# PLAINTIFF'S OUTLINE OF SUBMISSIONS IN RPELY

**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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## Certification

1. The plaintiff certifies that this submission is in a form suitable for publication on the internet.

## Introduction

2. These submissions reply to those of the Defendant (**the Minister**) and the Commonwealth Attorney-General (together, **the Commonwealth**) filed on 7 June 2017 (**CS**). These submissions supplement those filed Mr Falzon on 10 May 2017 (**PS**).

## The Commonwealth's two primary contentions

3. The Commonwealth's argument pursues two primary and related contentions: (1) the Commonwealth has a plenary power to determine the conditions upon which an alien will be entitled to retain the privilege of residence in Australia: CS [14], [34]-[36], [38], [57];[1] (2) the Commonwealth Parliament is entitled to choose criminal offending as the statutory criterion upon which visa cancellation is founded: CS [36], [41]-[43], [53], [55].

4. These contentions are overbroad and miss the mark.

5. The first contention is overbroad and incorrect. The true constitutional position is that the Commonwealth has a power to make laws with respect to aliens *provided that* the law is consistent with express and implied constitutional constraints: see, eg, *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 284-5. So much flows from the express subjection of s 51(xix), in s 51's chapeau, to "this Constitution". So much also flows from general principle: *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 606 (Gummow J). Those express and implied constitutional constraints mean that the Commonwealth's power to determine the conditions upon which an alien's visa is to be cancelled is not at large. It is unlikely that Parliament could, consistently with the freedom of political communication, provide for visa cancellation based on an alien's advocacy of opposition policies. It is unlikely that Parliament could, consistently with s 116, provide for visa cancellation based on an alien's adherence to particular religious beliefs. It is also unlikely that Parliament could, consistently with the *Kable* doctrine, impose a duty on a Ch III court to cancel a visa upon application by the Minister. Examples could be multiplied, but the point would remain the same. To observe that a law confers a power to cancel the visas of aliens is to observe no more than that the law is, all other things being equal, a law with respect to aliens. That is only the starting point of proper constitutional analysis. It leads to, but does not answer, the critical question: is the law, which would otherwise be a valid law with respect to aliens, nevertheless ultra vires because it infringes an express or implied constitutional constraint? That is the true question in this case.

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1 See, in particular, CS [57]: "It is open to the Parliament, in the exercise of its undoubted legislative power under s 51(xix), to identify a class of non-citizens who are to be excluded from the community by reference to whatever criteria it wishes to select, whether or not that imposes hardship on the non-citizen in question".

6. The Commonwealth's second contention misses the mark. This case does not raise the discrete question of whether the selection of criminal offending as a criterion upon which an alien's visa may be cancelled is, considered alone, consistent with Ch III. The issue is the validity of s 501(3A). That provision selects two criteria for its operation, one of which is criminal offending and the other of which is current imprisonment. The constitutional character of s 501(3A) turns on all the circumstances. Those circumstances include Parliament's choice of both of those criteria. Those circumstances also include the fact that s 501(3A) is mandatory and immediately subjects an alien whose visa is cancelled under s 501(3A) to executive detention under ss 189 and 196. There is no analogy with other provisions, such as s 501(2), which give the Minister a discretion to cancel and oblige the Minister to have regard to protective considerations when exercising the discretion: cf CS [43].

## Chapter III and executive detention (CS [24]-[29])

7. The Commonwealth accepts, first, that the validity of executive detention "depends on whether or not that detention is imposed for a punitive or a non-punitive purpose" and, secondly, that the relevant purpose of the law is determined "having regard to all the circumstances of the case": CS [27]. Any contention that statutory purpose, understood in a narrow sense, is the sole determinant of Ch III validity would be too narrow. However, the Commonwealth's acceptance of these two propositions furnishes significant common ground between the parties. Those two propositions support a major premise sufficient for the acceptance of Mr Falzon's case: in his submission, s 501(3A) pursues a punitive purpose to an extent sufficient for invalidity. That is so even if purpose is understood in some narrow sense. It would, however, be an error to view any "purpose" criterion narrowly. The root principle is constitutional, and should therefore should be understood broadly. "Purpose" cannot solely mean purpose as that concept is understood in the law of statutory construction - because Ch III bites on non-statutory power as much as statutory power. The "purpose" criterion on which the constitutional constraint in part hinges directs attention to "the effect of a law" - that is, "what the law does in fact": *Leask v The Commonwealth* (1996) 187 CLR 579, 591 (Brennan J), 602-603 (Dawson J). The "purpose" is to be collected from "the facts to which [the law] applies": *Stenhouse v Coleman* (1944) 69 CLR 457 at 471 (Dixon J).

