IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M97 of 2016

BETWEEN:

AARON JOE THOMAS GRAHAM
Plaintiff

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Defendant

PERTH REGISTRY

No. P58 of 2016

BETWEEN:

MEHAKA LEE TE PUIA
Applicant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Respondent

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

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Part I: Certification

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

Part II: Basis for intervention

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

Part III: Leave to intervene

3. Not applicable.

Part IV: Applicable legislative provisions

4. South Australia accepts the statement by the defendant in M97 of 2016 of the applicable legislative provisions.

Part V: Submissions

5. South Australia confines its submissions to matters of principle relevant to the first question of law stated for the opinion of the Court in each of the Special Cases.[1]

6. South Australia makes no submission as to the validity of ss 501(3) and 503A(2) of the *Migration Act 1958* (Cth).

Introduction

7. The questions posed regarding the constitutional validity of the impugned provisions concern the immunity from production to a federal court of information which may be relevant to that court's task in judicially reviewing a decision made by the Minister under s 501(3).

8. The challenges to validity do not invite consideration of the extent to which a privative clause may, consistent with the Constitution, exclude or limit the supervisory jurisdiction of a federal court or the remedies which may be granted by a federal court exercising such jurisdiction. Neither do they invite consideration of the extent to which the legislature may validly remove limits on a statutorily conferred administrative decision-making power or determine that transgression of limits does not invalidate the decision in question. Determination of the complaints raised in the present proceedings

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[1] Graham Special Case at [16(1)] (Graham Special Case Book at 17); Te Puia Special Case at [13(1)] (Te Puia Special Case Book at 14).

need not and should not extend to those complex issues.[2]

9. With respect to the nature and extent of any constitutionally implied limitation on legislative power to immunise from production to a federal court, in particular circumstances, information which may be relevant to the court's task of judicially reviewing an administrative decision, South Australia makes two observations.

    i. First, that information may be rendered unavailable to a federal court in its judicial review of an administrative decision, with the consequence that certain jurisdictional errors committed by the decision-maker remain unidentified by the court, is not of itself constitutionally offensive[3] ("limiting the information available").

    ii. Second, there is nothing inherently unconstitutional about legislative modifications to, or displacements of, the common law which have the practical effect of limiting the information to which a federal court will be required to have regard in the discharge of its judicial function and exercise of its jurisdiction, even where that effect depends in part upon a decision or act of a member of the executive ("the means of limitation").

Limiting the information available

10. Courts must often exercise their jurisdiction on the basis of incomplete information. The ways in which *"the laws of evidence have imposed extensive constraints on the ability of a court to consider all the material which a party might wish to present in support of its case"*[4] provide pervasive examples. The absence of evidentiary or other material capable of informing the exercise of jurisdiction does not of itself preclude the exercise of jurisdiction or compromise the court's essential character.

11. The force of that general proposition does not diminish in the supervisory jurisdiction. The availability of and accessibility to all relevant evidence or information *"is not*

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2 *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [355] (Crennan J); *O'Donoghue v Ireland* (2008) 234 CLR 599 at [14] (Gleeson CJ); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at [250]-[252] (Gummow and Hayne JJ); *Cheng v The Queen* (2000) 203 CLR 248 at [58] (Gleeson CJ, Gummow and Hayne JJ); *Lambert v Weichelt* (1954) 28 ALJ 282 at 283 (Dixon CJ, McTiernan, Webb, Fullagar, Kitto and Taylor JJ); *Attorney-General (NSW) v Brewery Employees' Union (NSW)* (1908) 6 CLR 469 at 553-554 (Isaacs J).

3 Either for offending implications arising from Ch III generally or for being directly incompatible with s 75(v).

4 *A v Independent Commission Against Corruption* (2014) 88 NSWLR 240 (***A v ICAC***) at [51] (Basten JA, Bathurst CJ agreeing at [7]).

absolute".[5] A court is capable of conducting judicial review without having access to all information relevant to that review task. That is so even where the absence of otherwise relevant information has the potential to preclude detection of jurisdictional error by the original decision-maker.

12. Where the court's task involves examining an administrative decision-making process, matters which may have impacted (consciously or unconsciously) upon that process and the decision produced by it, but which remain peculiarly within the mind of the decision-maker, will often be undiscernible and thereby insusceptible to scrutiny. This carries an inherent risk that a court on review may not be able to ascertain, in a particular case, the existence of an error that may properly be characterised as jurisdictional.[6] One such example may be where the decision-making power is exercised for an improper purpose but that fact is not revealed on the available material. Another would be where regard was had to an irrelevant consideration, but that regard was not articulated or reflected in the decision-maker's reasons for decision or otherwise manifest in the ultimate decision.

