an applicant, and without taking any further steps, but the Tribunal is in no sense obliged to do so. Whilst the test is stringent, the primary judge did not err in finding legal unreasonableness in this exercise of discretion, and the Full Court did not err in dismissing the appeal against that finding.

66. *First*, contrary to AS [53] there is no inconsistency between the primary judge's decision and the deeming effect of s 441C of the Act. As identified by the primary judge at PJ [75] and [80] – [81] by reason of the facts that the hearing invitation was sent by prepaid and not registered post and that there was no tracking of the hearing invitation or contact with the respondents since it was apparently sent, the Tribunal had no knowledge as to the actual fate of the hearing invitation and there was no evidence that the respondents had received the hearing invitation. That was an objective circumstance against which the question of legal unreasonableness was properly considered and to which weight could and should be given. That the discretion under s 426A was enlivened if s 441A(4) were satisfied says nothing as to how that discretion should be exercised. As held by Gageler J

[8] *Li* at 362 [61] & 368 [83] *per* Hayne, Kiefel and Bell JJ.

in *Li* at 373 [100], reasonableness can require more than compliance with the express statutory requirements as to affording the opportunity to attend a hearing.

67. In any event, contrary to AS [53], the primary judge reached no conclusion as to whether s 441A(4) of the Act was satisfied but conducted the analysis of legal unreasonableness on the assumption that the Tribunal had a discretion to exercise under s 426A of the Act which in turn presupposed that there was deemed delivery of the hearing invitation.

68. *Second*, contrary to AS [54] there was no evidence before the Tribunal from which any inference could properly be drawn as to the reason for the respondents' non-attendance at the Tribunal hearing. Moreover, the Tribunal did not draw any such inference. The Tribunal merely noted the history (TD [4] and [15] – [17]) and found that "*the hearing invitation was sent to the last address for service provided in connection with the review and in the circumstances, pursuant to s 426A of the Act, the Tribunal has decided to make its decision ...*" (TD [17]). The Tribunal did not in its reasons consider whether or not the hearing invitation had in fact been received by the respondents or why the respondents had not attended the hearing. There was no error in the primary judge's conclusion at PJ [78] that there was no pattern of communication between the respondents and the Tribunal. Moreover, non-attendance at the interview with the delegate provides no basis to find that non-attendance at the Tribunal hearing was in character or to be expected, and nor did the Tribunal so find.

69. *Third*, contrary to AS [55], it is manifestly part of the analysis of legal unreasonableness to consider the significance of the Tribunal hearing to the respondents. Non-attendance before the delegate does not in any way diminish the significance of the hearing before the Tribunal, particularly where, as here, there was no evidence before the Tribunal as to why the respondents did not attend their interview with the delegate and the respondents were not represented.

70. *Fourth*, contrary to AS [56], a conclusion on the facts of this particular case does not impose any mandatory requirements on the Tribunal in the future. There is nothing in the legislative scheme of the Act which should be regarded as mandating or militating towards a conclusion to the contrary. The Act confers a discretion under s 426A, but it equally requires that that discretion be exercised reasonably and consistently with the requirement that the opportunity to attend a Tribunal hearing be meaningful in the particular case.

71. *Fifth*, comparison with *Kaur* does not demonstrate any error in the approach of the primary judge or the Full Court. The primary judge in the present case relied upon a number of particular circumstances apparent in this case, and took into account the fact that the key

reasoning relied upon by the Tribunal was as set out above at [14]. The outcome in *Kaur* says nothing about the correctness of the primary judge's conclusion here.

72. *Finally*, a decision of the Tribunal under s 426A of the Act, like the refusal to adjourn in *Li*, is one which reflects the aspirations of fairness and justice which are "*at the core of the judicial function*" and are not affected by policies of which the court has little experience (as recognised by Gageler J in *Li* at 377 [112]). The primary judge should be assumed to be readily familiar with, and able to evaluate the weight to give to, such considerations.

## PART VII ORAL ADDRESS

10 73. The respondents estimate that 1.5 hours will be required for the presentation of oral argument on the appeal.

Dated: 13 November 2017

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## Division 3—Exercise of Refugee Review Tribunal's powers

### 420 Refugee Review Tribunal's way of operating

(1) The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

(2) The Tribunal, in reviewing a decision:
  (a) is not bound by technicalities, legal forms or rules of evidence; and
  (b) must act according to substantial justice and the merits of the case.

