PLAINTIFF'S OUTLINE OF SUBMISSIONS

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S31/2017

JOHN FALZON
Plaintiff

v

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Respondent

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PART I: CERTIFICATION

1. It is certified that this submission is in a form suitable for publication on the internet.

PART II: ISSUES

2. Section 501(3A) of the *Migration Act 1958* (Cth) (**the Act**) imposes a duty on the Minister to cancel the visa of a person if the person is currently serving a sentence of full-time imprisonment in a custodial institution for an offence and the Minister is satisfied that the person either has a substantial criminal record or has been convicted of or found to have committed a sexually based offence against a child. Where the power is exercised, its necessary and immediate consequence is to subject the person to executive detention. Criminal detention seamlessly becomes immigration detention.

3. The sole issue in this case is whether s 501(3A) invalidly purports to vest the judicial power of the Commonwealth in a person other than a Ch III court and is therefore invalid.

PART III: SECTION 78B

4. The Plaintiff has served notices under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: JUDGMENT BELOW

5. This application is in the Court's original jurisdiction. There is no judgment below.

PART V: BACKGROUND

6. Mr Falzon has lived in Australia for 61 years.[1] He arrived in Australia at the age of three, on 29 February 1956,[2] shortly before the Melbourne Olympic Games. Mr Falzon has four adult children and ten grandchildren, four of whom are under 18.[3] His wife, the mother of his four children, died of cancer in 2012.[4]

7. On 26 June 2008, Mr Falzon was convicted of trafficking a large commercial quantity of cannabis and sentenced to 11 years' imprisonment[5] with a non-parole period of eight years.[6] He had previous convictions for drug offences (1995) and for other offences between 1971 and 1984.[7]

8. Until at least 10 March 2016, Mr Falzon held a Class BF Transitional (permanent) visa.[8] On 10 March 2016, and apparently while Mr Falzon was still

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1 Application Book filed on 26 April 2017 at 23 [1] (**AB**).
2 AB 23 [2].
3 AB 24 [11], [15].
4 AB 24 [16].
5 AB 31.
6 AB 43 [3].
7 AB 31.
8 AB 192 [1].

in custody in respect of his 2008 conviction, that visa was cancelled by a delegate of the Minister purportedly under s 501(3A) of the Act (**Cancellation Decision**).[9]

9. Section 501(3A), which is the key provision at issue in these proceedings, provides that:

> The Minister must cancel a visa that has been granted to a person if:
>
> (a) the Minister is satisfied that the person does not pass the character test because of the operation of:
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> (i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or
>
> (ii) paragraph (6)(e) (sexually based offences involving a child); and
>
> (b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

10. Section 501(6)(a) provides that "a person does not pass the ***character test*** if: (a) the person has a substantial criminal record (as defined by subsection (7)). Section 501(7)(a) provides that "a person has a ***substantial criminal record*** if: (a) the person has been sentenced to death; or (b) the person has been sentenced to imprisonment for life; or (c) the person has been sentenced to a term of imprisonment of 12 months or more". There are provisions for working out the length of a term of imprisonment where a person is given concurrent sentences (s 501(7A)), sentenced to periodic detention (s 501(8)) or ordered to participated in a residential drug rehabilitation scheme or a residential program for the mentally ill (s 501(9)).

11. There is no conception in s 501(6)(a) (or s 501(7)) of a "stale" or "antique" record, such that a criminal record no longer meets the statutory standard if the offences giving rise to it occurred many years or decades previously.

12. Section 501(6)(e) provides that "a person does not pass the ***character test*** if: ... (e) a court in Australia or a foreign country has: (i) convicted the person of one or more sexually based offences involving a child; or (ii) found the person guilty of such an offence, or found a charge against the person proved for such an offence, even if the person was discharged without a conviction".

13. Section 501(10) provides: "[f]or the purposes of the character test, a sentence imposed on a person, or the conviction of a person for an offence, is to be disregarded if: (a) the conviction concerned has been quashed or otherwise nullified; or (b) both: (i) the person has been pardoned in relation to the conviction concerned; and (ii) the effect of that pardon is that the person is taken never to have been convicted of the offence". There is no exception where

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9 AB 10.

a person's conviction or sentence is under appeal. Nor is it a ground of error in a cancellation that it was based on a conviction which, after the cancellation, is overturned or quashed.

14. Section 501(12) defines the words "court", "imprisonment" and "sentence". Both "imprisonment" and "sentence" are defined by reference to punitive consideration. So, "imprisonment" is defined to "includ[e] any form of punitive detention in a facility or institution". "Sentence" is defined to "include[e]" any form of determination of the punishment for an offence".

15. Decisions under s 501(3A), whether made by the Minister or a delegate, are not subject to merits review: s 501(4), (4A)(c).

16. By at least 14 March 2016, four days after the Cancellation Decision, Mr Falzon was released from criminal custody and taken into immigration detention where he remains.[10] It can be inferred that the basis of that detention was s 189 of the Act. The effect of the Cancellation Decision, if valid, was to take Mr Falzon outside the definition of "lawful non-citizen" in s 13(1)[11] thus rendering him an "unlawful non-citizen": s 14(1). There arose immediately a duty on an "officer"[12] to detain him: s 189(1). The Act purports to prevent a court, including this Court, from granting an interlocutory injunction ordering the release of a person who is detained under s 189 - and that is so "whether or not a visa decision relating to the person detained is, or may be, unlawful": s 196(4A), (5)(b), (6).

17. On 15 March 2016, Mr Falzon applied for revocation of the Cancellation Decision under s 501CA(4) of the Act.[13] The permission to make "representations ... about revocation" of a s 501(3A) decision is given by s 501(3)(b) and (4)(a). The manner and form of those representations is regulated by r 2.52 of the *Migration Regulations 1994* (Cth).

18. On 10 January 2017, the Assistant Minister for Immigration and Border Protection decided not to revoke the Cancellation Decision (**the Non-Revocation Decision**). In making the Non-Revocation Decision, the Assistant Minister decided not to exercise the power given by s 501CA(4) which provides: "[t]he Minister may revoke the original decision if: (a) the person makes representations in accordance with the invitation; and (b) the Minister is satisfied: (i) that the person passes the character test (as defined by section 501); or (ii) that there is another reason why the original decision should be revoked". The concept of "another reason" is not defined.

19. Section 501CA(5) provides that "[i]f the Minister revokes the original decision, the original decision is taken not to have been made". Revocation does not, however, affect the validity of any interim detention. Under s 501CA(6), "[a]ny

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10 AB 23 [3]; *Falzon v Minister for Immigration and Border Protection* [2017] HCA Trans 084 at 109-110 (Keane J).