13. Occasions where an administrative decision-maker provides no, or only limited, reasons for his or her decision, supply ready examples. Implicit in the authorities which recognise that there is no common law duty upon an administrative decision-maker to supply reasons for decision,[7] is an acceptance that the ability of a court to judicially review such decision is not thereby denied.[8] The absence of reasons does not make an administrative decision-maker's decision unexaminable for jurisdictional error on judicial review,[9] despite the fact that it may result in certain jurisdictional errors going

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5 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 (***Gypsy Jokers***) at [189] (Crennan J, Gleeson CJ agreeing), cited with approval in *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 (***Condon v Pompano***) at [70] (French CJ).

6 This being a question of statutory construction: *Commissioner of Taxation v Futuris Corp Ltd* (2008) 237 CLR 146 at [23]-[24], [55] (Gummow, Hayne, Heydon and Crennan JJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [93] (McHugh, Gummow, Kirby and Hayne JJ).

7 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 662 (Gibbs CJ, Wilson, Brennan and Dawson JJ agreeing); *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 at [43] (French CJ, Crennan, Bell, Gageler and Keane JJ); *Minister for Home Affairs v Zentai* (2012) 246 CLR 213 (***Zentai***) at [93] (Heydon J).

8 Or even explicit: *Commissioner of Police v Sleiman* (2011) 78 NSWLR 340 at [226] (Sackville AJA, Allsop P and Handley AJA agreeing).

9 *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 (Dixon J); see also *South Australia v Totani* (2010) 242 CLR 1 (***Totani***) at [195] (Hayne J); see also *Zentai* (2012) 246 CLR 213 at [94] (Heydon J).

undetected.

14. Similarly, where a court[10] grants a claim of public interest immunity (or applies some statutory immunity which has displaced that common law doctrine[11]) over material relied upon by the administrative decision-maker, the court which subsequently judicially reviews that decision will be required to do so without having regard to the entirety of the material that was before the original decision-maker. The absence of such material necessarily deprives the reviewing court (and the applicant) of an ability to discern certain species of jurisdictional error that might have attended the decision.[12]

15. The resultant *"handicap"* suffered by both the court and applicant in such circumstances is well-understood.[13] However, *"[t]he fact that a successful claim for privilege handicaps one of the parties to litigation is not a reason for saying that the Court cannot or will not exercise its ordinary jurisdiction; it merely means that the Court will arrive at a decision on something less than the entirety of the relevant materials."*[14] That the practical difficulties attending an applicant's challenge of a decision in such circumstances might even sometimes warrant description as *"formidable"*[15] does not alter their essential character as evidential difficulties faced by the applicant in discharging his or her onus of proof;[16] they do not, either in form or substance, cause the Court's review jurisdiction to have been *"ousted"*.[17]

16. That the absence of certain relevant material before the reviewing court (and from view of the applicant) may cause error, including error capable of going to jurisdiction, to go undetected does not, of itself, trespass upon the essential character of the court

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[10] Preferably constituted of a judicial officer other than the judge who will hear the ultimate judicial review: *Gypsy Jokers* (2008) 234 CLR 532 at [24] (Gummow, Hayne, Heydon and Kiefel JJ).

[11] See, for example, *Gypsy Jokers* (2008) 234 CLR 532 at [25] (Gummow, Hayne, Heydon and Kiefel JJ).

[12] See *Gypsy Jokers* (2008) 234 CLR 532 at [24] (Gummow, Hayne, Heydon and Kiefel JJ).

[13] *Gypsy Jokers* (2008) 234 CLR 532 at [24] (Gummow, Hayne, Heydon and Kiefel JJ); as to the handicap to the applicant specifically see also *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 (***Church of Scientology***) at 61 (Mason J), 72, 74-77 (Brennan J); *Totani* (2010) 242 CLR 1 at [195] (Hayne J, French CJ agreeing on this point at [27], Crennan and Bell JJ agreeing on this point at [415]); *Commissioner of Police v Sleiman* (2011) 78 NSWLR 340 at [226] (Sackville AJA, Allsop P and Handley AJA agreeing).