### 420A Principal Member may give directions

(1) The Principal Member may, in writing, give directions, not inconsistent with this Act or the regulations as to:
  (a) the operations of the Tribunal; and
  (b) the conduct of reviews by the Tribunal.

(2) In particular, the directions may relate to the application of efficient processing practices to the conduct of reviews by the Tribunal.

(3) The Tribunal should, as far as practicable, comply with the directions. However, non-compliance by the Tribunal with any direction does not mean that the Tribunal's decision on a review is an invalid decision.

(4) If the Tribunal deals with a review of a decision in a way that complies with the directions, the Tribunal is not required to take any other action in dealing with the review.

### 421 Constitution of Refugee Review Tribunal for exercise of powers

(1) For the purpose of a particular review, the Tribunal is to be constituted, in accordance with a direction under subsection (2), by a single member.

## Division 3—Part 7-reviewable decisions: Tribunal powers

### 420 Tribunal's way of operating

The Tribunal, in reviewing a Part 7-reviewable decision:

(a) is not bound by technicalities, legal forms or rules of evidence; and

(b) must act according to substantial justice and the merits of the case.

### 420B Guidance decisions

(1) The President of the Tribunal, or the head of the Migration and Refugee Division of the Tribunal, may, in writing, direct that a decision (the ***guidance decision***) of the Tribunal, or of the former Refugee Review Tribunal, specified in the direction is to be complied with by the Tribunal in reaching a decision on a review of a Part 7-reviewable decision of a kind specified in the direction.

(2) In reaching a decision on a review of a decision of that kind, the Tribunal must comply with the guidance decision unless the Tribunal is satisfied that the facts or circumstances of the decision under review are clearly distinguishable from the facts or circumstances of the guidance decision.

(3) However, non-compliance by the Tribunal with a guidance decision does not mean that the Tribunal's decision on a review is an invalid decision.

## 425 Tribunal must invite applicant to appear

(1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.

(2) Subsection (1) does not apply if:
  (a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or
  (b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or
  (c) subsection 424C(1) or (2) applies to the applicant.

(3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.

## 425A Notice of invitation to appear

(1) If the applicant is invited to appear before the Tribunal, the Tribunal must give the applicant notice of the day on which, and the time and place at which, the applicant is scheduled to appear.

(2) The notice must be given to the applicant:
  (a) except where paragraph (b) applies—by one of the methods specified in section 441A; or
  (b) if the applicant is in immigration detention—by a method prescribed for the purposes of giving documents to such a person.

(3) The period of notice given must be at least the prescribed period or, if no period is prescribed, a reasonable period.

(4) The notice must contain a statement of the effect of section 426A.

## 426 Applicant may request Tribunal to call witnesses

(1) In the notice under section 425A, the Tribunal must notify the applicant:

(a) that he or she is invited to appear before the Tribunal to give evidence; and

(b) of the effect of subsection (2) of this section.

(2) The applicant may, within 7 days after being notified under subsection (1), give the Tribunal written notice that the applicant wants the Tribunal to obtain oral evidence from a person or persons named in the notice.

(3) If the Tribunal is notified by an applicant under subsection (2), the Tribunal must have regard to the applicant's wishes but is not required to obtain evidence (orally or otherwise) from a person named in the applicant's notice.

## 426A Failure of applicant to appear before Tribunal

*Scope*

(1) This section applies if the applicant:

(a) is invited under section 425 to appear before the Tribunal; but

(b) does not appear before the Tribunal on the day on which, or at the time and place at which, the applicant is scheduled to appear.

*Tribunal may make a decision on the review or dismiss proceedings*

(1A) The Tribunal may:

(a) by written statement under section 430, make a decision on the review without taking any further action to allow or enable the applicant to appear before it; or

(b) by written statement under section 426B, dismiss the application without any further consideration of the application or information before the Tribunal.

Note 1: Under section 430A, the Tribunal must notify the applicant of a decision on the review.

Note 2: Under section 426B, the Tribunal must notify the applicant of a decision to dismiss the application.