11 "A non-citizen in the migration zone who holds a visa that is in effect is a lawful non-citizen".

12 As defined in s 5(1).

13 AB 192 [3].

detention of the person that occurred during any part of the period: (a) beginning when the original decision was made; and (b) ending at the time of the revocation of the original decision; is lawful and the person is not entitled to make any claim against the Commonwealth, an officer or any other person because of the detention".

20. There is no merits review of a s 501CA(4) decision if it is made by the Minister, rather than a delegate: s 501CA(7); cf s 500(1)(ba). Where a non-revocation decision is made by a delegate, the Act limits appeal rights to the Tribunal and the ability of the Tribunal to consider oral and documentary evidence: s 500(6B), (6H), (6J).

21. In exercising power under s 501(3A) and s 501CA(4), the Minister is entitled to rely on "confidential" s 503A information which cannot be disclosed to any person, including a court.[14]

PART VI: ARGUMENT

Introduction

22. Mr Falzon advances five propositions which these submissions address in turn.

a) The Constitution reserves to the Ch III judiciary the power to punish guilt for an offence against the laws of the Commonwealth.

b) Whether a law confers such a power is to be assessed by reference to all the circumstances, including the text, context, purpose and practical operation of the law.

c) A Commonwealth law which subjects a person to executive detention prima facie confers power to punish guilt for an offence against a Commonwealth law. There is no absolute distinction between detention of citizens and detention of aliens. In determining whether it is appropriate to depart from that default position, it is relevant to consider whether the law is proportionate to a non-punitive end.

d) Section 501(3A) purports to confer power on the Minister which is reserved to the Ch III judiciary. The provision is therefore invalid.

e) In the premises, the Cancellation Decision and the Non-Revocation Decision are invalid and the relief sought in the Application for an Order to Show Cause[15] should be granted.

Proposition 1: the power to punish guilt for an offence against a law of the Commonwealth is exclusive to the Ch III judiciary

23. "[A]djudging and punishing criminal guilt is an exclusively judicial function": *Magaming v The Queen* (2013) 252 CLR 381 at [47] (French CJ, Hayne, Crennan,

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[14] The Court has considered s 503A in *Graham v Minister for Immigration and Border Protection* (M97/2016).

[15] AB 3.

Kiefel and Bell JJ) (***Magaming***). See also *Magaming* at [62] (Gageler J); *Kuczborski v Queensland* (2014) 254 CLR 51 at [233] (Crennan, Kiefel, Gageler and Keane JJ); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ) (***Chu Kheng Lim***).

24. This proposition derives not only from the separation of powers, but also from other fundamental constitutional and political principle. The essential role for an independent judiciary in the task of punishing criminal guilt "has its foundation in the concern for the protection of personal liberty lying at the core of our inherited constitutional tradition": *Northern Australian Aboriginal Justice Agency Limited v Northern Territory of Australia* (2015) 256 CLR 569 (***NAAJA***) at [96] (Gageler J). That "guarantee of liberty" is one of the two constitutional objectives of the constitutional separation of powers: *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *South Australia v Totani* (2010) 242 CLR 1 at [423] (Crennan and Bell JJ). The proposition is a basic tenet of a "free society under the rule of law": *Haskins v The Commonwealth* (2011) 244 CLR 22 at [73] (Heydon J). The principle plays an important protective role: "in the absence of legal control of punishments ... there is the risk of administrative arbitrariness" (*Pollentine v Bleijie* (2014) 253 CLR 629 at [21] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

25. The constitutional prohibition on extra-judicial adjudgment and punishment is disjunctive not conjunctive. The exclusive power is "to adjudge guilt of, *or* determine punishment, for breach of the law" (emphasis added): *Re Tracey; ex parte Ryan* (1989) 166 CLR 518 at 580 (Deane J). Thus, as McHugh J said in *Re Woolley* (2004) 225 CLR 1 at [82] (***Re Woolley***), "a law may infringe [Ch III] even if the punitive or penal sanction is not imposed for breach of the law or the existence of the fact or reason for the punishment is not transparent. If the purpose of the law is to *punish* or *penalise* the detainee without identifying the fact, reason or thing which gives rise to the punishment or penalty, then, as a matter of substance it gives rise to the strong inference that it is a disguised exercise of judicial power. Chapter III looks to the substance of the matter and cannot be evaded by formal cloaks". Put another way, a law which confers power on the executive to punish for breach of the law is invalid for that reason alone and irrespective of whether it also confers power to adjudge guilt. That is consistent with the fundamental principles referred to in paragraph 24: there is a need for legal control of punishment irrespective of whether the punisher also chooses to adjudge guilt. Indeed, were it otherwise, as McHugh J suggested in *Re Woolley*, the constitutional prohibition could be avoided by the device of conferring power to adjudge and power to punish on different organs. What the Constitution prohibits directly cannot be done indirectly. If "the measures taken [by an] Act [are] punitive they ... call for exercise of judicial power": *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 240 (Webb J).

Proposition 2: whether a law purports to confer power to punish guilt for an offence against a law of the Commonwealth is to be assessed by reference to all the circumstances

21. In assessing whether a law contravenes the constitutional requirement, the Court should consider all the circumstances, and particularly those bearing on the construction of the law in accordance with ordinary principles.

22. Accordingly, "[w]hether detention is penal or punitive must depend on all the circumstances of the case": *Re Woolley* at [58] (McHugh J).

23. There is "a threshold question of construction": *NAAJA* at [53] (Gageler J). Because the question is one of construction, an important issue is the purpose of the law as ascertained in accordance with ordinary principles of statutory construction. That purpose may be but need not be, expressly stated in the Act: *Acts Interpretation Act 1901* (Cth) s 15AA.[16]

24. In addition to this, those circumstances which may be relevant should not be understood in any narrow sense. They may include the following:

a) "[t]he terms of the law, the surrounding circumstances, the mischief at which the law is aimed and sometimes the parliamentary debates preceding its enactment will indicate the purpose or purposes of the law": *Re Woolley* at [58], [60] (McHugh J);

b) "the operation and effect of the law understood in light of its proper construction": *NAAJA* at [149] (Keane J);

c) the "consequences" of the law: *NAAJA* at [70] (Gageler J).

