

FEDERAL COURT OF AUSTRALIA

Miller v Minister for Immigration, Citizenship and Multicultural Affairs

[2022] FCAFC 183

Appeal from: *Miller v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 489

File number(s): NSD 367 of 2022

Judgment of: **THAWLEY, HALLEY AND O'SULLIVAN JJ**

Date of judgment: 15 November 2022

Catchwords: **MIGRATION** – appeal from decision of primary judge to refuse application for review of decision of the Administrative Appeals Tribunal – where application to the Tribunal was not made in compliance with s 29(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) – whether application contained a “statement of the reasons for the application” – whether failure to include statement invalidated application – appeal dismissed

Legislation: *Administrative Appeals Tribunal Act 1975* (Cth) ss 2A, 25, 29, 29AB, 69C, 70
Administrative Appeals Tribunal Amendment Bill 2004 (Cth)
Administrative Appeals Tribunal Regulation 2015 (Cth) regs 20, 24
Migration Act 1958 (Cth) ss 500, 501, 501CA

Cases cited: *CTC Resources NL v Commissioner of Taxation* [1994] FCA 947; 48 FCR 397
Fernando v Minister for Immigration and Multicultural Affairs [2000] FCA 407; 97 FCR 407
Forrest & Forrest Pty Ltd v Wilson [2017] HCA 30; 262 CLR 510
Miller v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 489
Murphy v Farmer [1988] HCA 31; 165 CLR 19
Project Blue Sky v Australian Broadcasting Authority [1998] HCA 28; 194 CLR 355

Division: General Division

Registry: New South Wales

National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	65
Date of last submissions:	14 November 2022
Date of hearing:	7 November 2022
Counsel for the Appellant:	Mr P Herzfeld SC with Mr J Donnelly
Solicitor for the Appellant:	Zarifi Lawyers
Counsel for the First Respondent:	Mr N Wood SC with Ms K McInnes
Solicitor for the First Respondent:	Sparke Helmore
Counsel for the Second Respondent:	The Second Respondent filed a submitting notice, save as to costs

ORDERS

NSD 367 of 2022

BETWEEN: **JOSEPH MILLER**
Appellant

AND: **MINISTER FOR IMMIGRATION, CITIZENSHIP AND
MULTICULTURAL AFFAIRS**
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: **THAWLEY, HALLEY AND O’SULLIVAN JJ**

DATE OF ORDER: **15 NOVEMBER 2022**

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs as agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

- 1 The issues in this appeal concern s 29(1)(c) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**). The appellant sought review in the Administrative Appeals **Tribunal** of a decision of the first respondent (the **Minister**) under s 501CA(4) of the *Migration Act 1958* (Cth) not to revoke a cancellation of the appellant's visa. The application for review had to be made within nine days of the day on which the appellant was notified of the Minister's decision and there was no power on the part of the Tribunal to entertain an application to extend the time in which to make an application for review: s 500(6B) of the Migration Act. The application was one which had to be brought in the Tribunal's General Division, not the Tribunal's Migration and Refugee Division.
- 2 The manner of applying for review to the Tribunal is addressed in s 29 of the AAT Act. Paragraph (c) of s 29(1) provided that the appellant's application to the Tribunal "must contain a statement of the reasons for the application".
- 3 Before the Tribunal, there was no issue that, at the time the appellant's application was lodged, the application did not contain a statement of the reasons for the application. A statement of reasons for the application was later provided, but only after the nine day time prescribed for the lodging of the application. The Tribunal held that the application was valid, notwithstanding the absence of a statement of reasons for the application having been made within the time prescribed. On the basis that the application to it was valid, the Tribunal proceeded to affirm the decision under review.
- 4 The appellant applied in this Court's original jurisdiction for judicial review of the Tribunal's decision. In this Court, the Minister accepted that, if the Tribunal had jurisdiction to engage in the review, then the Tribunal's decision was affected by jurisdictional error and would have to be remitted. However, the Minister contended that the Tribunal did not have jurisdiction because the application made to it was invalid for non-compliance with s 29(1)(c). As had been the position before the Tribunal, there was no issue that the application did not contain a statement of reasons for the application to the Tribunal as required by s 29(1)(c). The primary judge held that the application was invalid by reason of non-compliance with s 29(1)(c): *Miller v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 489.