*Reinstatement of application or confirmation of dismissal*

(1B) If the Tribunal dismisses the application, the applicant may, within 14 days after receiving notice of the decision under section 426B, apply to the Tribunal for reinstatement of the application.

Note: Section 441C sets out when a person (other than the Secretary) is taken to have received a document from the Tribunal for the purposes of this Part.

(1C) On application for reinstatement in accordance with subsection (1B), the Tribunal must:

(a) if it considers it appropriate to do so—reinstate the application, and give such directions as it considers appropriate in the circumstances, by written statement under section 426B; or

(b) confirm the decision to dismiss the application, by written statement under section 430.

Note 1: Under section 426B, the Tribunal must notify the applicant of a decision to reinstate the application.

Note 2: Under section 430A, the Tribunal must notify the applicant of a decision to confirm the dismissal of the application.

(1D) If the Tribunal reinstates the application:

(a) the application is taken never to have been dismissed; and

(b) the Tribunal must conduct (or continue to conduct) the review accordingly.

(1E) If the applicant fails to apply for reinstatement within the 14-day period mentioned in subsection (1B), the Tribunal must confirm the decision to dismiss the application, by written statement under section 430.

Note: Under section 430A, the Tribunal must notify the applicant of a decision to confirm the dismissal of the application.

(1F) If the Tribunal confirms the decision to dismiss the application, the decision under review is taken to be affirmed.

(1G) To avoid doubt, the Tribunal cannot give a decision orally under subsection (1A), (1C) or (1E).

*Other measures to deal with failure of applicant to appear*

(2) This section does not prevent the Tribunal from rescheduling the applicant's appearance before it, or from delaying its decision on the review in order to enable the applicant's appearance before it as rescheduled.

### 426B Failure to appear—Tribunal's decisions, written statements and notifying the applicant

*Decisions to which this section applies*

(1) This section applies in relation to the following decisions (each of which is a ***non-appearance decision***):

(a) a decision to dismiss an application under paragraph 426A(1A)(b);

(b) a decision to reinstate an application under paragraph 426A(1C)(a) and to give directions (if any) under that paragraph.

Note: For similar provisions applying to a decision to confirm the dismissal of an application under section 426A, see sections 430 and 430A.

*Written statement of decision*

(2) If the Tribunal makes a non-appearance decision, the Tribunal must make a written statement that:

(a) sets out the decision; and

(b) sets out the reasons for the decision; and

(c) in the case of a decision to reinstate an application:

(i) sets out the findings on any material questions of fact; and

(ii) refers to the evidence or any other material on which the findings of fact were based; and

(d) records the day and time the statement is made.

(2A) However, subsection (2) does not apply if section 441EA (which relates to giving documents in the case of combined applications) applies in relation to the minor.

(3) If the Tribunal gives a document to an individual, as mentioned in subsection (2), the Tribunal is taken to have given the document to the minor. However, this does not prevent the Tribunal giving the minor a copy of the document.

## 441A Methods by which Tribunal gives documents to a person other than the Secretary

*Coverage of section*

(1) For the purposes of provisions of this Part or the regulations that:

(a) require or permit the Tribunal to give a document to a person (the ***recipient***); and

(b) state that the Tribunal must do so by one of the methods specified in this section;

the methods are as follows.

(1A) If a person is a minor, the Tribunal may use the methods mentioned in subsections (4) and (5) to dispatch or transmit, as the case may be, a document to an individual (a ***carer of the minor***):

(a) who is at least 18 years of age; and

(b) who a member or an officer of the Tribunal reasonably believes:

(i) has day-to-day care and responsibility for the minor; or

(ii) works in or for an organisation that has day-to-day care and responsibility for the minor and whose duties, whether alone or jointly with another person, involve care and responsibility for the minor.

Note: If the Tribunal gives an individual a document by the method mentioned in subsection (4) or (5), the individual is taken to have received the document at the time specified in section 441C in respect of that method.

(1B) However, subsection (1A) does not apply if section 441EA (which relates to giving documents in the case of combined applications) applies in relation to the minor.

*Giving by hand*

(2) One method consists of a member or an officer of the Tribunal, or a person authorised in writing by the Registrar, handing the document to the recipient.