25. Further, consistently with the general principles which govern the characterisation of power as judicial or otherwise, it is relevant to consider "the subject-matter upon which the body purportedly exercising judicial power operates and the purposes and consequences of any decisions it makes": *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 at [35] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

26. The breadth of the inquiry for the Court is underscored by the basal proposition that the question is one of substance, not mere form: *Chu Kheng Lim* at 27.

27. One consequence of this second proposition is that a law may infringe the separation of powers even though it does not *in terms* require or authorise the extra-judicial detention of a person. The legal and practical operation of the law, not just its terms, are relevant to its constitutional character or purpose: see, for example, *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at [138] (Hayne, Kiefel and Bell JJ). If a law, in its legal or practical operation,

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[16] "In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether nor not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation".

founds the detention of a person, then it does not escape Ch III merely because it does not provide for detention in its terms.

Proposition 3: executive detention of a person is prima facie penal or punitive

28. The default position is that non-judicial detention of a person is penal or punitive and thus involves an exercise of the judicial power of the Commonwealth.

29. Support for that proposition can be found in many of this Court's judgments.

a) In *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at [53] (***Emmerson***), French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ said that "[d]etention of a person without just cause is also prohibited, which evokes the constitutional principle derived from Ch III of the Constitution stated in *Chu Kheng Lim*".

b) In *Re Woolley*, McHugh J said at [60]: "[t]hat persons are ordinarily detained by the Executive only as the result of an order made in judicial proceedings is by itself an indication that a law that authorises detention without a judicial order is, as a matter of substance, punitive in nature. However, the object for which the law authorises or requires the detention of a person is an even stronger indication of whether the detention is penal or punitive in nature. If no more appears than that the law authorises or requires detention, the correct inference to be drawn from its enactment is likely to be that, for some unidentified reason, the legislature wishes to punish or penalise those liable to detention without the safeguards of a judicial hearing".

c) In *NAAJA* at [99], Gageler J stated: "[t]he difficulty of drawing any distinction between detention which is penal or punitive and detention which is not highlights the significance of default characterisation: any form of detention is penal or punitive unless justified as otherwise".

d) In *Fardon v Attorney-General (Qld)* (2004) 223 CLR 57 at [153] (***Fardon***), Kirby J stated: "[n]ormally, a law providing for the deprivation of the liberty of an individual will be classified as punitive."

30. These cases establish that here, as in other constitutional contexts where a law imposes a restriction on an important freedom - in this case, the freedom from executive detention - it is incumbent on government to justify the law: see *McCloy v State of New South Wales* (2015) 257 CLR 178 at [24] (French CJ, Kiefel, Bell and Keane JJ); *Street v Queensland Bar Association* (1989) 168 CLR 461, 511-512 (Brennan J). This reflects the status of the separation of powers as a constitutional limitation and guarantee.[17] It also reflects the fact that the Commonwealth is best placed to explain and justify its laws: see, by analogy,

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[17] As to the status of the separation of powers as a constitutional guarantee, see *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580; *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 540.

Williamson v Ah On (1926) 39 CLR 95 at 113-115; *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* [1983] 1 NSWLR 1, 12 (Hunt J).

31. Mr Falzon's third proposition is stated to apply to detention of a person, not detention of a citizen: *Chu Kheng Lim* at 27. This is because the *Chu Kheng Lim* principle protects aliens as much as citizens: *Fardon* at [78] (Gummow J); *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614 at [83]-[84] (Gummow and Hayne JJ) (Heydon J agreeing at [222]), [189] (Kirby J); see also *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at [24] (French CJ, Hayne, Crennan, Kiefel and Keane JJ); *Emmerson* at [53] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). As Gummow J said in *Fardon* at [78]: "aliens are not outlaws; many will have a statutory right or title to remain in Australia for a determinate or indeterminate period and at least for that period they have the protection afforded by the Constitution and the laws of Australia". That principle is at its zenith in the case of a person such as Mr Falzon who, prior to the Cancellation Decision, was a permanent resident and had lived in Australia since he was three.

32. This is not to say that a person's status as an alien is irrelevant to whether a law can escape its default characterisation as penal or punitive. There are non-punitive reasons why the Commonwealth might choose to detain an alien which could not lawfully justify the detention of a citizen. An example is detention incidental to deportation. However, in Mr Falzon's submission, in any case it remains necessary for the Commonwealth to establish the just cause for the detention.

33. In deciding whether a law which authorises or imposes executive detention cannot escape characterisation as penal or punitive, or as a purported conferral of judicial power, it is relevant to ask whether the law is proportionate or reasonably appropriate and adapted to a non-punitive end. So, in *Chu Kheng Lim*, the joint judgment asked whether the detention was "reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered": at 33. Similarly, McHugh J stated that "if imprisonment goes beyond what is reasonably necessary to achieve the non-punitive object, it will be regarded as punitive in character": at 71. See also *Chu Kheng Lim* at 57 (Gaudron J, in the context of asking a s 51 question); *Al-Kateb v Godwin* (2004) 219 CLR 562 at [129]-[131] (Gummow J); *Plaintiff M47 v Director-General of Security* (2012) 251 CLR 1 at [402]-[403] (Crennan J). Further, in *Kruger v The Commonwealth* (1997) 190 CLR 1 at 162, Gummow J stated: "[t]h question whether a power to detain persons or to take into custody is to be characterised as punitive in nature, so as to attract the operation of Ch III, depends upon whether those activities are reasonably capable of being seen as necessary for a legitimate non-punitive objective". Callinan and Heydon JJ applied that passage in *Fardon* at [215]. Further, in *Re Woolley*, both Gummow J and Callinan J asked whether the law was reasonably capable of being seen as necessary for a non-punitive purpose: at [164]-[165], [260].

34. Proportionality is relevant for a number of reasons. The ends to which a law is proportionate is an indicator of the law's purpose: for example, *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 471 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 324-5 (Brennan J); *Re Woolley* at [25] (Gleeson CJ); *Maloney v The Queen* (2013) 252 CLR 168 at [244] (Bell J); *AMS v AIF* (1999) 199 CLR 160 at [100] (Gaudron J). Further, proportionality analysis supplies a structure for the inquiry into whether a law which infringes the freedom from executive detention is nevertheless consistent with Ch III: *McCloy v State of New South Wales* (2015) 257 CLR 178 at [69]-[76] (French CJ, Kiefel, Bell and Keane JJ).

Proposition 4: section 501(3A) purports to confer judicial power on the Minister

35. These first three propositions, and particularly the first proposition, when applied to s 501(3A), yield the conclusion that the provision invalidly purports to invest the judicial power of the Commonwealth on the Minister and his delegates. That is so for the following reasons.