5 Contrary to its position before the Tribunal and on its application for judicial review, on this appeal, the appellant contends that his application to the Tribunal did contain a statement of the reasons for the application. The Minister did not object to this contention being raised on appeal and leave to raise the issue is granted.

6 The issues on appeal therefore are:

- (1) did the appellant’s application to the Tribunal “contain a statement of the reasons for the application” within the meaning of s 29(1)(c) at the time it was made; and
- (2) if the application did not comply with s 29(1)(c), was the application invalid?

7 For the reasons which follow:

- (1) the application did not comply with s 29(1)(c) because it did not contain a statement of the reasons for the application; and
- (2) the primary judge was correct to conclude that the consequence of non-compliance with s 29(1)(c) was that no valid application had been made and that the Tribunal therefore did not have jurisdiction.

BACKGROUND

8 The appellant is a Fijian national and citizen. He arrived in Australia in 1991 as a 10 year old with his parents and two siblings. He has three biological minor children from a former relationship with an Australian citizen. He also has five step-children to his current partner who is an Australian citizen.

9 The appellant has an extensive criminal history. Much of it involves assault, violence or physical intimidation. He has been convicted of offences relating to domestic violence, including contravening prohibition restrictions or apprehended violence orders.

10 On 27 November 2019 he was sentenced in the Local Court of New South Wales at Orange to a period of two year imprisonment for the offences of assault, stalk/intimidate, intend fear physical harm (domestic), and two counts of contravene prohibition/restriction in AVO (domestic). That sentence was subsequently reduced to a period of 12 months imprisonment with a non-parole period of six months.

11 As a consequence of the imposition of that term of imprisonment his visa was cancelled under s 501(3A) of the Migration Act on 4 March 2020.

12 The appellant made representations to the Minister pursuant to s 501CA(4)(a) of the Migration Act. The appellant did not claim in those representations that he passed the character test. Accordingly, the only issue for the delegate was whether there was “another reason” for revocation of the visa cancellation.

13 On 15 March 2021, the delegate determined that he was not satisfied that there was “another reason” why the original cancellation decision should be revoked and, accordingly, the power under s 501CA(4) to revoke was not enlivened.

14 The appellant was notified of the delegate’s decision on 16 March 2021. The letter contained various attachments, including the “decision record” being a statement of reasons for the decision. One attachment to the notification letter explained that, to make an application for review of the s 501CA(4) decision, the appellant could either: apply online; fill out an application form; write a letter; send an email. The attachment explained:

Regardless of which method you use, your application must contain a statement of reasons explaining why you are making the application for review.

15 Section 500(6B) of the Migration Act required that any application for review be lodged within nine days after the decision was notified, namely within nine days after 16 March 2021.

16 On 24 March 2021 the appellant, by his migration agent, filed a document in the Tribunal purportedly seeking a review of the delegate’s decision. That document was a form, being form eM2, which was not in fact the form designed for use in applying for a review in respect of decisions made under s 501CA(4). Form eM2 is designed for use in the Tribunal’s Migration and Refugee Division. It does not contain a question or dedicated space for identifying the reasons for making the application. Applications for review of decisions under s 501CA(4) are brought in the Tribunal’s General Division.

17 The appellant could have used an available form headed, “Application for Review of Decision (Individual)”, which is designed for use in the Tribunal’s General Division. In section 3 of that form, which is entitled “Reasons for the Application”, the following appears:

Why do you claim the decision is wrong?*

Please read the “reasons you are making an application” section in the Guide to applying for a review before answering this question.

18 By using eM2 it is apparent that the migration agent overlooked the requirement in s 29(1)(c) of the AAT Act to include a statement of the reasons for making the application.

19 A directions hearing took place on 1 April 2021 at which a Senior Member of the Tribunal requested that the appellant provide the reasons for his application.

20 On 9 April 2021 by email to the Tribunal the appellant's solicitors advised that the reasons for the application were as follows:

Why do you claim the decision is wrong?

The Minister erred in concluding that there is not another reason why the original decision to cancel the applicant's Resident Return (Subclass 155) visa should be revoked.