## The Commonwealth's contention that s 501(3A) does not authorise, require or cause detention

8. The Commonwealth contends that s 501(3A) does not engage Ch III because it does not "itself authoris[e], requir[e] or caus[e]" detention: CS [32]. The Commonwealth's submissions on this issue at CS [30]-[33] conflate two separate points.

9. One point is that s 501(3A) does not *itself* cause detention. This point is trite and irrelevant. The constitutional character of s 501(3A) derives from its legal and practical operation. The legal and practical operation of s 501(3A) includes its direct and necessary intersection with other provisions of the Act, including ss 189 and 196. Cancellation of a visa directly creates an immediate liability to detention and, in

practice, immediately causes executive detention. The nexus with executive detention is particularly strong in the case of s 501(3A) because the person is already in criminal custody and so is readily able to be taken into the custody of the Minister's officers. No principle of constitutional characterisation could support a contention that the Court should turn its eyes away from those direct and immediate consequences of visa cancellation when assessing the constitutional character of s 501(3A) (and the Commonwealth does not cite any such principle).

10. The second point seemingly advanced by the Commonwealth is that it is a sufficient answer to Mr Falzon's case that s 501(3A) causes, but does not authorise, detention. This contention cannot be accepted. It involves a rejection of the proposition that the constitutional character of a law depends on its legal and practical operation, not just what the terms of the law considered alone require. This contention also cannot stand with the proposition accepted by the Commonwealth at CS [27] that the constitutional character of a law depends on "all the circumstances". *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 257 CLR 28 (***S156***) at [37] is not to the contrary: cf CS [31]. *S156* did not concern a scheme which directly and immediately effected detention under a Commonwealth law.

## Visa cancellation and Ch III (CS [34]-[37])

11. The Commonwealth's submissions at CS [34]-[37] are directed to a proposition which Mr Falzon does not advance, namely, that the Ch III judiciary has exclusive power to determine whether non-citizens who commit criminal offences in Australia should be allowed to remain. The proposition advanced by Mr Falzon is that the Commonwealth executive may not adjudge and punish guilt for an offence.

## Conviction as a factum for visa cancellation (CS [38]-[46])

12. The Commonwealth contends that there is a long history of Commonwealth laws providing for removal or deportation following conviction for an offence: CS [42]. The factual foundation for that submission - namely, s 8 of the *Immigration Restriction Act 1901* (Cth) (see CS fn 36) - is rather unedifying. That section, which was an aspect of the White Australia policy, did not impose a duty to deport an alien who was convicted of an offence. Rather, it permitted an immigration officer a power to require the alien to "write out at dictation and sign in the presence of an officer a passage of fifty words in length in an European language". If the alien failed the test, he or she was liable to deportation. It is unlikely that the Commonwealth truly wishes to assert in these proceedings that s 8 of the 1901 Act furnishes any analogy s 501(3A).

13. As it is, the laws referred to by the Commonwealth at CS fn 36 evidence an important proposition: a law like s 501(3A) is unprecedented in the history of the Commonwealth. Never has the Commonwealth purported to impose a duty to cancel an alien's visa enlivened solely by criminal offending and current imprisonment which directly and immediately exposes the alien to executive detention.

14. The Commonwealth is also not assisted by the Canadian, New Zealand and United States cases referred on at CS [44]. The issue in those cases was the character of

*deportation* consequential on criminal offending. Mr Falzon's case is not about the character of any power to remove him from Australia. It is about the validity of the sui generis power given by s 501(3A).

## The constitutional purpose and character of s 501(3A) (CS [46], [48]-[57])

15. The Commonwealth advances a number of submissions directed to establishing that s 501(3A) and/or detention resulting from the exercise of power under s 501(3A) is not penal or punitive.