*Handing to a person at last residential or business address*

(3) Another method consists of a member or an officer of the Tribunal, or a person authorised in writing by the Registrar, handing the document to another person who:

(a) is at the last residential or business address provided to the Tribunal by the recipient in connection with the review; and

(b) appears to live there (in the case of a residential address) or work there (in the case of a business address); and

(c) appears to be at least 16 years of age.

*Dispatch by prepaid post or by other prepaid means*

(4) Another method consists of a member or an officer of the Tribunal dating the document, and then dispatching it:

(a) within 3 working days (in the place of dispatch) of the date of the document; and

(b) by prepaid post or by other prepaid means; and

(c) to:

(i) the last address for service provided to the Tribunal by the recipient in connection with the review; or

(ii) the last residential or business address provided to the Tribunal by the recipient in connection with the review; or

(iii) if the recipient is a minor—the last address for a carer of the minor that is known by the member or officer.

*Transmission by fax, email or other electronic means*

(5) Another method consists of a member or an officer of the Tribunal transmitting the document by:

(a) fax; or

(b) email; or

(c) other electronic means;

to:

(d) the last fax number, email address or other electronic address, as the case may be, provided to the Tribunal by the recipient in connection with the review; or

(e) if the recipient is a minor—the last fax number, email address or other electronic address, as the case may be, for a carer of the minor that is known by the member or officer.

*Documents given to a carer*

(6) If the Tribunal gives a document to a carer of a minor, the Tribunal is taken to have given the document to the minor. However, this does not prevent the Tribunal giving the minor a copy of the document.

## 441B Methods by which Tribunal gives documents to the Secretary

*Coverage of section*

(1) For the purposes of provisions of this Part or the regulations that:

(a) require or permit the Tribunal to give a document to the Secretary; and

(b) state that the Tribunal must do so by one of the methods specified in this section;

the methods are as follows.

*Giving by hand*

(2) One method consists of a member or an officer of the Tribunal, or a person authorised in writing by the Registrar, handing the document to the Secretary or to an authorised officer.

*Dispatch by post or by other means*

(3) Another method consists of a member or an officer of the Tribunal dating the document, and then dispatching it:

(a) within 3 working days (in the place of dispatch) of the date of the document; and

(b) by post or by other means; and

(c) to an address, notified to the Tribunal in writing by the Secretary, to which such documents can be dispatched.

*Transmission by fax, email or other electronic means*

(4) Another method consists of a member or an officer of the Tribunal transmitting the document by:

(a) fax; or

(b) email; or

(c) other electronic means;

to the last fax number, email address or other electronic address notified to the Tribunal in writing by the Secretary for the purpose.

## 441C When a person other than the Secretary is taken to have received a document from the Tribunal

(1) This section applies if the Tribunal gives a document to a person other than the Secretary by one of the methods specified in section 441A (including in a case covered by section 441AA).

*Giving by hand*

(2) If the Tribunal gives a document to a person by the method in subsection 441A(2) (which involves handing the document to the person), the person is taken to have received the document when it is handed to the person.

*Handing to a person at last residential or business address*

(3) If the Tribunal gives a document to a person by the method in subsection 441A(3) (which involves handing the document to

another person at a residential or business address), the person is taken to have received the document when it is handed to the other person.

*Dispatch by prepaid post or by other prepaid means*

(4) If the Tribunal gives a document to a person by the method in subsection 441A(4) (which involves dispatching the document by prepaid post or by other prepaid means), the person is taken to have received the document:

(a) if the document was dispatched from a place in Australia to an address in Australia—7 working days (in the place of that address) after the date of the document; or

(b) in any other case—21 days after the date of the document.

*Transmission by fax, email or other electronic means*

(5) If the Tribunal gives a document to a person by the method in subsection 441A(5) (which involves transmitting the document by fax, email or other electronic means), the person is taken to have received the document at the end of the day on which the document is transmitted.

*Document not given effectively*

(7) If:

(a) the Tribunal purports to give a document to a person in accordance with a method specified in section 441A (including in a case covered by section 441AA) but makes an error in doing so; and

(b) the person nonetheless receives the document or a copy of it;

then the person is taken to have received the document at the times mentioned in this section as if the Tribunal had given the document to the person without making an error in doing so, unless the person can show that he or she received it at a later time, in which case, the person is taken to have received it at that time.