LEGISLATIVE FRAMEWORK

21 Section 29(1) of the AAT Act addresses how an application to the Tribunal is made. It provides:

29 Manner of applying for review

- (1) An application to the Tribunal for review of a decision:
- (a) must be made:
 - (i) in writing; or
 - (ii) if the decision is reviewable in the Social Services and Child Support Division – in writing or by making an oral application in person at, or by telephone to, a Registry of the Tribunal; and
 - (b) must be accompanied by any prescribed fee; and
 - (c) unless paragraph (ca) or (cb) applies or the application was oral – must contain a statement of the reasons for the application; and
 - (ca) in respect of an application made under section 54(1) of the *Australian Security Intelligence Organisation Act 1979* for review of a security assessment – must be accompanied by:
 - (i) a copy of the assessment as given to the applicant; and
 - (ii) a statement indicating any part or parts of the assessment with which the applicant does not agree and setting out the grounds on which the application is made; and
 - (cb) in respect of an application under section 54(2) of the *Australian Security Intelligence Organisation Act 1979* – must be accompanied by a statement setting out the grounds on which the application is made;
 - (d) if the terms of the decision were recorded in writing and set out in a document that was given to the applicant or the decision is deemed to be made by reason of the operation of subsection 25(5) or (5A) – shall be lodged with the Tribunal within the prescribed time.

Note: Paragraph 33(1)(c) provides that the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.

22 If the Tribunal considers that an applicant's s 29(1)(c) statement "does not clearly identify the respects in which the applicant believes that the decision is not the correct or preferable decision", the Tribunal may request the applicant amend the statement. Section 29AB provides:

29AB Insufficient statement of reasons for application

If the Tribunal considers that an applicant's statement under paragraph 29(1)(c) does not clearly identify the respects in which the applicant believes that the decision is not the correct or preferable decision, the Tribunal may, by notice given to the applicant, request the applicant to amend the statement appropriately, within the period specified in the notice.

23 Section 29(7) gives the Tribunal power to extend time in which to make an application and s 29(8) permits that power to be exercised after the time for making an application for review has expired. Sections 29(7) to (9) provide:

- (7) The Tribunal may, upon application in writing by a person, extend the time for the making by that person of an application to the Tribunal for a review of a decision (including a decision made before the commencement of this section) if the Tribunal is satisfied that it is reasonable in all the circumstances to do so.
- (8) The time for making an application to the Tribunal for a review of a decision may be extended under subsection (7) although that time has expired.
- (9) Before the Tribunal determines an application for an extension of time, the Tribunal or an officer of the Tribunal may:
 - (a) give notice of the application to any persons the Tribunal or officer considers to be affected by the application; or
 - (b) require the applicant to give notice to those persons.

24 The operation of s 29 may be modified or altered by enactments conferring jurisdiction on the Tribunal: s 25(3) and (6). Relevantly for present purposes, s 29(7) to (9) do not apply to various applications for reviews of decisions of delegates, including for review of decisions under s 501CA(4) of the Migration Act. Section 500(6B) of the Migration Act provides:

If a decision under section 501 of this Act, or a decision under subsection 501CA(4) of this Act not to revoke a decision to cancel a visa, relates to a person in the migration zone, an application to the Tribunal for review of the decision must be lodged with the Tribunal within 9 days after the day on which the person was notified of the decision in accordance with subsection 501G(1). Accordingly, paragraph 29(1)(d) and subsections 29(7), (8), (9) and (10) of the *Administrative Appeals Tribunal Act 1975* do not apply to the application.

25 The legislative provisions concerning fees are referred to further below.

THE PRIMARY JUDGE'S REASONING

26 The primary judge addressed each of the many arguments advanced by the appellant against the construction ultimately reached by his Honour. It is unnecessary to set these out. Those which remain relevant to the appeal are addressed later.

27 The core of the primary judge's reasoning was as follows:

[38] The textual aspects of s 29 and, in particular, subparagraph (1)(c), point strongly to the conclusion that an application would be invalid and of no effect if it failed to "contain a statement of the reasons for the application". The requirements in s 29(1) for an application to review a decision are expressed in obviously imperative or obligatory terms. The section specifies that the application "must be made in writing" (s 29(1)(a)); "must be accompanied by any prescribed fee" (s 29(1)(b)); "must contain a statement of the reasons for the application" (s 29(1)(c)); and "shall be lodged with the Tribunal within the prescribed time" (s 29(1)(d)). The use of the imperatives "must" and "shall" naturally indicate that the requirements to which they relate are necessary constituent elements of an application. There was no dispute that, in the ordinary course, the natural meaning of the word, "must", was that the matter to which it related was obligatory. So much was recognised in cognate circumstances in *Fernando v Minister for Immigration and Multicultural Affairs* (2000) 97 FCR 407, 419 [50] (*Fernando*) where Finkelstein J said:

Then there is the language of s 412 itself. An application for review "must" be given to the Tribunal within the prescribed period. If one adopts, as it is sometimes necessary to do, the maxim that Parliament says what it means and means what it says, the language adopted by the legislature strongly suggests that an application given to the Tribunal after the relevant period has elapsed is invalid.

