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Document Lodged:	Submissions
File Number:	NSD728/2019
File Title:	CLM18 v MINISTER FOR HOME AFFAIRS & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

Dated: 27/08/2019 3:52:08 PM AEST

Registrar

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No. NSD728 of 2019

Federal Court of Australia
District Registry: New South Wales
Division: General

CLM18

Appellant

Minister for Home Affairs

First Respondent

Informed Referral to Status Resolution Officer

Second Respondent

Submissions of the Australian Human Rights Commission

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1. The Australian Human Rights Commission makes these submissions as *amicus curiae* pursuant to the leave granted by Perram J on 12 July 2019 in relation to grounds 1, 3 and 4 of the proposed Amended Notice of Appeal (**ANOA**). In summary, the Commission submits that: **first**, the decision by the Minister for Immigration and Border Protection on 19 September 2017 (**Revocation Decision**) was subject to a requirement of procedural fairness; **secondly**, the Minister made a personal procedural decision to consider the exercise of his powers under s 46A(2) (or s 195A) of the *Migration Act 1958* (Cth) (**Act**). Accordingly the second and third Informed Referral to Status Resolution (**IRSR**) assessments undertaken by the Department in relation to the appellant were subject to a requirement of procedural fairness; **thirdly** (and alternatively), those assessments were subject to a requirement of procedural fairness, regardless of whether they had that statutory basis.

2. ***Ground 1 – The Revocation Decision:*** Ground 1 raises the issue of whether the exercise of the revocation power in s 46A(2C) of the Act is subject to a requirement to afford procedural fairness to a person in the position of the appellant. The Minister had earlier made a determination under s 46A(2) of the Act to 'lift the bar' and allow the appellant to make an application for a Temporary Protection Visa (**TPV**) or a Safe Haven Enterprise Visa (**SHEV**).[1] The determination was not subject to any limitation as to a "specified period" pursuant to s 46A(2A).[2] Accordingly it could only cease to have effect if the Minister exercised his revocation power under s46A(2C).

3. The ability to make an application for a TPV or a SHEV was a valuable right. The grant of one of these visas would provide a lawful basis to remain in Australia for the duration of the visa. The Revocation Decision operated to destroy or defeat that right.[3]

4. A power of that kind necessarily engages the presumption identified by the unanimous decision of the High Court in *Saeed*:[4] that is, that the legislature, being aware of common law principles of natural justice, would have intended that they apply to the exercise of such a power.[5] The corollary (as the appellant observes at AS [27]) is that the principles of procedural

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[1] *CLM18 v Minister for Home Affairs* [2019] FCCA 1106 (**J**) at [28].

[2] *Cf.* Act, s 46A(2A).

[3] Compare *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 (***Plaintiff S10***) at 659 [68]-[70] (Gummow, Hayne, Crennan and Bell JJ).

[4] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 (***Saeed***).

[5] *Saeed* at 258-259 [12] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

fairness may be excluded only by "plain words of necessary intendment".[6] The force with which those principles of construction operate is to be understood by reference to the fact that the principles of procedural fairness are deeply embedded as fundamental principles or systemic values.[7] That, in turn, attracts the more broadly applicable principle of construction that has come to be described as the principle of legality:[8] that is, it is presumed that it is "highly improbable" that Parliament would overthrow fundamental principles or depart from the general system of law, without expressing its intention with "irresistible clearness". That necessary "irresistible" clarity is not necessarily demonstrated by simply pointing to some similarities with other provisions, serving a different statutory purpose, which have been held to evince such an intention. Nor is it necessarily demonstrated by pointing to some similarities with the "position" of persons subject to those other powers.

