IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S10 of 2011

BETWEEN: **PLAINTIFF S10/2011**
Plaintiff

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP
First defendant

SECRETARY FOR THE DEPARTMENT OF IMMIGRATION AND CITIZENSHIP
Second defendant

No. S43 of 2011

BETWEEN: **JASVIR KAUR**
Plaintiff

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP
First defendant

SECRETARY FOR THE DEPARTMENT OF IMMIGRATION AND CITIZENSHIP
Second defendant

No. S49 of 2011

BETWEEN: **PLAINTIFF S49/2011**
Plaintiff

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP
First defendant

SECRETARY FOR THE DEPARTMENT OF IMMIGRATION AND CITIZENSHIP
Second defendant

No. S51 of 2011

BETWEEN: **PLAINTIFF S51/2011**
Plaintiff

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP
First defendant

SECRETARY FOR THE DEPARTMENT OF IMMIGRATION AND CITIZENSHIP
Second defendant

PLAINTIFFS' AMENDED SUBMISSIONS IN RESPONSE TO THE ATTORNEY-GENERAL FOR SOUTH AUSTRALIA

Filed on behalf of the plaintiffs on 30 January 2012:

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Summary

1. In response to the submissions for the Intervenor (the Attorney-General for South Australia), the plaintiffs submit that:

   a) statutory and non-statutory executive power is limited by an obligation to afford procedural fairness, the content of which varies with the circumstances of each case and the existence of which may only be statutorily excluded by plain words of necessary intendment; and

   b) the question whether rights may be sufficiently affected by the process of exercising power so as to attract an obligation of procedural fairness is different to the question whether rights have been sufficiently affected by a decision or exercise of power meriting the issue of certiorari. Both questions should, however, be answered favourably to the plaintiffs.

2. These submissions should be read with the plaintiffs' previous submissions.

Affecting rights in the context of procedural fairness

3. The Intervenor submits that:

> *... unless the inquiry itself, or the decision made by a government officer following the inquiry, has directly affected the rights, interests or privileges of the plaintiffs, the principles of procedural fairness are not enlivened*[1]

4. The scope and content of that proposition rests in the meaning to be given to the words "directly affected". It should be noted at the outset that none of the leading authorities in this area disclose a requirement that rights, interests or privileges must be affected in a manner that is "direct" rather than in some other manner. In particular, none of the cases from this court referred to by the Intervenor in footnote 4 state that rights and such must be "directly affected".

5. The Intervenor offers no compelling explanation for concluding that executive power under s 61 of the Constitution extends to a power to act unfairly or unreasonably in relation to a right, interest or privilege which will or might be indirectly affected.

6. Reference is made to *Hot Holdings Pty Ltd v Creasy*, but as was noted by the majority judgment in that case: "Consideration of the requirement for certiorari that the impugned decision determines questions affecting rights, on occasion has been

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[1] Intervenor's submissions at [17].

confused with a distinct body of principle [concerning] the existence of a requirement of procedural fairness."[2] That decision concerned the former and not the latter.

7. The only other authorities called in aid of the conclusion are the *dictum* of Wilcox J in 1987 to the effect that "the law has not yet reached the stage of applying the obligation of natural justice to every decision which disadvantages individuals",[3] citing a "warning" given a decade earlier by Megarry VC.

8. The law has developed substantially in the 25 years and 34 years respectively since those judgments were given. One need only turn to the authorities collected by this court in *M61*, including *Saeed*[4] and *Annetts v McCann*.[5]

10 9. In *Annetts v McCann*,[6] a majority of this court quoted the observation by Deane J in *Haoucher*[7] that the law seems "to be moving towards a conceptually more satisfying position where common law requirements of procedural fairness will, in the absence of a clear contrary legislative intent, be recognised as applying generally to governmental executive decision-making".[8] Justice Brennan expressly agreed with Deane J's dictum that "the requirements of procedural fairness must be observed in any case where... it is proper to discern a legislative intent that the donee of governmental executive power or authority should be bound by them".[9]

10. The "warning" of Megarry VC is met by the modern view that the content of the obligation to afford procedural fairness varies with the circumstances of each case.[10]