[39] The conclusion that, generally, s 29(1) imposes conditions of validity is supported by the cumulative effect of the sub-paragraphs. Leaving aside for present purposes the requirement in (1)(b) that the intending applicant is to pay the prescribed fee, each of the other requirements concern a different aspect of the application. Sub-paragraph (1)(a) is concerned with its mode or form; (1)(c) is concerned with its content, and (1)(d) is concerned with the time in which it might be made. It was not disputed by the applicant that the requirements that the application be in writing and that it be lodged within a specific time, were matters which went to its validity. That is, if either were not complied with no valid application would exist. It was also not disputed that this conclusion arises by reason of the use of the word "must" in (1)(a) and "shall" in (1)(d). As was submitted by Mr Wood SC, the manner in which the requirements that the application be in writing and be lodged within the specified time are expressed is relevantly indistinguishable from the manner in which the requirement in 1(c) is expressed. There is no apparent qualitative difference between the requirements of the mode or form of the application and the time of its lodging on the one hand and, on the other, its contents. None were suggested by the applicant. This too rather strongly indicates that the requirement for the application to contain a statement of reasons also went to its validity.

28 The primary judge also recorded that an application which did not contain a statement of reasons could be “perfected” provided that was done within the relevant prescribed time for lodging the application:

[40] That is not to say that an invalid application which does not contain a statement of reasons cannot be perfected by amending it by including a statement of reasons. However, the taking of any remediating step must occur such that, by the time limited by s 29(1) for the filing of the application, a complying application has been lodged. In this case the delivery of a statement of reasons on 9 April 2021, did not have the effect of validating, *nunc pro tunc*, the original deficient application. Whilst it might be accepted that once the statement of reasons was provided an application in the required form had been made, it was only from that point in time that the requirements as to form were satisfied: *Minister for Immigration and Citizenship v Chan* (2008) 172 FCR 193, 203 – 204 [52] – [54]. In this case that was from 9 April 2021 with the result that no valid application had been lodged within the prescribed time. It would be entirely inconsistent with the whole scheme of the *AAT Act* (as modified by the *Migration Act*) to hold otherwise.

THE APPEAL

Did the application contain a statement of reasons?

29 The application form which the appellant used was the form prescribed for use in the Tribunal’s Migration and Refugee Division, not its General Division. That is, the wrong form was used. As mentioned earlier, the application form which the appellant used did not contain a dedicated place in which to set out a statement of reasons for making the application. Such a statement is not required for applications for review made under Parts 5 and 7 of the Migration Act to the Tribunal’s Migration and Refugee Division.

30 The application form which the appellant used did contain a dedicated place to refer to the “Decision to be reviewed”. In that section of the form, the appellant described the “Decision for review” in the following terms:

Non-revocation of a visa cancellation

31 The appellant submitted that his application contained a statement that he sought review of the “non-revocation” of the cancellation of his visa. It was submitted that this was necessarily a statement by the appellant that he:

- contended that the non-revocation decision was wrong;
- sought the only different decision possible, namely revocation of the visa cancellation.

32 The appellant submitted that, in substance, the application contained a statement that the decision was wrong and a different decision should be made, being what the appellant later contended in his letter of 9 April 2021.

33 The appellant also relied upon the fact that the application attached the delegate's reasons. The appellant submitted that the reasons made clear that the appellant accepted he did not satisfy the character test and it necessarily followed from the terms of s 501CA(4) of the Migration Act that the only thing the appellant could be submitting before the Tribunal was that there was "another reason" the cancellation of his visa should be revoked.