5. Her Honour's conclusion that such an analysis did so here paid insufficient attention to three critical differences between s 46A(2C) and the dispensing provisions. **First**, the fact that the power to vary or revoke conferred by s 46A(2C) was "non-compellable" (see s 46A(7)) bears a distinctly different shade of significance in the current context. The position of the appellant was, until the exercise of that power, <u>within</u> what Heydon J described in *Plaintiff S10* at [108] as the "conventional statutory regime": a regime in which the Minister's powers were hedged all around by duties and mandatory requirements (see similarly French CJ and Kiefel J at [53] and Gummow, Hayne, Crennan and Bell JJ at [86]). It is trivially true that the appellant could not (against his own interests) have sought to "compel" the Minister to exercise that power to take him outside that regime. But the more important point was that it was <u>only</u> by an exercise of that power that the Minister could alter the existing right of the appellant to apply for a visa which arose following the exercise of the power conferred by s 46A(2C) (having not specified a limited period during which the determination would have effect under s 46A(2A)). That is, the Act, in its practical operation, <u>did compel</u> the Minister to exercise the power conferred by s 46A(2C) if he was to achieve his desired outcome. Indeed, that was

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[6] *Annetts v McCann* (1990) 170 CLR 596 at 598 (Mason CJ, Deane and McHugh JJ), referred to with approval in *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 (***Plaintiff M61***) at 352 [74] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). See also *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 668 [100].

[7] *Lee v NSW Crime Commission* (2013) 251 CLR 196 at [313] (Gageler and Keane JJ); *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 371 [92] read with 370 [90] (Gageler J).

[8] *Saeed* at 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

acknowledged in the briefing note at AB 190[2] ("To enforce the deadline for applications you must..." – emphasis added).

6. **Secondly**, the fact that the appellant could (until the Revocation Decision) have availed himself of the "conventional" regime by making an application for a visa does not mean that he has had an opportunity to deal with the particular matters that were potentially relevant to the decision to be made under s 46A(2C). The significance of that is apparent from the critical passage in the reasoning of Gummow, Hayne, Crennan and Bell JJ in *Plaintiff S10*, which appears at [100]. Their Honours there drew an analogy with Justice Brennan's reasons in *South Australia v O'Shea* (1987) 163 CLR 378 (***O'Shea***) at 410 where his Honour discerned a contrary legislative intention in a case involving a "pyramidal structure of administration" where the individual has the opportunity "in the course of the administrative process, of dealing with every fact which is to be taken into account in reaching the decision" (emphasis added). In such a case, his Honour said, there is "no room" for an implication that the power exercised by a decision-maker at the apex of the pyramid is conditioned on the giving of an opportunity for a further hearing. Likewise, in *Plaintiff S10* (at 642-646 [5]-[22]), each of the plaintiffs had already had at least an opportunity of a merits review in the course of an administrative process directed to an ultimate question that was identical with (or closely related to) that to be determined by the Minister: should the plaintiffs be granted or permitted to apply for a visa?

7. On the other hand, there is a disjuncture between the matters likely to be in issue in the visa application process and the matters that arise when the Minister comes to consider the exercise of the power conferred by s 46A(2C). Indeed, that is apparent from the briefing note which informed the Minister's actual decision in the current matter. A matter expressly drawn to the Minister's attention was the position of "a small number" of people who will "not be able to lodge an application before 1 October [2017] due to acute mental or physical health reasons...": AB 192[13]. The note also records that only some of those individuals were then known to the Department. An aspect of the appellant's case is that he was in fact in that position, but that his circumstances were unknown to the Department: AS [48] and AB 213. None of that would have been relevant in any merits review that might have followed a visa application for a TPV or a SHEV.[9]

8. **Thirdly**, the fact of the power being conditioned on the Minister's view as to the "public interest" likewise does not carry the same consequences for construction in the current context.

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[9] See, as to the relevant visa criteria, the Act, s 36; *Migration Regulations 1994* (Cth), Sch 2, Subclass 785 (Temporary Protection), cl 785.2 and Subclass 790 (Safe Haven Enterprise), cl 790.2.

The particular significance attributed to that matter in *Plaintiff S10* by Gummow, Hayne, Crennan and Bell JJ at [99(vi) and (vii)] was that it pointed to the fact that "while the personal circumstances of an individual may be taken into account, they are not a mandatory relevant consideration" which, in turn, was a further reason for concluding that "individual interests and rights are [relevantly] dealt with by provisions of the Act regulating applications and providing for review of decisions concerning visas". But, again, for the reasons given at [6]-[7] above, that is not true of the particular individual rights and interests that potentially arise as regards the exercise of the power conferred by s 46A(2C).