36. ***First***, s 501(3A) bears an unmistakeable constitutional character: it imposes *punishment* for and by reference to *criminal offending* which is additional to that deemed appropriate by a court. That is also its purpose. These matters are disclosed by the text, structure and purpose of s 501(3A).

a) The primary and characteristic factum for the law's operation is that the person has committed an offence or offences: see s 501(3A)(a), (b).

b) A further factum for the law's operation is that the person is, at the time the power is exercised, in criminal custody: s 501(3A)(b).

c) Parliament had in mind that the criteria in s 501(3A)(b) would be often or characteristically punitive. The definitions of both "sentence" and "imprisonment" expressly include a punitive element.

d) Before the power can be exercised, the Minister must form a positive satisfaction as to one of the matters in s 501(3A)(a) - that is, as a positive satisfaction in relation to some prior offending. The provision is not self-executing: cf *Re Woolley* at [224] (Hayne J).

e) Where s 501(3A) applies, it is because the Minister has decided to consider whether to exercise the power. In making that decision, the Minister necessarily decides to consider the exercise of a power which involves the extension of a person's (currently criminal) detention.

f) In its practical operation, s 501(3A) can operate to extend the period of imprisonment to which a person is subject by reason of a sentence of imprisonment for an offence. It can therefore operate to extend that period beyond that which a court has deemed appropriate. When it does so, it effects double and additional punishment.

g) The place at which a person is held in "immigration detention" may be the very same prison in which the person was held in "criminal detention": see s 196(1) and the definition of "immigration detention" in s 5(1).[18] The place at which a person is held is in the discretion of the Minister.

h) A s 501(3A) cancellation may have the effect, loosely speaking, of "converting" criminal detention into immigration detention, such that a portion (or a large portion) of a criminal sentence is served in immigration detention. Take an alien who is sentenced to 5 years' imprisonment who, during the first week of the sentence, has their visa cancelled. (The Minister may be under a duty to cancel as soon as he becomes aware of the person's circumstances.) From that moment on, the person is liable to immigration detention under s 189. That immigration detention may be served in a correctional centre or even the very correctional centre that was the place of criminal detention. In practical respects, the criminal sentence will be served under the Act as immigration detention.

i) The extrinsic materials to s 501(3A) indicate that the purpose of the provision is to ensure that a person is detained. The Explanatory Memorandum to the *Migration Amendment (Character and General Visa Cancellation) Bill 2014* (Cth) (**2014 Bill**) stated (at [34]) that "[t]he intention" of the provision "is that decision to cancel a person's visa is made before the person is released from prison, to ensure that the non-citizen remains in criminal detention or, if released from criminal custody, in immigration detention while revocation is pursued". The Second Reading Speech to the 2014 Bill was to similar effect. The then Minister, Scott Morrison MP, stated that s 501(3A) was calculated to ensure that "noncitizens who pose a risk to the community will remain in either criminal or immigration detention until they are removed or their immigration status is otherwise resolved": House of Representatives, *Parliamentary Debates* (24 September 2014) 10327.

37. ***Secondly***, the Act gives a cancellation decision under s 501(3A) a significant degree of conclusiveness.[19]

a) Merits review is not available.

b) The courts are prevented by s 196 from ordering interlocutory release from immigration detention, even if the court considers that the decision "is, or may be, unlawful": s 196(5)(b): cf *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614 at [112] (Gummow and Hayne JJ) (Heydon J agreeing at [222]). In this sense, a s 501(3A) cancellation brings about, at least for a period, a conclusive subjection to detention.

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[18] Which includes "being held by, or on behalf of, an officer: ... (ii) in a prison or remand centre of the Commonwealth a State or a Territory ...".

[19] Conclusiveness is, of course, a characteristic of judicial power: *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 257, 259-260, 269 (Mason CJ, Brennan and Toohey JJ).

c) Decisions under both s 501(3A) (cancellation) and s 501CA(4) (revocation) may be made on the basis of "secret" s 503A information. A court cannot compel the Minister to disclose that information. Where s 503A information is relied on to justify a cancellation, it need not and cannot be provided to the alien to assist in engaging the revocation power.

d) The power to revoke in s 501CA is expressly discretionary rather than mandatory.

e) There is no duty to revoke a s 501(3A) decision even if the Minister is satisfied that the person does not pose a risk to the Australian community.

10 f) The Minister cannot revoke the cancellation decision unless the Minister is positively satisfied of one of the criteria in s 501CA(4)(b). In at least a practical sense, there is an "onus" on the alien to satisfy the Minister of one of those criteria. The scheme thus inverts the normal position in relation to cancellation of visas under s 501(2) and (3), where there is initially an "onus" on the Minister to form a positive satisfaction that the alien is of bad character before cancellation can occur.

g) The Minister can choose the procedure which he adopts in advance of making a s 501(3A) decision and, in particular, is not obliged to afford natural justice: s 501(5).

20 h) There is no express duty to make a revocation decision within any particular time. (And, in the circumstances of this case, the Non-Revocation Decision was made some 10 months after cancellation.)

i) Even if a cancellation decision is revoked, detention which was practically caused by the cancellation decision is deemed to be valid.

j) A court has no power to review a s 501(3A) decision for non-jurisdictional error of law: s 474(1).

k) A s 501(3A) decision is not retrospectively rendered invalid if the criminal conviction which founded either or both the current sentence of imprisonment or the substantial criminal record[20] is ultimately set aside, on
30 appeal or otherwise.

l) The criterion in s 501(3A)(a) is the Minister's satisfaction. The Minister would not jurisdictionally err if, by reason of an error of fact, he formed an erroneous satisfaction that a non-citizen had a substantial criminal record.

m) The power in s 501(3A) is a coercive and compulsory one. It exists and can be exercised irrespective of the consent of the non-citizen and is not attended by procedural fairness.

38. ***Thirdly***, s 501(3A), in its legal operation, characteristically effects and causes the non-judicial detention of a person under s 189: s 189 detention is an immediate

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[20] Or the s 501(3A)(a)(ii) matter.

legal consequence of the change in status effected by purported cancellation. Alternatively, the immediate and direct practical operation of a s 501(3A) decision is to impose detention on a person. Parliament had that legal and practical operation in mind when it passed the 2014 Bill: see paragraph 36i).