34 It should be observed at the outset that s 29(1) of the AAT Act is not limited in its application to reviews of the kind the subject of this appeal. Some applicants will be unsophisticated, perhaps frequently in this particular context. Others will not be. The appellant emphasised that it would be of limited utility to provide a statement that the applicant considered the decision to be wrong. So much may be accepted but that is not to the point. Statements of reasons for the application will vary in length and utility. The correct construction of what is required by s 29(1)(c) must be undertaken recognising that it is a provision of general application. The statutory regime, particularly s 29AB of the AAT Act, indicates that some importance is attached to the statement of reasons for making the application for review.

35 The explanatory memorandum to the *Administrative Appeals Tribunal Amendment Bill 2004* (Cth) (**2004 EM**) which introduced s 29(1B), the immediate predecessor to s 29AB, included (emphasis added):

Under paragraph 29(1)(c) of the AAT Act, an applicant must include a statement of reasons with their application for review of a decision (unless their application is one covered by paragraphs 29(1)(ca) or (cb)). **Item 95 inserts a new subsection 29(1B) into the Act. New subsection 29(1B) enables the Tribunal to obtain a further statement of reasons from the applicant if the Tribunal is of the opinion that the statement provided with the application does not assist the Tribunal in identifying why the applicant (or applicants) believes the decision is not the correct or preferable decision.**

This provision is made to overcome the practise of applicants submitting in their statement of reasons that there was "error in fact and law" without further substantiation, particularly where the applicant has legal representation. Such a statement does not assist the Tribunal in identifying why the applicant believes the decision under review was incorrect.

... The provision is intended to encourage applicants to make more detailed statements so as to assist the Tribunal to resolve matters as early as possible. It is not intended to disadvantage applicants with few resources.

36 The 2004 EM recognises that whilst unhelpful, nonetheless the practice of an applicant submitting in their statement of reasons that there was “error in fact and law” is nonetheless sufficient.

37 Section 29(1)(c) is not satisfied by the fact that it may be possible to draw an inference from the terms of an application and/or the accompanying documents as to the reasons that the applicant has made the application. Such an inference may or may not in fact be correct and might be drawn with varying degrees of certainty. An inference drawn from the objective matters stated in the application or the accompanying documents might be quite inconsistent with the actual reason. Further, the inference drawn might differ depending on the Tribunal member or officer drawing the inference. The legislature should not be presumed to have intended that a statement of reasons complying with s 29(1)(c) could be an implicit statement drawn by inference from the way in which the decision was identified and/or the documents which accompany the application. Indeed, were that to be the case, s 29 (1) (c) would have no work to do. The language and context lend no support to such a construction.

38 Section 29(1)(c) requires a positive statement as to the reasons for making the application. That was not achieved by the manner in which the decision the subject of the application was identified in the application form lodged in an endeavour to engage the Tribunal’s jurisdiction in the present case.

39 As the Minister submitted, it will always be implicit from the lodging of a document indicating that the applicant wishes to apply for review of a decision (whether or not the decision or reasons are attached) that an applicant wants to initiate a review of the decision. It will not necessarily be the case that the applicant seeks the review because the applicant considers that the decision is wrong or that it contains some error. In a typical case in the General Division, the Tribunal stands in the shoes of the decision-maker and makes the correct or preferable decision. That decision may or may not turn on an identified error in legal or factual approach. Further, it may turn on the introduction of material which had not been before the decision-maker.

40 As the Minister also submitted, in many cases it may be implicit from the mere act of lodging a written application for review that the applicant wants a different result. However, that will not always be the case. It may be that an applicant wishes the same result, but on a different basis to that found. Further, an applicant for review of a refusal of a visa application might,

for example, wish to obtain a benefit of the mere pendency of the review application, such as the obtaining (or prolongation) of a bridging visa.

Was a valid application made?

The issue

41 The parties were agreed that the question of whether non-compliance with s 29(1)(c) of the AAT Act led to the invalidity of the application turned on a construction of the provision, applying the principles from *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355, in particular at [91], where the High Court stated (footnotes omitted):

An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.

42 As the primary judge stated at [36]:

In *Project Blue Sky* the majority identified that the real question is whether an act done in breach of a legislative provision is invalid and that the classification of a statutory provision as “mandatory” or “directory” merely records a result which has been reached on other grounds. As their Honours said (at 390 – 391 [93]):

... A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to “the language of the relevant provision and the scope and object of the whole statute”.