9. Of course, the breadth of the notion of the "public interest" may well likewise point away from individual circumstances being a mandatory consideration in the context of s 46A(2C). But it has never been the case that a duty of procedural fairness is attracted only where the decision maker is bound to have regard to these matters: it is sufficient that the repository of power is "bound or is entitled to have regards to the interests of an individual": see eg *Kioa v West* (1985) 159 CLR 550 at 619 (Brennan J, emphasis added). Nothing in *Plaintiff S10* suggests otherwise. And the Minister plainly understood here that he was at least entitled to have regard to the interests of people in the position of the appellant and purported to take them into account to some extent: see again the passage at AB 192[13].

10. For those reasons, the matters her Honour relied upon as evincing a sufficiently clear intention to exclude the principles of procedural fairness did not in fact do so (ground 1 of the ANOA). The Commission does not seek to make submissions about whether procedural fairness was in fact accorded to the appellant in relation to the making of the Revocation Decision (ground 2 of the ANOA).

11. ***Grounds 3 and 4 – Status of the IRSR process:*** The Department made a submission to the Minister on 12 September 2017. The third recommendation of that submission was that the Minister note the Department's proposed arrangements for non-lodgers after 1 October 2017. Those arrangements were set out at [10] of the submission (AB 191, see also J59, AB 45). The purpose of those arrangements was further explained at AB 192-193 as being a "referral process … to ensure that any protection claims raised after the application deadline are assessed by protection officers". It was also specifically noted there that the amendment of the s 46A guidelines did "not preclude IMAs who are found to meet Australia's international obligations being referred to you to consider re-lifting the bar". The process by which persons in the position of the appellant would be "found" to meet Australia's international obligations was that specified in paragraph [10]. Three matters suggest that that state of affairs did in fact

involve a "personal procedural decision" (*SZSSJ* at [53], [54]) by the Minister to consider the exercise of the powers conferred by s 46A(2).

12. **First**, when a Minister is provided with such a briefing note, the usual inference is that they have read it.[10] It does not appear that the first respondent contends otherwise in this case. That is important because it necessarily follows that the position in the current case was materially identical to that in *SZSSJ*. The unchallenged finding of the Full Court of the Federal Court in that matter was that the Minister had made a personal procedural decision to consider whether to grant a visa under ss 195A or 417 or to lift the bar under s 48B in the case of each applicant for a protection visa affected by the Data Breach.[11] The "specific" basis for this finding was that, given, amongst other things, the administrative magnitude of the International Treaties Obligations Assessment (**ITOA**) process, its budgetary implications and the significance of Australia's international obligations in respect of the people affected, it was "unlikely that the Minister is not personally aware" of the Data Breach and the subsequent ITOA process. The fact of that "personal awareness", in turn, gave rise to an "unavoidable inference" that the Minister had already decided to consider the cases of those affected under his dispensing powers. In that regard, the Full Court said: "If he has not decided to consider the non-refoulement claims, why has he suffered the ITOA process to be carried out on his behalf?"[12] The Full Court further observed that Australia's international obligations regarding non-refoulement could only be given effect under domestic law through the exercise of the Minister's powers in issue there. Their Honours said that they would "hesitate" to conclude that "the Minister has put in place a structure in which persons making claims relating to non-refoulement were not given the opportunity to have the only officer of the Commonwealth who can vindicate those claims under Australian law consider them".[13]

13. The position is *a fortiori* in the present case where the evidence points even more strongly to the Minister's personal awareness (and "sufferance") of the IRSR process; and where it is equally the case that compliance with Australia's non-refoulement obligations depends (entirely) upon the possible exercise of the Minister's s 46A(2) power. The distinction the first

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[10] *Stambe v Minister for Health* [2019] FCA 43 at [74] (Mortimer J).

[11] *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 (***SZSSJ***) at 200 [56] (the Court).

[12] *SZSSJ v Minister for Immigration and Border Protection* (2015) 234 FCR 1 (***SZSSJ FFC***) at 24-25 [82] (the Court).