39. ***Fourthly***, it cannot be said that s 501(3A) pursues a protective purpose.[21]

a) Section 501(3A) imposes a duty; it does not confer a discretion.

b) In exercising the power under s 501(3A), the Minister is neither obliged nor permitted to have regard to the protection of the Australian community or any other protective consideration. In this respect, the power is distinct from that given by s 501(2): *Moana v Minister for Immigration and Border Protection* (2015) 230 FCR 367.

c) In deciding whether to consider the exercise of the s 501(3A) power, the Minister has a choice between s 501(3A) (which is not conditioned by protective considerations) and s 501(2) (which is so conditioned): note s 501(3B).

d) For the reasons set out in paragraph 36, the provision is properly characterised as pursuing a punitive purpose.

40. In not pursuing a protective purpose, s 501(3A) departs from the balance of the scheme established by s 501, the "proper scope and limits of" which have been said to be concerned with "the protection of the Australian public" and not punishment of aliens: *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1 at [28] (Allsop CJ and Katzmann J).

41. ***Fifthly***, the Minister cannot establish that s 501(3A) is proportionate to a non-punitive end or, in the alternative, s 501(3A) is not proportionate to any such end.

42. Section 501(3A) is not proportionate to any purpose of protecting the Australian community from harm.

a) The "substantial criminal record" referred to in s 501(3A)(a)(i) may be antique. It may not furnish any probative evidence that the person poses a risk of harm.

b) The current sentence of imprisonment may be based on a conviction which is ultimately set aside on appeal or otherwise quashed.

c) It is not a jurisdictional fact that the person poses a risk of harm. Nor, as submitted, is that matter a mandatory or even permissible consideration under s 501(3A).

d) A person can be subjected to detention by reason of a s 501(3A) decision for a period well exceeding that which a sentencing court considered necessary

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[21] Compare *Al-Kateb v Godwin* (2004) 219 CLR 562 at [44] (McHugh J).

or appropriate for the offending which gave rise to the sentence of imprisonment and, in particular, for a period well exceeding the period which the court considered the person should be removed from the community for reasons of incapacitation of deterrence.

e) The current sentence of imprisonment may be based on a conviction for an offence which furnishes no probative basis for a satisfaction that the non-citizen poses a risk of harm. The sentence of imprisonment may be for a week (or less). The person may be a fine defaulter. The basis of the sentence may have been general deterrence and/or objective seriousness, not any need or desire for specific deterrence. Section 501(3A) thus operates "capriciously", just as the law considered in *Roach v Electoral Commissioner* (2007) 233 CLR 162 did: see at [90]-[95] (Gummow, Kirby and Crennan JJ).

f) The provision operates even if the Executive Government is of the opinion that the person has fully rehabilitated from the offence for which they are serving a term of imprisonment and poses no risk of harm to the community.

g) It is no aspect of the scheme that, after being taken into immigration detention, the person must be assessed for whether he or she poses a risk of harm to the public: cf *Pollentine v Bleijie* (2014) 253 CLR 629 at [73] (Gageler J).

h) There is no obligation to revoke a s 501(3A) decision even if the Minister is satisfied that the person poses no risk of harm to the Australian community: cf *Pollentine v Bleijie* (2014) 253 CLR 629 at [65]-[66] (Gageler J).

i) There is no obligation to revoke a s 501(3A) decision even if the effect of a s 501(3A) decision is to expose a person to indefinite detention - whether because the person is not a citizen of any other country or otherwise.

j) Section 501(3A), in its legal or practical operation, infringes[22] the fundamental common law right to freedom from detention. And it infringes that right to a significant extent - including by deeming consequential detention valid even if the cancellation is ultimately set aside and because a court is prevented from ordering interlocutory release.

k) There are many obvious and compelling alternatives. The power could be discretionary. Risk of harm to the community could be a mandatory, or at least permissible, consideration. There could be a duty to revoke if the person poses no risk of harm to the community. There could be a power in the courts to order interlocutory release if the court was satisfied that there was a prima facie case for invalidity and the person posed no real risk of harm. Under s 501(3), the Minister *already* had a power to cancel a person's

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[22] Note *Polyukhovich v Commonwealth of Australia* (1991) 172 CLR 501 at 592-3 (Brennan J) (Toohey J agreeing at 684); *Davis v The Commonwealth* (1988) 166 CLR 79, 100; *Cunliffe v The Commonwealth of Australia* (1994) 182 CLR 272, 297 (Mason CJ); *Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1, 34 (Mason CJ), 94-95 (Gaudron J), 101-105 (McHugh J); *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1 at [43], [55] (French CJ).

visa immediately and without notice if the person failed the character test and the Minister was satisfied that cancellation was in the national interest. These are no more than examples. Each of these alternatives is at least as practicable at achieving a protective end than is s 501(3A).

43. The Minister's reference in the Second Reading Speech to the provision's application to "noncitizens who pose a risk to the community" does not and cannot[23] furnish any evidence that the provision is proportionate to a protective purpose. Nor do the extrinsic materials to the 2014 Bill disclose any compelling justification or need for s 501(3A). The Minister already had ample powers to cancel a person's visa under s 501(2) (with natural justice) and (3) (without natural justice, in the national interest).

44. Nor would the Court find that s 501(3A) pursues or is proportionate to some purpose of removing aliens. The law targets only a subset of aliens. Within that class, it selects criminality and current imprisonment as its discrimen. Neither the text of s 501(3A) nor the extrinsic materials to the 2014 Bill furnish any support for the proposition that its purpose was to facilitate removal: rather, they indicate that its purpose was to ensure detention in Australia.

45. Nor still would the Court find that s 501(3A) pursues or is proportionate to some purpose of inquiring into making inquiries about aliens' migration status. Again, the law targets only a subset of aliens and makes criminality and current imprisonment the central criterion of operation.

46. Further, s 501(3A) infringes the "long-standing constitutional principl[e] and common law valu[e] ... in respect of double punishment": *Emmerson* at [70] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); see also *Pearce v R* (1998) 194 CLR 610 and the references in *Fardon* at [180] (Kirby J).

Proposition 5: the Cancellation Decision and the Non-Revocation Decision are invalid and appropriate relief should issue

47. For the reasons advanced above, s 501(3A) of the Act is invalid.

48. Section 501(3A) was the sole statutory basis of the Cancellation Decision: AB 10. The invalidity of s 501(3A) thus renders the Cancellation Decision invalid. A writ of certiorari should issue quashing it.