The primary judge’s reliance on the word “must”

43 The appellant attacked the primary judge’s reasoning that the textual aspects of s 29(1) “point strongly to the conclusion that an application would be invalid” if it failed to contain a statement of the reasons for the application because s 29(1) was expressed in “obviously imperative or obligatory terms” in its use of the words “must” and “shall”: at [38]. The appellant also challenged the reasoning of Finkelstein J in *Fernando v Minister for Immigration and Multicultural Affairs* [2000] FCA 407; 97 FCR 407 at [50] to which the primary judge referred at [38], set out above. According to the appellant:

- (a) the conclusion that the statute contains a requirement is a necessary premise for the question posed by *Project Blue Sky*;
- (b) if s 29(1)(c) was not expressed using the word “must”, no question of non-compliance would arise and, therefore, the use of that word tells one nothing about the consequences of non-compliance.

44 The submission in (a) above may be accepted. The submission in (b) must be rejected. The use of mandatory language alone is not of itself sufficient to supply the answer to the question whether non-compliance results in invalidity. The primary judge did not proceed on that basis. Just as other provisions of the AAT Act are relevant in construing a provision to determine the consequences of non-compliance, so too is the language of the section imposing the requirement. This can be seen, for example, in the approach of the High Court in *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30; 262 CLR 510, for example at [62] and [63] where the plurality stated (footnotes omitted):

[62] In *Project Blue Sky*, this Court was concerned with whether a statutory requirement that an administrative agency perform its functions in a manner consistent with Australia’s obligations under any convention or international agreement to which Australia is a party was intended to invalidate an act done in breach of the requirement. The majority in *Project Blue Sky* were strongly influenced in reaching a conclusion in the negative by the consideration that the requirement in question regulated the exercise of functions already conferred on the agency, rather than imposed essential preliminaries to the exercise of those functions. **Their Honours were also influenced by the circumstance that the provisions did not have “a rule-like quality which [could] be easily identified and applied”, many of the obligations relevant in that case being “expressed in indeterminate language”.** Also important to the decision was the consideration that “public inconvenience would be a result of the invalidity of the act”, especially if those affected by non-compliance were neither responsible for, nor aware of, the non-compliance.

[63] The present case is readily distinguishable. **A consideration of “the language of the statute, its subject matter and objects, and the consequences for the parties of holding void” acts done in breach of the Act, reveals that ss 74(1)(ca)(ii), 74A(1) and 75(4a) imposed essential preliminaries to the exercise of the power conferred by s 71 of the Act. That this was so was made clear by both the express terms and the structure of the provisions as sequential steps in an integrated process leading to the possibility of the grant of a mining lease by the Minister. These provisions were not expressed in indeterminate terms: they imposed rules which could be easily identified and applied.** In addition, any inconvenience suffered by treating the requirements of the Act as conditions precedent to the exercise of the Minister’s power would enure only to those with some responsibility for the non-observance, whereas (as will be explained) the contrary view would disadvantage both the public interest and individuals who were within the protection of the Act. Finally, and importantly, *Project Blue Sky* was not

concerned with a statutory regime for the making of grants of rights to exploit the resources of a State.

45 Section 29 is concerned with the manner in which an application is to be made. The immediate statutory context, namely the object of s 29(1), is how to invoke the jurisdiction of the Tribunal by the making of an application. It is relevant in carrying out the task of determining the presumed intended consequences of non-compliance to examine the certainty with which the requirement itself is expressed. The primary judge did not err in attaching weight to the word “must” when determining the consequences of non-compliance. Indeed, the primary judge’s essential reasoning at [38], set out earlier, should be endorsed. For the reasons given next, so too should the reasoning at [39].

Paragraphs (a), (b) and (d) of s 29(1)

46 The requirements of the application document – that it be in writing and contain a statement of the reasons for the application – are addressed in s 29(1)(a) and (c) (or (ca) or (cb) instead of (c) where those provisions apply). The requirement that the document constituting the written application be lodged within the prescribed time is addressed by s 29(1)(d). Section 29(1)(b) addresses something which must “accompany” the application, namely “any prescribed fee”.

47 There was no dispute between the parties that s 29(1)(a) set out requirements as to the form of a valid written application and that non-compliance with s 29(1)(a) results in invalidity.