[13] See also their Honour's "second" "more general" consideration at *SZSSJ FFC* [83]-[85].

respondent seeks to draw at RS [21]-[27] between "noting" and "agreeing" (reflecting the reasoning of the primary judge at J [139]) is an arid semantic one, that does not grapple with the reasoning in *SZSSJ FFC*. It is, of course, true that that reasoning arose in the context of a specific factual conclusion. But no reason has been identified by the first respondent as to why a similar path of reasoning is not available here. This court is in as good a position as the primary judge to decide whether an "unavoidable inference" of the nature drawn in *SZSSJ FFC* is to be drawn from the similar facts found by her Honour in the current matter.[14]

14. **Secondly**, it is also significant that it was known and contemplated by the Department that at least some people in the position of the appellant would not hold a visa under the Act (see AB 98, 103), necessarily meaning that they were required to be detained under s189 during the IRSR process (see AB 112). Of course, that in fact came to pass in the current matter. That presents the very same difficulty identified in *Plaintiff M61* at [66] (an "irreducible tension" between the exercise of a power to detain in a way that prolongs detention, because inquiries are being made, and an assertion that those inquiries having no statutory foundation). Indeed, the position is more acute by reason of the addition to the Act of s197C,[15] which specifically provides that, for the purposes of the duty of removal under s198 (which must take place "as soon as reasonably practicable"), "it is irrelevant" whether Australia has *non-refoulement* obligations in respect of an unlawful non-citizen. The point is not whether in this particular case the appellant's detention was in fact prolonged by such inquiries (see J [148], RS [31]). The point rather is that the potential existence of *non-refoulement* obligations were (consistently with the terms of the briefing note) understood to be "barriers" to removal (AB 220), raising the clear possibility that detention might be prolonged while the IRSR process remained incomplete. The imperative to avoid that resulting "tension" is a further matter which gives rise to an "unavoidable" inference similar to that identified in *SZSSJ FC*.

15. **Thirdly**, the process proposed by the Department was unequivocal about the circumstances in which cases would be brought to the Minister for his consideration and used mandatory language ("will undertake an assessment…"; "will prepare a submission for your consideration"). In this respect, it was substantially the same as the announcement by the then Minister in *Plaintiff M61* that "asylum claims of future unauthorised boat arrivals would be

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[14] *Warren v Coombes* (1979) 142 CLR 531 at 551 (Gibbs ACJ, Jacobs and Murphy JJ).

[15] Added by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* – see schedule 5, clause 2 and *SZSSJ FFC* at [48]-[52]. See also *DMH16 v Minister for Immigration and Border Protection* (2017) 253 FCR 576.

processed on Christmas Island" pursuant to the RSA and IMR processes: at 342 [37]. The effect of that was that consideration would be given to exercising the powers conferred by ss 46A and 195A in every case in which an offshore entry person claimed protection obligations. It was also expressly noted by the Court that it was <u>only</u> in a case where the Department concluded that protection obligations were owed that a submission would be prepared for the Minister for consideration of the exercise of his powers under ss 46A(2) or 195A: at 343 [44] and 344 [49]. That, the Court said, did not of itself "deny that the Minister has begun the task of considering whether to exercise [those powers]": at 349 [67] (rejecting a submission of the Commonwealth to that effect).

16. The process proposed by the Department in this case was also substantially similar to the process put in place in *SZSSJ* to assess the effect of the Data Breach on Australia's *non-refoulement* obligations. A letter from the Australian Government Solicitor to SZSSJ's solicitors noted that: 'If the ITOA concludes that Australia's non-refoulement obligations are engaged ... <u>your client's case will be referred to the Minister for consideration under the Minister's intervention powers under the Migration Act</u>' (emphasis added): at [22]. Again, the fact that the process was, on one view, "anterior to any exercise by the Minister of the dispensing power" (*SZSSJ FFC* at [78]) did not prevent the Court from concluding that the Minister had made a procedural decision to consider whether to make a substantive decision.

17. Attention to those matters reveals the flaw in the reasoning of the primary judge at J [142], [144]. Her Honour there attributed particular significance to the fact that para [11] of the briefing note indicated that the Department would only prepare a submission to the Minister <u>after</u> it had conducted its assessment. That, her Honour said, indicated that the Department processes were "anterior" to any relevant exercise of statutory power by the Minister (see also RS [27]). But, as will be apparent from paras [15] and [16] above, exactly the same was true of each of the processes put in place in *Plaintiff M61* and in *SZSSJ.* That was no obstacle to a conclusion reached in those matters that there was a prior procedural decision by the Minister to consider the exercise of the relevant powers and that the assessment process was a process undertaken by the Department to assist in that consideration: *SZSSJ* at [56]. Nor is it here.