[14] *Church of Scientology* (1982) 154 CLR 25 at 61 (Mason J), quoted with approval in *Gypsy Jokers* (2008) 234 CLR 532 at [24] (Gummow, Hayne, Heydon and Kiefel JJ).

[15] *Church of Scientology* (1982) 154 CLR 25 at 61 (Mason J), 72 (Brennan J).

[16] *Church of Scientology* (1982) 154 CLR 25 at 61 (Mason J), 74-77 (Brennan J).

[17] *Church of Scientology* (1982) 154 CLR 25 at 76 (Brennan J). See also *A v ICAC* (2014) 88 NSWLR 240 at [184] (Ward JA, Bathurst CJ agreeing at [7]); *Commissioner of Police v Sleiman* (2011) 78 NSWLR 340 at [223], [226] (Sackville AJA, Allsop P and Handley AJA agreeing).

conducting the review, the essential nature of judicial power or the supervisory jurisdiction entrenched by s 75(v) of the Constitution. This is a structural exigency, the nature and extent of which is amenable to legislative alteration.

The means of limitation

17. In a curial context unmodified by statute, a court applies the common law – including any relevant immunities and privileges and rules of evidence – in determining which materials will be made available in connection with the relevant judicial proceedings or admitted as evidence. Those common law rules and principles may be modified or displaced by legislation. Legislative competence to do so does not depend on the provisions being characterised as *"mere rules of evidence"*.[18] Parliament may prescribe a court's practice or procedure,[19] or the substantive law which falls to be applied by a court,[20] without impermissibly interfering with judicial power.

18. For example, common law principles of public interest immunity may be modified by a legislative determination that in balancing competing public interests, certain interests are to weigh more heavily.[21] Equally, legislation may wholly displace that common law immunity and impose an alternative scheme to govern the use and disclosure of certain information.[22]

19. Similarly, legislation may alter common law rules of evidence by stipulating that certain material relevant to a proceeding is inadmissible[23] or that certain material amounts to conclusive evidence of a fact (provided the fact in question is not the ultimate fact for judicial determination).[24] The tender of such (legislatively determined) conclusive

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18 See Graham Submissions (**GS**) at [22].

19 *Nicholas v The Queen* (1998) 193 CLR 173 (***Nicholas***) at [20] (Brennan CJ); *Kuczborski v Queensland* (2014) 254 CLR 51 at [240] (Crennan, Kiefel, Gageler and Keane JJ); *Williamson v An Oh* (1926) 39 CLR 95 at 108, 110-111 (Isaacs J), 122 (Higgins J), 126-127 (Powers J), 128-129 (Rich and Starke JJ).

20 *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 at [26] (French CJ, Kiefel, Bell and Keane JJ); *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at [50] (French CJ, Crennan and Kiefel JJ); *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at [18]-[22] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Palling v Corfield* (1970) 123 CLR 52 at 58-59 (Barwick CJ), 64 (Menzies J), 67 (Owen J), 69-70 (Walsh J).

21 GS at [23]; see *Nicholas* (1998) 193 CLR 173 at [38] (Brennan CJ), [55] (Toohey J), [160], [164] (Gummow J), [238] (Hayne J).

22 See *Gypsy Jokers* (2008) 234 CLR 532 at [25] (Gummow, Hayne, Heydon and Kiefel JJ).

23 See *Nicholas* (1998) 193 CLR 173. Examples of such provisions include, s 34P *Evidence Act 1929* (SA), s 115 *Evidence Act 1995* (Cth).

24 *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at [65] (Gummow, Hayne, Heydon and Crennan JJ) considering s 177(1) of the *Income Tax*

evidence necessarily denies the relevance (and admissibility) of other material relevant to the fact in issue. The substantive effect of such a provision is little different from one which directly prohibits the admissibility or production of that other material. Where the court determines that the (legislatively) stipulated conditions have been met, the material in question will be immune from consideration in the substantive proceedings.