20 11. This court has taken the same broad approach to the affection of rights in other contexts. In *Griffith University v Tang*,[11] a majority of this court considered the provenance of the words "decision of an administrative character made ... under an enactment" from first principles, posing the following question: "What is it, in the course of administration, that flows from or arises out of the decision taken so as to give that significance which has merited the legislative conferral of a right of judicial review upon those aggrieved?"[12] The answer was "in general terms ... the affecting of

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2 *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 159 (Brennan CJ, Gaudron and Gummow JJ).
3 Intervenor's submissions at [16]; *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 at 306 (Wilcox J).
4 *Saeed v Minister for Immigration and Citizenship* (2010) 84 ALJR 507 at 511 [11].
5 *Annetts v McCann* (1990) 170 CLR 596 at 598 (Mason CJ, Deane and McHugh JJ).
6 *Annetts v McCann* (1990) 170 CLR 596 at 598 (Mason CJ, Deane and McHugh JJ).
7 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 653 (Deane J).
8 *Annetts v McCann* (1990) 170 CLR 596 at 598 (Mason CJ, Deane and McHugh JJ).
9 *Annetts v McCann* (1990) 170 CLR 596 at 607 (Brennan J), citing *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 652 (Deane J).
10 See, for example, *Barratt v Howard* (2000) 96 FCR 428 at 451-452.
11 (2005) 221 CLR 99.
12 *Griffith University v Tang* (2005) 221 CLR 99 at 128 [79] (Gummow, Callinan and Heydon JJ).

legal rights and obligations".[13] The court explained that the answer "does not require the relevant decision to affect or alter *existing* rights or obligations, and it will be sufficient that the enactment requires or authorises decisions from which new rights or obligations arise" (original emphasis).[14]

12. It is that same broad affecting of existing or potential legal rights and obligations which gives rise to significance attracting the obligation of a procedural fairness more generally in the exercise of statutory executive power. Coherence in the law requires the same test to be applied in the exercise of non-statutory executive power.

13. An obvious example of where the content of the obligation is likely to be reduced is where the exercise of power affects a group rather than individuals as such. This circumstance avoids what appears to be the main concern in the Intervenor's submissions (see [22]).

14. To the extent that the Intervenor contends that procedural fairness obligations "crystallise at the point of the execution of the final decision", this is without foundation and is contradicted by the law pertaining to apprehended bias. The obligation to be fair and to be seen to be fair operates throughout the process and is not to be judged only at the end of the making of a decision that is subject to certiorari.

The assessment scheme

15. The Intervenor appears to describe the process adopted in these cases as "the making of inquiries by government officers and the provision of a report for the purpose of informing Ministers about matters that may be no more than relevant to a possible exercise of a discretionary power".[15]

16. The true position is that these cases involve much more than mere inquiries. Prior to the making of the inquiries, the Minister determined that every request for ministerial intervention received by the department would be assessed by a departmental officer. Subsequent to the making of the inquiries, in purported compliance with the Minister's direction, a departmental officer referred a submission or a schedule to the Minister, or decided that the department would take no further action in respect of the request.

17. If these processes are not being carried out under and for the purposes of the Act, they are analogous to a previous non-statutory scheme which featured the Determination of Refugee Status (DORS) Committee. The functions of the DORS Committee were

13 *Griffith University v Tang* (2005) 221 CLR 99 at 128 [80] (Gummow, Callinan and Heydon JJ).
14 *Griffith University v Tang* (2005) 221 CLR 99 at 130-131 [89] (Gummow, Callinan and Heydon JJ).
15 Intervenor's submissions at [21].

explained in *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 300-301.

18. Breaches of the rules of natural justice by the non-statutory DORS Committee were regarded as occurring "in connection with" the subsequent decision by the delegate.[16] For example, in one case, procedural fairness required the Secretariat of the DORS Committee to give to the applicant the opportunity in writing, after consultation with her legal advisers, to reply to the substance of certain views expressed in the minutes of the DORS Committee.[17]

19. The submissions and schedules prepared by officers in the present cases perform a similar role to the recommendations of the DORS Committee. There is no reason why similar obligations of procedural fairness should not likewise arise.

Dated: 30 January 2012

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16 *Yaa Akyaa v Minister for Immigration and Ethnic Affairs* (unreported, FCA, Gummow J, 5 May 1987). The words "in connection with" appeared in s 5(1)(a) of the ADJR Act.

17 Ibid.