49. If the Cancellation Decision is quashed, there is probably no utility in the Court issuing relief in respect of the Non-Revocation Decision. However, it can be noted that s 501CA(1) appears to have the effect that the s 501CA(4) power is available only where there is a "decision ... to cancel a visa" - that is, a valid decision. Further, in the circumstances of this case, the Assistant Minister proceeded on the assumption that there was a valid s 501(3A) visa cancellation in making the Non-Revocation Decision: AB 192 [4]. In those circumstances,

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[23] See *Parliamentary Privileges Act 1987* (Cth) s 16(3)(c).

if the Cancellation Decision was invalid, then the Non-Revocation Decision was invalid.

50. If the Cancellation Decision was invalid, then Mr Falzon "holds a visa that is in effect" and is a "lawful non-citizen": s 13(1). That status should be effected by an order for immediate release.

51. Costs should follow the event.

PART VII: APPLICABLE PROVISIONS

52. See Annexure.

PART VIII: ORDERS SOUGHT

53. Mr Falzon seeks the following orders.

1. A writ of certiorari issue quashing the decision of the Defendant dated 10 January 2017 not to revoke his decision dated 10 March 2016 to cancel the Plaintiff's Class BF Transitional (permanent) visa (**Visa**).

2. A writ of certiorari issue quashing the decision of the Defendant dated 10 March 2016 to cancel the Visa.

3. A writ of mandamus directing the Defendant, by his officers, to release the Plaintiff from immigration detention immediately.

4. A declaration that s 501(3A) of the *Migration Act 1958* (Cth) is invalid.

5. Costs.

PART IX: ORAL ARGUMENT

54. Mr Falzon estimates he will need 2 hours to present oral argument.

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10 May 2016

ANNEXURE

Commonwealth of Australia Constitution

51 Legislative powers of the Parliament [*see* Notes 10 and 11]

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

(xix) naturalization and aliens;

Migration Act 1958 **(Cth)**

500 Review of decision

(1) Applications may be made to the Administrative Appeals Tribunal for review of:

(a) decisions of the Minister under section 200 because of circumstances specified in section 201, other than decisions to which a certificate under section 502 applies; or

(b) decisions of a delegate of the Minister under section 501 (subject to subsection (4A)); or

(ba) decisions of a delegate of the Minister under subsection 501CA(4) not to revoke a decision to cancel a visa; or

(c) a decision, other than a decision to which a certificate under section 502 applies, to refuse under section 65 to grant a protection visa, relying on:

(i) subsection 5H(2) or 36(1C); or

(ii) paragraph 36(2C)(a) or (b) of this Act.

Note: Decisions to refuse to grant a protection visa to fast track applicants are generally not reviewable by the Administrative Appeals Tribunal. However, some decisions of this kind are reviewable by that Tribunal, in the circumstances mentioned in paragraph (a), or subparagraph (b)(i) or (iii), of the definition of ***fast track decision*** in subsection 5(1).

...

(4) The following decisions are not reviewable under Part 5 or 7:

(a) a decision under section 200 because of circumstances specified in section 201;

(b) a decision under section 501;

(c) a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on:

(i) subsection 5H(2) or 36(1C); or

(ii) paragraph 36(2C)(a) or (b) of this Act.

(4A) The following decisions are not reviewable under this section, or under Part 5 or 7:

(a) a decision to refuse to grant a protection visa relying on subsection 36(1B);

(b) a decision to cancel a protection visa because of an assessment by the Australian Security Intelligence Organisation that the holder of the visa is directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*);

(c) a decision of a delegate of the Minister under subsection 501(3A) to cancel a visa.

501 Refusal or cancellation of visa on character grounds

Decision of Minister or delegate—natural justice applies

(1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.

Note: ***Character test*** is defined by subsection (6).

(2) The Minister may cancel a visa that has been granted to a person if:

(a) the Minister reasonably suspects that the person does not pass the character test; and

(b) the person does not satisfy the Minister that the person passes the character test.

Decision of Minister—natural justice does not apply

(3) The Minister may:

(a) refuse to grant a visa to a person; or

(b) cancel a visa that has been granted to a person;

if:

(c) the Minister reasonably suspects that the person does not pass the character test; and

(d) the Minister is satisfied that the refusal or cancellation is in the national interest.

(3A) The Minister must cancel a visa that has been granted to a person if:

(a) the Minister is satisfied that the person does not pass the character test because of the operation of:

(i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or

(ii) paragraph (6)(e) (sexually based offences involving a child); and

(b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

(3B) Subsection (3A) does not limit subsections (2) and (3).

(4) The power under subsection (3) may only be exercised by the Minister personally.

(5) The rules of natural justice, and the code of procedure set out in SubdivisionAB of Division 3 of Part 2, do not apply to a decision under subsection (3) or (3A).

Character test

(6) For the purposes of this section, a person does not pass the ***character test*** if:

(a) the person has a substantial criminal record (as defined by subsection (7)); or

(aa) the person has been convicted of an offence that was committed:

(i) while the person was in immigration detention; or

(ii) during an escape by the person from immigration detention; or

(iii) after the person escaped from immigration detention but before the person was taken into immigration detention again; or

(ab) the person has been convicted of an offence against section 197A; or

(b) the Minister reasonably suspects:

(i) that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and

(ii) that the group, organisation or person has been or is involved in criminal conduct; or

(ba) the Minister reasonably suspects that the person has been or is involved in conduct constituting one or more of the following:

(i) an offence under one or more of sections 233A to 234A (people smuggling);

(ii) an offence of trafficking in persons;

(iii) the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery or a crime that is otherwise of serious international concern;

whether or not the person, or another person, has been convicted of an offence constituted by the conduct; or

(c) having regard to either or both of the following:

(i) the person's past and present criminal conduct;

(ii) the person's past and present general conduct;

the person is not of good character; or

(d) in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would:

(i) engage in criminal conduct in Australia; or

(ii) harass, molest, intimidate or stalk another person in Australia; or

(iii) vilify a segment of the Australian community; or

(iv) incite discord in the Australian community or in a segment of that community; or

(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way; or

(e) a court in Australia or a foreign country has:

(i) convicted the person of one or more sexually based offences involving a child; or

(ii) found the person guilty of such an offence, or found a charge against the person proved for such an offence, even if the person was discharged without a conviction; or

(f) the person has, in Australia or a foreign country, been charged with or indicted for one or more of the following:

(i) the crime of genocide;

(ii) a crime against humanity;

(iii) a war crime;

(iv) a crime involving torture or slavery;

(v) a crime that is otherwise of serious international concern; or

(g) the person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*); or

(h) an Interpol notice in relation to the person, from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community, is in force.

Otherwise, the person passes the ***character test***.