48 There was no dispute between the parties that non-compliance with the requirement in s 29(1)(b) to pay any prescribed fee did not result in invalidity of the application. Section 29(1)(b) imposes a requirement that the document be “accompanied by any prescribed fee”. Section 70(2) of the AAT Act permits the making of regulations for the prescribing of fees to be payable in respect of applications to the Tribunal. Regulations imposing fees are found in reg 20 of the *Administrative Appeals Tribunal Regulation 2015* (Cth) (**AAT Regs**). Section 69C(1) of the AAT Act provides that the Tribunal may dismiss an application to the Tribunal if: (a) regulations under s 70 prescribe a fee to be payable in respect of the application; and (b) the fee has not been paid by the time worked out under regulations under s 70. Regulation 24 of the AAT Regs provides:

- (1) If an application is not accompanied by the prescribed fee, the Tribunal is not required to deal with the application unless, and until, the fee is paid.

- (2) For the purposes of section 69C(1)(b) of the Act, the time by which the fee must be paid is the end of the 6 weeks starting on the day the application is lodged.

Note: The Tribunal may dismiss the application under that section if the fee is not paid by that time.

49 Section 69C(1) of the AAT Act reveals that the accompaniment of the fee with the application might occur after the prescribed time for lodgement of the application. As the primary judge stated at [48]:

... It is the ameliorating effect of the inclusion of the permissive powers of the Tribunal in s 69C and reg 24 to dismiss an application which is not accompanied by the prescribed fee, which provides context for the interpretation of s 29(1)(b) ...

50 The parties were in dispute as to whether the requirement in s 29(1)(d) as to the time in which an application must be made was a requirement non-compliance with which would result in invalidity.

51 The appellant submitted that, having regard to the power to extend the time for making an application in s 29(7), including pursuant to s 29(8) after the time has expired, the requirement to lodge an application within the prescribed time in s 29(1)(d) is not essential to its validity. The Minister submitted that such an application is invalid, but that the “prescribed time” identified in s 29(1)(d) for the making of an application is capable of being “extend[ed]” under s 29(7), whether before or after the expiry of the ordinary deadline: s 29(8).

52 The Minister’s construction is the correct one. The appellant’s submissions elide two different applications: (a) an application for review of a decision; (b) an application made under s 29(7) to extend time to make an application for review of a decision. The Tribunal has jurisdiction to entertain an application brought under s 29(7) at any time. The Tribunal does not have jurisdiction to entertain an application for review of a decision brought outside of the prescribed time unless the Tribunal has extended time under s 29(7) pursuant to an application made under that provision. Section 29(1)(d) is mandatory in the sense that non-compliance with it means a purported application for review of a decision made out of the prescribed time for the making of that application is invalid. An application made out of time does not engage the Tribunal’s jurisdiction.

53 In summary, paragraphs (a) and (d) of s 29(1) impose requirements which must be complied with for the application to be valid. Paragraph (b) of s 29(1) does not. However, the word “must” is not necessarily used differently in s 29(1)(b) than it is used in s 29(1)(a) and (d). In each case, the word imposes a requirement. The real point is that the construction of paragraph

(b) in s 29(1), when taken in context, including its peculiar legislative history, reveals that non-compliance with the requirement in that paragraph does not result in invalidity. The legislative history may be summarised as follows:

- Under the original AAT Act fees were not required to be paid at all.
- In 1977, s 70 was inserted, which authorised regulations to make provision requiring the payment of fees, but not in a provision of the Act that went to the validity of an application: *Administrative Appeals Tribunal Amendment Act 1977* (Cth).
- In 1993, s 29A was introduced, providing that an application is “not taken to have been made” unless the fee is paid, but contemplating that the fee could be paid after lodgement: *Administrative Appeals Tribunal Amendment Act 1993* (Cth).
- In 2012, s 29A was repealed and s 69C was introduced: *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth).

54 Even if the word “must” were being used in a different way in s 29(1)(b), which it is not, as Gummow J stated in *CTC Resources NL v Commissioner of Taxation* [1994] FCA 947; 48 FCR 397 at 405, citing *Murphy v Farmer* [1988] HCA 31; 165 CLR 19 at 27: “the presumption that a word is used with a uniform meaning in a statute, or even in the one section, readily yields to the context”. A part of the context is the legislative history just described.