20. In each case, it remains for the court to apply the relevant law, as altered or replaced by statute, to the material in question in order to determine whether it is to be produced for the purposes of the relevant judicial proceedings or admitted within them. The statute supplies the criteria upon which the exclusion operates (be the exclusion a declaration of inadmissibility, immunity from production or irrelevance resulting from the tender of other conclusive evidence); the court is to determine whether those criteria are satisfied.[25] Whether or not that judicial assessment will be possible without the court itself reviewing the material will depend upon the nature of the criteria fixed by statute for the operation of the relevant exclusion.[26]

21. The fact that satisfaction of the criteria might depend in part upon an act or decision of a member of the Executive does not transform that judicial task into one that impairs or threatens the independence or impartiality of the court in question.[27] However, whether the statutory criteria so fixed are sufficiently substantive to give the court's task the character of a genuine adjudicative process,[28] or whether the scheme impermissibly *"represents a substantial recruitment of the judicial function of [the court] to an*

Assessment Act 1936 (Cth). Such provisions are commonplace. Examples include s 221(3) of the *Commonwealth Electoral Act 1918* (Cth) (considered in *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at [80] (Gageler J)); s 1389 of the *Corporations Act 2001* (Cth); s 51A of the *Real Property Act 1886* (SA); and s 47EB of the *Road Traffic Act 1961* (SA). See also *Police v Dunstall* (2015) 256 CLR 403 at [3]-[11], [36], [43] (French CJ, Kiefel, Bell, Gageler and Keane JJ) regarding ss 47B(1)(a) and 47K of the *Road Traffic Act 1961* (SA) which operated, in the circumstances of that case, as non-rebuttable conclusive evidence provisions.

25 *Gypsy Jokers* (2008) 234 CLR 532 at [7] (Gleeson CJ), [33] (Gummow, Hayne, Heydon and Kiefel JJ), [173] (Crennan J, Gleeson CJ agreeing); *Condon v Pompano* (2013) 252 CLR 38 at [75] (French CJ), at [98] (Hayne, Crennan, Kiefel and Bell JJ); see also *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [10], [63], [76], [94] (French CJ), [143]-[144] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

26 See, eg, *Vella v Minister for Immigration and Border Protection* [2014] FCA 1177 at [33]- [35] (Wigney J) and *Vella v Minister for Immigration and Border Protection* (2015) 230 FCR 61 at [69] (the Court) regarding s 503A of the *Migration Act 1958* (Cth).

27 See, eg, *Condon v Pompano* (2013) 252 CLR 38; *Gypsy Jokers* (2008) 234 CLR 532; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501. Cf GS at [31.2]-[31.3].

28 See *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [219] (Callinan and Heydon JJ); *Totani* (2010) 242 CLR 1 at [320] (Heydon J).

essentially executive process",[29] will be a question of degree.[30]

22. Finally, some legislative schemes which have the effect of removing certain material from the court's consideration may disadvantage a party to proceedings. However, *"[t]hat a law imposes a disadvantage on one party to proceedings in order to restrict, mitigate or avoid damage to legitimate competing interests does not mean that the defining characteristics of the court required to administer such a law are impermissibly impaired."*[31] Designation of how the balance between such competing interests is to be struck engages questions of policy and is squarely a matter within the province of the elected Parliament.

10 **Conclusion**

23. Merely limiting the available information relevant to the judicial task, including where that task is performed in the discharge of a federal court's supervisory jurisdiction, does not offend Ch III of the Constitution. Equally, legislation which modifies or displaces the common law with the effect of excluding otherwise relevant and admissible material from the consideration of a court is not, of itself, invalid. This is so even where the application of the exclusion depends in part upon an act or decision of a member of the Executive. The legislature has scope to define or influence the level of judicial scrutiny of an administrative decision. The extent to which it has done so in a given case will be a matter of statutory construction.

20 24. A legislative scheme may limit the availability, to a federal court, of information otherwise relevant to the task and it may select a decision or act of the Executive as a factum upon which that limitation will depend. There can be no "bright line" test for whether doing so in a particular instance is so egregious as to necessarily require a federal court to exercise judicial power in a manner inconsistent with the essential character of a court or with the nature of judicial power, or so as to be inconsistent with s 75(v) of the Constitution.[32]

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29 *Totani* (2010) 242 CLR 1 at [82] (French CJ).
30 *Totani* (2010) 242 CLR 1 at [81]-[82] (French CJ), [149] (Gummow J).
31 *Condon v Pompano* (2013) 252 CLR 38 at [86] (French CJ).

Part VI: Estimate of time for oral argument

25. South Australia estimates that 10 minutes will be required for the presentation of oral argument.

Dated: 3 February 2017

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[32] *A v ICAC* (2014) 88 NSWLR 240 at [50], [52] (Basten JA, Bathurst CJ agreeing at [7]), see also at [184] (Ward JA); *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at [51], [53] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).