18. The primary judge also held that the absence of a personal procedural decision could be inferred from the fact of the Revocation Decision. Her Honour referred to *AOB18 v Minister for Home Affairs* [2018] FCCA 2748 at [62] for the proposition that the Revocation Decision amounted to 'a statement by the Minister that he was not going to consider making any substantive decision': J [132] and [135]-[137]. But the fact of making the Revocation Decision

said nothing of what the Minister proposed to do *in the future* as regards the possible exercise of his powers under s 46A(2) – only that his *earlier* exercise of that power was to cease to have effect from a particular date. Notably, the first respondent does not seek to defend that aspect of her Honour's reasoning.

19. If it is accepted that the Minister did made a personal procedural decision to consider whether to exercise his power under s 46A(2), the IRSR process undertaken by the Department to assist the Minister's consideration has a statutory basis and attracts an implied statutory requirement to afford procedural fairness where the process is apt to affect an interest of an individual.[16] Whatever be the position regarding the prolonging of the appellant's detention (see AS [61] and cf RS [31]), such interests were apt to be affected here.[17]

20. As to whether those requirements were met, it was not in issue before the primary judge that the appellant had no notice of the nature and purpose of the IRSR process; or of the issues to be considered in conducting that inquiry; or of the nature and content of information that the repository of power might take into account as a reason for coming to a conclusion adverse to the appellant. Nor was the appellant invited to make written or oral submissions on those matters so as to give him an opportunity to propound his case for a favourable outcome.[18] The content of the requirement to adopt a procedure that is reasonable in the circumstances to afford an opportunity to be heard demanded at least that much.[19] Further, it is clear from the face of those assessments that, had the appellant been accorded procedural fairness, the outcome of the assessments may well have been different.[20] On that basis, it is open to the Court to uphold grounds 3 and 4 of the ANOA as regards the second and third IRSR.

21. ***Alternative argument: judicial review of non-statutory decisions***: If, contrary to the Commission's primary submission, the second and third IRSR were non-statutory processes (that is, supported only by the executive power of the Commonwealth, vested by s 61 of the Constitution), they were still subject to a requirement of procedural fairness. Australian authority establishes that exercises of non-statutory executive power may be amenable to

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[16] *SZSSJ* [56]-[57], 205-206 [74]-[77] (the Court).

[17] See, by way of analogy, the first affectation of interest identified in *SZSSJ* at [76] and *Plaintiff S10* at [69].

[18] J [74].

[19] *SZSSJ* at [82], [83]; *Minister for Immigration v WZARH* (2015) 256 CLR 326 at [52]).

[20] See J [72] and [73].

judicial review depending upon its nature and subject matter, as opposed to its source.[21] It also establishes that the grounds of such review may extend to a failure to afford procedural fairness.[22]

22. No question of justiciability arises here by reason of the subject matter - eg an assessment of where Australia's foreign policy interests lie: cf *Aye* at [9], [15] (Spender J, McKerracher J agreeing at [127]). And, as to the nature of the exercise of power, there is nothing that would suggest that it lies outside the "mainstream of government actions" by reason of its subject matter or as involving a political judgment or matters of policy.[23] Rather, the circumstances are "more closely related to justice to the individual than with political, social and economic concerns".[24] Where the exercise of such a power has the potential adversely to affect a person's rights or interests a duty to afford that person procedural fairness arises.[25] That was plainly the case here for the reasons given above at para [19]. As such, the second and third IRSR processes were, subject to the caveat identified in the next paragraph, subject to such a duty.

