HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

BIF23
Appellant

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Respondent

APPELLANT'S REPLY

I. CERTIFICATION

1. This reply is in a form suitable for publication on the Internet.

II. CONCISE REPLY

2. The appellant joins issue with the Minister on the principal question of the proper construction of the word "practicable" in s 501CA of the Migration Act (relevant to ground 1) and the related issue of whether it involves a question of jurisdictional fact; and also the intersection of s 33(1) of the AI Act with s 501CA of the Migration Act (ground 2), for the reasons given in the appellant's submissions in chief. In this reply, the appellant addresses a number of errant submissions made by the Minister on the context in which those questions arise, and which are said by the Minister to inform the answers to those questions.

A. Appellant's lack of capacity

3. The Minister purports to accept that the appellant "lacked legal decision-making capacity" (elsewhere, that he was "under a legal incapacity" and "lacked formal legal capacity") at the time the notice under s 501CA(3) was handed to him (RS [7]-[10]).

4. Yet in the very same sentence in which the Minister accepts that the appellant was under such an incapacity, the Minister submits that "the question of whether it was possible, as a matter of fact, for representations to be made on the Appellant's behalf is more

nuanced" (RS [10], emphasis added; see also the reference to "on behalf" in RS [25]). The Minister supports this submission by stating that the appellant "was able to consent on 1 December 2021 for Forensicare to contact Victoria Legal Aid [**VLA**]".

5. This submission simply muddies the waters. The primary judge found that the appellant lacked legal decision-making capacity at the relevant time and (as the appellant has previously noted) no contention was made by the Minister in that respect on appeal (*PJ* [86], CAB 55; see also AS [10] and fn 4). Moreover, the fact that the appellant provided "verbal consent" to Forensicare "to contact VLA to request urgent legal assistance" (cf. *J* [8], CAB 49) does not entail that he had capacity to decide whether to make representations and (if so) what representations to make, if that is what the Minister is suggesting. The whole point of the (successful) application for a guardianship order by Forensicare, which was supported by medical evidence, was that the appellant was unable to make such decisions. And, if the Minister does accept that the appellant could not make such decisions, then it is distracting to allude to the "possib[ility]" of representations being made "as a matter of fact" on the appellant's behalf (cf. RS [10]). As previously explained (AS [38]), setting aside circumstances of agency and guardianship, s 501CA of the Act does not admit of one person providing representations "on behalf" of the recipient of the notice (see also reg 2.52(4)(e)).

B. Consequences of the appellant's lack of capacity

6. The Minister appears to accept that, as a matter of "ordinary principle", a consequence of the appellant's lack of decision-making capacity is that a purported representation by him in response to the Minister's invitation under s 501CA(3) – i.e., otherwise than by a guardian – would have been "deprive[d] of legal effect" (RS [21], [22]). Yet, the Minister contends that representations made under s 501CA(3) should be "treat[ed] as" valid even where a person lacks capacity (RS [25]). This submission is also flawed.

7. **First**, it is true that legal capacity is assessed having regard to the nature of the transaction and the person's capacity to understand the transaction or act and its consequences (see AS [43]; cf. RS [23]). But in the present case, the order made under the Guardianship Act recorded that, due to the appellant's disability, he did not have capacity to make decisions about the personal and financial matters listed in the order, including matters pertaining to his visa and immigration status: ABFM 37. The application and medical evidence upon which it relied stated specifically that "entrenched, firmly held, bizarre and grandiose delusions were colouring [the appellant's] decision-making regarding his possible

deportation": ABFM 24 (emphasis added). In other words, insofar as legal capacity is "assessed on an issue by issue basis" (RS [23]), there is no doubt here that the central "issue" in relation to which appellant was found to lack capacity was the "issue" of making representations in response to the s 501CA(3) notice.

8. **Secondly**, the decisions of the Full Court in *Soondur* and this Court in *Re Woolley* (see AS [48]-[52]) are analogous. They support a conclusion that the "ordinary principle" identified by the Minister applies in this context: a person who lacks capacity to make a representation cannot make a valid representation under s 501CA of the Act. Case law relied on by the Minister regarding the competency of curial proceedings is inapposite. Aside from anything else, a curial proceeding is capable of being "regularised" by the appointment of a litigation guardian prior to the determination of the proceeding. Whereas it is inapt to speak of "regularising" a representation after it is made. The strict 28-day time limit here also entails that any appointment of a guardian after a notice is issued under s 501CA(3) could not avoid the unfairness arising from purported provision of a notice and invitation to a person who lacks both capacity and a guardian at that time.

C. The appellant's construction of "practicability" does not "shift perspective"

9. The Minister submits that, on its ordinary meaning, what is "practicable" is assessed from the perspective of the person issuing the notice (RS [15]). And the Minister submits that the appellant's construction "shift[s] perspective to the capacity of the person receiving the notice", and is therefore "contrary to the ordinary meaning of s 501CA(3)".

10. However, it is Parliament's purpose in enacting s 501CA, and therefore the Minister's only lawful purpose in issuing a notice under s 501CA(3), to ensure that the person receives (after the mandatory cancellation) an opportunity to persuade the Minister that they do pass the character test and/or that there is another reason to revoke the cancellation. The fact that the availing of that opportunity is to the advantage of the person does not mean it is not the Minister's purpose to provide the opportunity. If, at a particular time, the person is incapable of taking an opportunity (because they lack capacity, and a guardian has not yet been appointed), then it is not "practicable" to issue the notice. That is because the Minister's only lawful purpose is incapable of being achieved at that time. It is not, at that time, feasible (or practicable) to provide the requisite opportunity.