16. The Commonwealth denies that s 501(3A) contemplates that criminal detention may effectively be served as immigration detention. The basis of this denial is a contention that detention pursuant to a court order is not custody "by or on behalf of an officer" under the Act: CS [52]. The Commonwealth furnishes no reason, beyond assertion, for this contention. It is difficult see how it could be correct. As soon as an alien's visa is cancelled, every "officer" in Australia has a duty to detain: s 189. "Officer" is broadly defined and includes members of the State police forces and other persons authorised in writing by the Minister: s 5(1). It would involve assuming a widespread failure to "officers" to perform the duty imposed on them by s 189 to conclude that visa cancellation under s 501(3A) will not result in detention under s 189. At that point, if the alien's term of imprisonment continues, there are a number of possibilities. One possibility is that the power to detain arising from the sentence of imprisonment and the power to detain under s 189 of the Act continue concurrently, each providing discrete sources of authority to detain. Another possibility is that the power to detain arising from the Court order ceases because s 189 prevails over it, whether by reason of s 109 of the Constitution or otherwise. In the first case, the term of imprisonment will be served in immigration detention. In the second case, the term of imprisonment will be replaced with immigration detention. In either case, the Commonwealth's contention at CS [52] is incorrect.

17. The Commonwealth contends that there is no constitutional distinction between a duty and a discretion: see CS [54]. This contention fails to account for two points. The first is the significance of the principle that a discretion is read subject to the Constitution: see, for example, *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45, 49; *Wotton v Queensland* (2012) 246 CLR 1 at [9], [21], [31]-[32]. That principle creates an important constitutional difference between duties and discretions: the latter can (and must if possible) be read in a manner which ensures their constitutional validity. The second point is that discretions are inherently apt to be construed and applied in ways which limit their scope. They are apt to be read so that they may not be exercised for impermissible purposes and may only be exercised for proper purposes and after regard is had to mandatory considerations. These points are significant here: if s 501(3A) were a discretionary power, to be exercised having regard to and for the purpose of protecting the Australian community, it might bear a materially distinct constitutional character.

18. The Commonwealth purports to support the validity of s 501(3A) by reference to the particular circumstances of Mr Falzon: CS [55]. It need hardly be said that reasoning of that kind is impermissible. If s 501(3A) is invalid, it is invalid irrespective of Mr

Falzon's circumstances. Nor is it an argument for the validity of s 501(3A) that the Commonwealth Parliament could have framed a valid law which applied to Mr Falzon.

19. The Commonwealth misrepresents the Second Reading Speech at CS [56]. The reference to "non-citizens who pose a risk to the community" was part of a *disjunctive* list of three kinds of persons, the first of which was "non-citizens who commit crimes in Australia". Section 501(3A) is obviously directed to the first class of persons: it operates irrespective of whether the person poses a risk to the community.

## Proportionality (CS [58]-[64])

20. The Commonwealth contends that the analysis adopted in *McCloy v New South Wales* (2015) 257 CLR 178 (***McCloy***) is inapplicable to the separation of powers because the latter is not concerned with a constitutional "freedom", but is instead no more than a structural requirement: see CS [58]-[60]. This submission proves too much and, in doing so, displays the error. The implied freedom, which was at issue in *McCloy*, is *also* a structural requirement of the Commonwealth Constitution, required by the structural imperative in ss 7, 24 and 128 for a "choice". The implied freedom, just like the separation of powers, "creates an area of immunity from legal control" and does not create an individual right: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560. The immunity so created is the consequence of the structural imperative and is not an end in itself. A zone of individual freedom is the result not the rationale. This Court has nevertheless found it appropriate to apply structured proportionality analysis to the implied freedom. It has done so because structured proportionality supplies an analytical framework by which questions as to whether laws are consistent with the constitutional imperative can be meaningfully tested. There is no less a need for such a framework in the context of the separation of powers. *Magaming v R* (2013) 252 CLR 381 is not to the contrary: cf CS fn 60. The contention in that case was that the law was invalid because it was too "harsh" and accordingly was disproportionate: see at [52]. Mr Falzon does not contend that Ch III prohibits "harsh" laws.

21. The Commonwealth also contends that s 501(3A) is proportionate to a non-punitive purpose because of the power to revoke: CS [63]. The power to revoke is of course of little succour to the person who, in the meantime, is detained and cannot obtain his release through an interlocutory injunction: see PS [37(b)]. In any event, the Commonwealth provides no response to Mr Falzon's submissions on the significance of the revocation power at PS [37(c), (d), (e) and (f)].

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