23. The caveat is this: in *SZSSJ* the Court explained that the principles to be drawn from *Plaintiff M61* and *Plaintiff S10* included the proposition that non-statutory processes to assist the Minister to make a procedural decision under ss 48B, 195A and 417 do <u>not</u> attract a requirement to afford procedural fairness.[26] Does a similar conclusion apply to non-statutory power exercised in aid of the power conferred by s 46A(2)? The Commission submits that the answer is "no". The proposition identified in *SZSSJ* regarding the exercise of non-statutory powers in aid of ss 48B, 195A and 417 is to be understood in light of the "extraordinary nature"

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[21] See eg *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987)15 FCR 274 (***Peko***); *Aye v Minister for Immigration and Citizenship* (2010) 187 FCR 449 (***Aye***) at 451 [1] (Spender J), 466-470 [84]-[98] (Lander J) and 474 [122] (McKerracher J); *Jabbour v Secretary, Department of Home Affairs* [2019] FCA 452 (***Jabbour***) at [87]-[88] and [93]-[99] (Robertson J).

[22] See eg *Peko* at 282 (Sheppard J) 298-304 (Wilcox J); *State of Victoria v Master Builders' Association of Victoria* [1995] 2 VR 121 (***Master Builders***) at 140 (Tadgell J), 151 (Ormiston J) and 167-168 (Eames J); *Blyth District Hospital Inc v South Australian Health Commission* (1988) 49 SASR 501 (***Blyth Hospital***) at 509-510 (King CJ) and 522 (Bollen J); *Aye* at [109] (Lander J).

[23] *Jabbour* at [92]; and compare, eg, *Blyth Hospital* at 509 (King CJ) and *Peko* at 305-307 (Wilcox J, Bowen J agreeing at 276).

[24] *Jabbour* at [92], referring to *O'Shea* at 387 (Mason CJ).

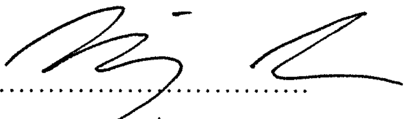
[25] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 408F (Diplock LJ); *Peko* at 303 (Wilcox J); *Aye* at 467 [87], 469-470 [98] (Lander J).

[26] *SZSSJ* at 200 [54] (the Court).

of those provisions and their "exceptional place within the scheme of the Act".[27] However, as Heydon J expressly observed in *Plaintiff S10*, there is no relevant analogy between such a case and a case involving the power conferred by s 46A(2) (the power in issue in *Plaintiff M61*): at 673 [121]. That is because the potential beneficiaries of that power are necessarily affected by the presence of s46A(1), which, as Heydon J explained, operates to prevent an unauthorised maritime arrival from applying for a protection visa in the ordinary course. As his Honour also explained (and as has been noted above), in such a case it will be only via an exercise of that power that Australia will comply with any non-refoulement obligations in respect of those persons.

24. At least in this case, the content of the duty is coextensive with that identified at paragraph [20] above. And for the reasons there given, those requirements were not met. Although non-statutory executive decision making may sometimes involve unique circumstances that bear upon the content of the duty,[28] no such matters arise here. There is otherwise no reason in principle that the content of the duty should depend upon whether the IRSR process was empowered by statute or by s61 of the Constitution alone.

25. For completeness as regards this issue, the Commission notes three further matters. **First**, it is not right to say that the Commission's application did not indicate that it intended to raise the issue regarding non-statutory executive power (cf RS [2]).[29] **Secondly** notwithstanding her Honour's conclusions on jurisdiction (at J [147]), her Honour went on to observe that the "IRSR process was not conditioned by any requirement to afford procedural fairness": J [148]. The correctness of that conclusion depends upon the issue the Commission has identified regarding non-statutory executive power. **Thirdly**, her Honour had jurisdiction to consider that issue by reason of s 18 of the *Federal Circuit Court of Australia Act 1999* (Cth). On that alternative basis, it is open to the Court to uphold grounds 4 of the ANOA as regards the second and third IRSR.



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Date: 27 August 2019

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[27] *Plaintiff S10* at 666 [96] (Gummow, Hayne, Crennan and Bell JJ).

[28] Compare the unique circumstances in issue in *Peko* (at 281-282 Sheppard J – cabinet decision making) with those in issue in *Aye* at [115] (Lander J) and *Master Builders* at 140-141 (Tadgell J).

[29] See the Commission's interlocutory application dated 27 June 2019 at [2(c)] and the affidavit in support of Emeritus Professor Rosalind Frances Croucher AM sworn 26 June 2019 at [3(c)].