Substantial criminal record

(7) For the purposes of the character test, a person has a ***substantial criminal record*** if:

(a) the person has been sentenced to death; or

(b) the person has been sentenced to imprisonment for life; or

(c) the person has been sentenced to a term of imprisonment of 12 months or more; or

(d) the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more; or

(e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or

(f) the person has:

(i) been found by a court to not be fit to plead, in relation to an offence; and

(ii) the court has nonetheless found that on the evidence available the person committed the offence; and

(iii) as a result, the person has been detained in a facility or institution.

Concurrent sentences

(7A) For the purposes of the character test, if a person has been sentenced to 2 or more terms of imprisonment to be served concurrently (whether in whole or in part), the whole of each term is to be counted in working out the total of the terms.

Example:A person is sentenced to 2 terms of 3 months imprisonment for 2 offences, to be served concurrently. For the purposes of the character test, the total of those terms is 6 months.

Periodic detention

(8) For the purposes of the character test, if a person has been sentenced to periodic detention, the person's term of imprisonment is taken to be equal to the number of days the person is required under that sentence to spend in detention.

Residential schemes or programs

(9) For the purposes of the character test, if a person has been convicted of an offence and the court orders the person to participate in:

(a) a residential drug rehabilitation scheme; or

(b) a residential program for the mentally ill;

the person is taken to have been sentenced to a term of imprisonment equal to the number of days the person is required to participate in the scheme or program.

Pardons etc.

(10) For the purposes of the character test, a sentence imposed on a person, or the conviction of a person for an offence, is to be disregarded if:

(a) the conviction concerned has been quashed or otherwise nullified; or

(b) both:

(i) the person has been pardoned in relation to the conviction concerned; and

(ii) the effect of that pardon is that the person is taken never to have been convicted of the offence.

Conduct amounting to harassment or molestation

(11) For the purposes of the character test, conduct may amount to harassment or molestation of a person even though:

(a) it does not involve violence, or threatened violence, to the person; or

(b) it consists only of damage, or threatened damage, to property belonging to, in the possession of, or used by, the person.

Definitions

(12) In this section:

court includes a court martial or similar military tribunal.

imprisonment includes any form of punitive detention in a facility or institution.

sentence includes any form of determination of the punishment for an offence.

Note 1: ***Visa*** is defined by section 5 and includes, but is not limited to, a protection visa.

Note 2: For notification of decisions under subsection (1) or (2), see section 501G.

Note 3: For notification of decisions under subsection (3), see section 501C.

501CA Cancellation of visa—revocation of decision under subsection 501(3A) (person serving sentence of imprisonment)

(1) This section applies if the Minister makes a decision (the ***original decision***) under subsection 501(3A) (person serving sentence of imprisonment) to cancel a visa that has been granted to a person.

(2) For the purposes of this section, ***relevant information*** is information (other than non-disclosable information) that the Minister considers:

(a) would be the reason, or a part of the reason, for making the original decision; and

(b) is specifically about the person or another person and is not just about a class of persons of which the person or other person is a member.

(3) As soon as practicable after making the original decision, the Minister must:

(a) give the person, in the way that the Minister considers appropriate in the circumstances:

(i) a written notice that sets out the original decision; and

(ii) particulars of the relevant information; and

(b) invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision.

(4) The Minister may revoke the original decision if:

(a) the person makes representations in accordance with the invitation; and

(b) the Minister is satisfied:

(i) that the person passes the character test (as defined by section 501); or

(ii) that there is another reason why the original decision should be revoked.

(5) If the Minister revokes the original decision, the original decision is taken not to have been made.

(6) Any detention of the person that occurred during any part of the period:

(a) beginning when the original decision was made; and

(b) ending at the time of the revocation of the original decision;

is lawful and the person is not entitled to make any claim against the Commonwealth, an officer or any other person because of the detention.

(7) A decision not to exercise the power conferred by subsection (4) is not reviewable under Part 5 or 7.

Note: For notification of decisions under subsection (4) to not revoke, see section 501G.

501D Refusal or cancellation of visa—method of satisfying Minister that person passes the character test

The regulations may provide that, in determining for the purposes of section 501, 501A or 501B, whether:

(a) a person; or

(b) a person included in a specified class of persons;

satisfies the Minister that the person passes the character test (as defined by section 501), any information or material submitted by or on behalf of the person must not be considered by the Minister unless the information or material is submitted within the period, and in the manner, ascertained in accordance with the regulations.

503A Protection of information supplied by law enforcement agencies or intelligence agencies

(1) If information is communicated to an authorised migration officer by a gazetted agency on condition that it be treated as confidential information and the information is relevant to the exercise of a power under section 501, 501A, 501B, 501BA, 501C or 501CA:

(a) the officer must not divulge or communicate the information to another person, except where:

(i) the other person is the Minister or an authorised migration officer; and

(ii) the information is divulged or communicated for the purposes of the exercise of a power under section 501, 501A, 501B, 501BA, 501C or 501CA; and

(b) an authorised migration officer to whom information has been communicated in accordance with paragraph (a) or this paragraph must not divulge or communicate the information to another person, except where:

(i) the other person is the Minister or an authorised migration officer; and

(ii) the information is divulged or communicated for the purposes of the exercise of a power under section 501, 501A, 501B, 501BA, 501C or 501CA.

Note: ***Authorised migration officer*** and ***gazetted agency*** are defined by subsection (9).

(2) If:

(a) information is communicated to an authorised migration officer by a gazetted agency on condition that it be treated as confidential information and the information is relevant to the exercise of a power under section 501, 501A, 501B, 501BA, 501C or 501CA; or

(b) information is communicated to the Minister or an authorised migration officer in accordance with paragraph (1)(a) or (b);

then:

(c) the Minister or officer must not be required to divulge or communicate the information to a court, a tribunal, a parliament or parliamentary committee or any other body or person; and

(d) if the information was communicated to an authorised migration officer—the officer must not give the information in evidence before a court, a tribunal, a parliament or parliamentary committee or any other body or person.

(3) The Minister may, by writing, declare that subsection (1) or (2) does not prevent the disclosure of specified information in specified circumstances to a specified Minister, a specified Commonwealth officer, a specified court or a specified tribunal. However, before making the declaration, the

Minister must consult the gazetted agency from which the information originated.

Note: ***Commonwealth officer*** is defined by subsection (9).

(3A) The Minister does not have a duty to consider whether to exercise the Minister's power under subsection (3).

(4) If a person divulges or communicates particular information to a Commonwealth officer in accordance with a declaration under subsection (3), the officer must comply with such conditions relating to the disclosure by the officer of the information as are specified in the declaration.