Paragraphs (ca) and (cb) of s 29(1)

55 The parties’ written submissions filed before the hearing did not address paragraphs (ca) and (cb) of s 29. The parties were provided the opportunity to file short written submissions after the hearing. Those paragraphs express requirements which must be complied with for a valid application to exist, at least before expiry of any prescribed time for the lodging of an application. This tends in favour of a like construction of paragraph (c) of s 29(1) and lends further support to the primary judge’s reasoning at [39].

The consequences of non-compliance with paragraph (c) of s 29(1)

56 A purported application which does not comply with s 29(1)(c), at least by the time the prescribed time has elapsed, is not a valid application. Section 29(1)(c) is cast in mandatory language. The requirements are easily identified and applied. They are contained in a provision identifying the manner in which an application is made. The statutory context indicates that the requirement is of importance. The context includes s 29AB, introduced to encourage or facilitate a better identification of the reasons for the application. With the

exception of s 29(1)(b), each of the paragraphs of s 29(1) contain requirements which must be complied with for the existence of a valid application. Section 29(1)(b) must be differently construed for the reasons given earlier.

57 Contrary to the appellant's submission, there is nothing harsh or capricious about s 29(1)(c) being intended to prescribe a requirement, non-compliance with which would result in an invalid application. In the usual case, an application for an extension of time could be made: s 29(7) and (8). It is true that no application for an extension of time can be made in the present case, but that is because of the intended operation of s 500(6B) of the Migration Act. Section 29(1)(c) of the AAT Act is not to be construed by reference to a statute which modifies its operation.

58 It remains to mention two further arguments made by the appellant.

The appellant's argument concerning the 2004 EM

59 The appellant sought to draw support from the last sentence of the following passage in the 2004 EM:

Where the Tribunal requests a further statement under new subsection 29(1B), paragraph 29(1)(c) of the Act would be taken to have been satisfied for the purposes of determining if a valid application has been lodged. That is, the request of a further statement by the Tribunal under new subsection 29(1B) does not mean that the original application did not contain a statement of reasons for the purposes of that subsection. Accordingly if the application has met the other requirements for a valid application in subsection 29(1) of the Act, the application would not be found to be invalid for failure to comply with paragraph 29(1)(c) of the Act.

60 The last sentence cannot be read in isolation. When the last sentence is read in the context of the whole paragraph, it is clear that the drafter proceeded upon the assumption that a "further statement" could only be requested where the application already contained a statement. This is made clear in the first sentence. All that the last sentence makes clear is that the request for a further statement cannot result in invalidity for non-compliance with s 29(1)(c).

Section 2A of the AAT Act

61 The appellant also sought to draw support from s 2A of the AAT Act which provides:

2A Tribunal's objective

In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that:

- (a) is accessible; and

- (b) is fair, just, economical, informal and quick; and
- (c) is proportionate to the importance and complexity of the matter; and
- (d) promotes public trust and confidence in the decision-making of the Tribunal.

62 The appellant criticised the following observations of the primary judge at [42]:

However, the flaw in this submission is that it fails to appreciate that the objectives only apply to the Tribunal “in carrying out its functions”. Clearly, the making of a valid application for review of a decision to the Tribunal is antecedent to the Tribunal carrying out its functions. It can hardly be said the Tribunal has failed to comply with its objectives due to the failure by the applicant to lodge a valid application for review.

63 The appellant observed that the Tribunal would be carrying out its functions when assessing the validity of an application and that, in any event, s 2A is part of the statutory context in which s 29(1) must be construed and in which the presumed intended consequences of non-compliance must be assessed: *Project Blue Sky* at [93].

64 Section 29(1) must be construed in context and this context includes s 2A. More broadly, the context is one of an administrative tribunal charged with merits review, whose users will include many who are unsophisticated. Accepting this context, s 29(1)(c) should be construed as containing a requirement, non-compliance with which has the result that the application is invalid with the consequence that the Tribunal’s jurisdiction is not engaged. The statutory scheme reveals that the requirement is one of some importance in identifying the issues at an early stage. It may be accepted that this identification of issues will be more important in some types of cases than others. The requirement in s 29(1)(c) is clear and unambiguous and compliance with it is easily achieved, typically by completing the relevant part of the correct form. In the ordinary case, if there was non-compliance within the prescribed time for lodging an application, an application for an extension of time could be made.

CONCLUSION

65 The appeal should be dismissed with costs.

I certify that the preceding sixty-five (65) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Thawley, Halley and O’Sullivan.

Associate:

Dated: 15 November 2022