D. Regulations do not assist the Minister's position

11. The Minister submits that reg 2.55 of the Regulations "provide[s] a strong indication that the validity of a notice does not depend on the legal capacity of the recipient" ([28]-[30]).

12. It does no such thing. Regulation 2.55 is simply a facultative provision as to how a document can be "given" to a "person" (including by dispatching by postage to their last-known address etc.) It says nothing as to whether a "person" to whom such a document is "given" can make a valid representation if they lack relevant legal decision-making capacity, and no guardian has yet been appointed. More generally, it says nothing as to the issue of construction raised by this ground: is it "practicable" to give a notice and invitation under s 501CA (including by any of the methods of service allowed by reg 2.55) to a person who is legally incapable of responding to it and who does not yet have a guardian?

13. The Minister's submissions in this respect are also affected by other errors. It is not true that the legislation "do[es] not permit the Minister to give documents to an adult's guardian" (cf. RS [28.1]); there is no reason why the legislation would not be construed harmoniously with the law of guardianship such that reference to "the person" in reg 2.55 encompasses the person's guardian (if a guardian has been appointed). Likewise, it does not follow from the statutory definition of "carer of the minor" in reg 2.54 that the Minister could not "give" a notice to a "person" by their guardian simply on the basis that the guardian is (for that purpose) the "person" (cf. RS [28.3] (see s 38(3) of the Guardianship Act and paragraph 14 below). Furthermore, contrary to the Minister's submission, not all minors lack "legal decision-making capacity" (cf. RS [29]).[1]

14. By virtue of the power vested in the guardian under the relevant legislation (in Victoria, under s 38(3) of the Guardianship Act), any "decision made, action taken, consent given or thing done by a guardian under a guardianship order has effect as if it were made, taken, given or done by the represented person". There is no textual, contextual or purposive indicator in the Act that Parliament intended that things done by guardians under State and Territory legislation would not have effect under the Act as a thing deemed to have been done by a represented person, including receive documents.

15. As the appellant has already observed, the law of incapacity and guardianship has deep common law roots (albeit that State and Territory legislation is now the principal means by which persons who lack capacity are protected), the central concern of which has always been the protection of the legal rights and interests of those of unsound mind (AS [43]-[45]). The fundamental common law right of persons to be able to have their (other)

[1] See, e.g., *Re Woolley* (2004) 225 CLR 1, [102]-[103] (McHugh J).

rights and interests protected by a guardian should not be taken to have been excluded by the Act absent express words or necessary implication.

16. Legislative history undermines the Minister's submission that s 501CA and the associated regulations (and the Act more broadly) are not to be read with general law notions of agency and guardianship.[2]

E. The supposed "inconvenience" to the Minister of the appellant's construction

17. Little weight should be given to the Minister's submission that the appellant's construction would create uncertainty in the "application" of s 501CA in cases involving a person lacking capacity (cf. RS [26]-[27]). The mandatory cancellation of the non-citizen's visa under s 501(3A) is unaffected by this issue, so the "need to act quickly" has little force in the context of s 501CA (as distinct from s 501(3A)): see AS [53]-[54], cf. RS [27]. It is also incorrect to say that, in a situation where the Minister knows of a person's incapacity, the Minister would have "no control" over whether and when a guardian is appointed: if necessary, the Minister may seek a guardianship order under the relevant State or Territory legislation.[3]

18. While this might be described as "inconvenient" (RS [39]) from the perspective of those administering the Act, it pales in comparison to the stark, objective unfairness that is consequent to the Minister's construction that is apt to annihilate fundamental rights and interests of persons who suffer incapacity for medical or other reasons, and who cannot act to protect their interests without a guardian.

Dated: 15 August 2024

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2 For instance, the Minister has not referred to s 494D of the Act, which provides that a person may authorise the giving of documents to an "authorised recipient" in connection with specified matters arising under the Act. The legislative history of s 494D(1) confirms that this provision is intended to supplement, rather than exclude, the general law of agency which otherwise applies to things done under the Act (and thus can be seen to diminish any contention that the general law of agency and guardianship is modified by the Act and the Regulations other than where this is done expressly (compare, in particular, ss 48(1A), 48A(1AA) and 501E(1A)): see Explanatory Memorandum to the Migration Legislation Amendment (No. 1) 2014 Bill [113]-[118] and Statement of Compatibility (Attachment A), 5-6, 8-9.

3 See, e.g, Guardianship Act, s 22.

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ANNEXURE

Pursuant to Practice Direction No 1 of 2019, the Appellant sets out below a list of the constitutional provisions and statutes referred to in these reply submissions.

No.	Description	Version	Provisions
	Statutory provisions		
1.	*Migration Act 1958* (Cth)	As at 1 December 2021	ss 48, 48A, 494D, 501CA, 501E
3.	*Migration Regulations 1994* (Cth)	As at 1 December 2021	regs 2.52, 2.54, 2.55
6.	*Guardianship and Administration Act 2019* (Vic)	As at 11 January 2022	ss 22, 38