(4A) If a person divulges or communicates particular information to a Commonwealth officer in accordance with a declaration under subsection (3):

(a) the officer must not be required to divulge or communicate the information to the Federal Court or the Federal Circuit Court; and

(b) the officer must not give the information in evidence before the Federal Court or the Federal Circuit Court.

The information may only be considered by the Federal Court or the Federal Circuit Court if a fresh disclosure of the information is made in accordance with:

(c) a declaration under subsection (3); or

(d) subsection 503B(6).

(5) If a person divulges or communicates particular information to a tribunal in accordance with a declaration under subsection (3), the member or members of the tribunal must not divulge or communicate the information to any person (other than the Minister or a Commonwealth officer).

(5A) If a person divulges or communicates particular information to a tribunal in accordance with a declaration under subsection (3):

(a) the member or members of the tribunal must not be required to divulge or communicate the information to the Federal Court or the Federal Circuit Court; and

(b) the member or members of the tribunal must not give the information in evidence before the Federal Court or the Federal Circuit Court.

The information may only be considered by the Federal Court or the Federal Circuit Court if a fresh disclosure of the information is made in accordance with:

(c) a declaration under subsection (3); or

(d) subsection 503B(6).

(6) This section has effect despite anything in:

(a) any other provision of this Act (other than sections 503B and 503C); and

(b) any law (whether written or unwritten) of a State or a Territory.

(7) To avoid doubt, if information is divulged or communicated:

(a) in accordance with paragraph (1)(a) or (b); or

(b) in accordance with a declaration under subsection (3);

the divulging or communication, as the case may be, is taken, for the purposes of the Australian Privacy Principles, to be authorised by this Act.

(8) If any Act (whether passed before or after the commencement of this section) provides for information to be given, that Act has effect subject to this section unless that Act expressly provides otherwise.

Note: This section is specified in Schedule 3 to the *Freedom of Information Act 1982* with the effect that documents containing information protected from disclosure by this section are exempt documents under that Act.

(9) In this section:

Australian law enforcement or intelligence body means a body, agency or organisation that is responsible for, or deals with, law enforcement, criminal intelligence, criminal investigation, fraud or security intelligence in, or in a part of, Australia.

authorised migration officer means a Commonwealth officer whose duties consist of, or include, the performance of functions, or the exercise of powers, under this Act.

Commonwealth officer has the same meaning as in section 70 of the *Crimes Act 1914*.

Note: A Minister is not a Commonwealth officer.

foreign law enforcement body means a body, agency or organisation that is responsible for, or deals with, law enforcement, criminal intelligence, criminal investigation, fraud or security intelligence in a foreign country or a part of a foreign country.

gazetted agency means:

(a) in the case of an Australian law enforcement or intelligence body—a body specified in a notice published by the Minister in the *Gazette*; or

(b) in the case of a foreign law enforcement body—a body in a foreign country, or a part of a foreign country, that is a foreign country, or part of a foreign country, specified in a notice published by the Minister in the *Gazette*; or

(c) a war crimes tribunal established by or under international arrangements or international law.

Note: For specification by class, see subsection 33(3AB) of the *Acts Interpretation Act 1901*.

Migration Regulations 1994 (Cth)

2.52 Refusal or cancellation of visa—representations in respect of revocation of decision by Minister (Act, s 501C and 501CA)

(1) This regulation applies to representations made to the Minister under paragraphs 501C(3)(b) and 501CA(3)(b) of the Act.

(2) The representations must be made:

(a) for a representation under paragraph 501C(3)(b) of the Act—within 7 days after the person is given the notice under subparagraph 501C(3)(a)(i) of the Act; and

(b) for a representation under paragraph 501CA(3)(b) of the Act—within 28 days after the person is given the notice and the particulars of relevant information under paragraph 501CA(3)(a) of the Act.

(3) The representations must be in writing, and:

(a) in English; or

(b) if the representations are in a language other than English—accompanied by an accurate English translation.

(4) The representations must include the following information:

(a) the full name of the person to whom the representations relate;

(b) the date of birth of that person;

(c) one of the following:

(i) the applicant's client number;

(ii) the Immigration file number;

(iii) the number of the receipt issued by Immigration when the visa application was made;

(d) if the visa application was made outside Australia—the name of the Australian mission or Immigration office at which the visa application was given to the Minister;

(e) a statement of the reasons on which the person relies to support the representations.

(5) A document accompanying the representations must be:

(a) the original document; or

(b) a copy of the original document that is certified in writing to be a true copy by:

(i) a Justice of the Peace; or

(ii) a Commissioner for Declarations; or

(iii) a person before whom a statutory declaration may be made under the *Statutory Declarations Act 1959*; or

(iv) if the copy is certified in a place outside Australia:

(A) a person who is the equivalent of a Justice of the Peace or a Commissioner for Declarations in that place; or

(B) a Notary Public.

(6) If a document accompanying the representations is in a language other than English, the document must be accompanied by an accurate English translation.

(7) For section 501C of the Act (see subsection (10)), a person is not entitled to make representations about revocation of an original decision if:

(a) the person is not a detainee; and

(b) the person is a non-citizen in Australia; and

(c) either:

(i) the person has been refused a visa under section 501or 501A of the Act; or

(ii) the last visa held by the person has been cancelled under either of those sections.

2.53Submission of information or material (Act,s501D)

(1) For section 501D of the Act, information or material must be:

(a) in writing; and

(b) received by the Minister or Immigration within 28days after the person is invited by the Minister or Immigration to submit information or material.

(2) A document containing the information or material must be:

(a) the original document; or

(b) a copy of the original document that is certified in writing to be a true copy by:

(i) a Justice of the Peace; or

(ii) a Commissioner for Declarations; or

(iii) a person before whom a statutory declaration may be made under the *Statutory Declarations Act 1959*; or

(iv) if the copy is certified in a place outside Australia:

(A) a person who is the equivalent of a Justice of the Peace or a Commissioner for Declarations in that place; or

(B) a Notary Public.

(3) The document must contain, or be accompanied by, the following written information:

(a) the full name of the person who is the subject of the decision to which the information or material contained in the document relates;

(b) the date of birth of that person;

(c) one of the following:

(i) the applicant's client number;

(ii) the Immigration file number;

(iii) the number of the receipt issued by Immigration when the visa application was made;

(d) if the visa application was made outside Australia–the name of the Australian mission or Immigration office at which the visa application was given to the Minister.

(4) If the document is submitted in a language other than English, it must be accompanied by an accurate English translation.