IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M97 of 2016

BETWEEN: **AARON JOE THOMAS GRAHAM**
Plaintiff

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Defendant

10 **IN THE HIGH COURT OF AUSTRALIA**
PERTH REGISTRY

No. P58 of 2016

BETWEEN: **MEHAKA LEE TE PUIA**
Applicant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Respondent

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ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

Date of document: 2 February 2017
Filed on behalf of: Attorney-General for the State of Victoria

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PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PARTS II & III: INTERVENTION

2. The Attorney-General for the State of Victoria intervenes in each proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth). In each case, the Attorney-General intervenes in support of the defendant.[1]

PART IV: APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

3. The applicable constitutional and statutory provisions are identified and extracted in the annexure to the submissions of each plaintiff.

PART V: ARGUMENT

A. Introduction

4. These proceedings raise several questions. Victoria makes submissions on just one question: whether either or both of s 501(3) and s 503A(2) of the *Migration Act 1958* (Cth) (the **Act**) are invalid (wholly or in part) on the ground they require a federal court to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power.[2] For the following reasons, Victoria contends this question should be answered 'no'.

5. Victoria adopts the description of the statutory framework set out in the Commonwealth's submissions in *Graham*.[3]

B. Plaintiffs' focus on the common law of public interest immunity

6. The plaintiffs' argument that the impugned provisions require a federal court to exercise judicial power inconsistently with the essential character of a court, as

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1 For readability, plaintiff/defendant terminology has been adopted in relation to both proceedings.

2 Question 1(a) of the questions of law stated for the opinion of the Full Court in the M97 of 2016 (*Graham v Minister for Immigration and Border Protection*) (***Graham***) Special Case at [16] (SCB 17) and in the P58 of 2016 (*Te Puia v Minister for Immigration and Border Protection*) (***Te Puia***) Special Case at [13] (SCB 14).

3 Commonwealth's *Graham* Submissions at [9]-[12].

outlined in the plaintiff's submissions in *Graham*, is preceded by a discussion of the development of common law principles relevant to public interest immunity and confidentiality.[4] The plaintiffs disavow any attempt to constitutionalise public interest immunity,[5] and they acknowledge the federal Parliament has power to 'strike a different balance' in relation to matters of public interest immunity and confidentiality and to alter court procedure relevant to the same.[6] Nevertheless, the plaintiffs' approach appears to use the common law of public interest immunity as the constitutionally acceptable baseline, and then proceeds to compare the impugned provisions to that baseline. The implication is that any departure from the common law position that shifts the balance in favour of the Executive is constitutionally suspect. Such an approach is incorrect. As Hayne J observed in *Nicholas v The Queen*, '[t]here are many rules which have been developed by the common law which have been changed or even abolished by legislation and yet it is not suggested that such legislation intrudes upon the separation of judicial and legislative powers'.[7] The plaintiffs' focus on the common law position serves only to distract from the real enquiry, namely, whether the impugned provisions fall foul of the *Lim* principle by requiring or authorising the federal courts 'to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power'.[8] There is no occasion to consider the altogether different constitutional setting of State courts, and the plaintiffs' reliance on the *Kable v Director of Public Prosecutions (NSW)*[9] line of authority is misplaced.

C. There is no inconsistency

7. The plaintiffs contend that the impugned provisions are inconsistent with the institutional integrity of the courts in four ways:[10]

   (a) *first*, the provisions are said to strike 'at the heart' of the court's ability to ascertain the facts;

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4 Plaintiff's *Graham* Submissions at [18]-[23]. The plaintiff in *Te Puia*, in his written submissions, relies upon the *Graham* Submissions (see Plaintiff's *Te Puia* Submissions at [14]).

5 Plaintiff's *Graham* Submissions at [23].

6 Plaintiff's *Graham* Submissions at [23].

7 (1998) 193 CLR 173, 272-273 [234] (***Nicholas***).

8 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

9 (1996) 189 CLR 51.

10 Plaintiff's *Graham* Submissions at [31].

(b) *secondly*, the provisions are said to impair the independence of the courts by '[v]esting control' in the Executive;

(c) *thirdly*, the provisions are said to threaten the appearance of impartiality because a party to the litigation (the Minister) can impact the court's decision-making by 'disclosing favourable material while withholding unfavourable material'; and

(d) *finally*, it is said the impugned provisions operate to create a court process that carries with it a real risk of 'practical injustice'.

Each of the plaintiffs' four arguments is addressed below.

10 Plaintiffs' first argument - limiting the court's ability to ascertain the facts

8. The plaintiffs' first argument (that the impugned provisions strike 'at the heart' of the court's ability to ascertain the facts)[11] can only result in invalidity if this Court accepts the plaintiffs' contention that one of the defining attributes of a court is 'judicial fact-finding'.[12] As the plaintiffs acknowledge,[13] the High Court has described the following attributes as essential to a court within the Australian legal system (whether a federal court or a 'court of a State'): institutional independence and impartiality;[14] the application of procedural fairness;[15] adherence to the open court principle;[16] and the giving of reasons for decisions.[17] Although this list is not exhaustive, this Court should not accept the plaintiffs' submission that 'judicial fact-finding' is also an essential
20 attribute of a court in the sense that it will always be present. Putting to one side those facts that are necessary to establish jurisdiction, the exercise of jurisdiction will not always require judicial fact finding.

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11 Plaintiff's *Graham* Submissions at [31.1].
12 Plaintiff's *Graham* Submissions at [15.2].
13 Plaintiff's *Graham* Submissions at [15.1].
14 *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 89 [125] (Hayne, Crennan, Kiefel and Bell JJ) (***Pompano***); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 544 [153] (***K-Generation***) (referring to courts of a State). As to impartiality, see *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248.
15 *Wainohu v New South Wales* (2011) 243 CLR 181, 209 [44] (French CJ and Kiefel J) (***Wainohu***), citing *Leeth v The Commonwealth* (1992) 174 CLR 455, 469-470 (Mason CJ, Dawson and McHugh JJ).
16 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 594 [39] (French CJ, Kiefel and Bell JJ) (***NAAJA***); *Wainohu* (2011) 243 CLR 181, 208-209 [44], 215 [58] (French CJ and Kiefel J).
17 *NAAJA* (2015) 256 CLR 569, 594 [39] (French CJ, Kiefel and Bell JJ); *Wainohu* (2011) 243 CLR 181.

9. While the work of a court often involves fact-finding, that is not always the case. For example, a court may proceed to decide a case on the basis of facts agreed between the parties. The parliament may confer jurisdiction with respect to a question of law only or an appeal may be decided on that basis. In a jury trial, the jury (not the judge) is the arbiter of fact. Moreover, the Australian legal system permits the finding of facts by bodies that are not courts – administrative decision-makers being the obvious example. Accordingly, while the exercise of judicial power by a court will often involve fact-finding, judicial power can be – and often is – exercised without the ascertainment of facts by the court. Accordingly, fact-finding cannot be said to be an essential attribute of a court within the Australian legal system. Even if the essential attribute is described as the ability to ascertain the facts (as is done in the Plaintiff's *Graham* Submissions at [31.1]), a court does not always have that 'ability' or power. One example has already been given – in a jury trial, the jury (not the court) is the arbiter of fact and the facts that are found by the jury may never be known.

10. In *Huddart, Parker & Co Pty Ltd v Moorehead*, Griffith CJ described 'judicial power' in s 71 of the Commonwealth Constitution as referring to 'the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects'.[18] His Honour, in the same passage, referred also to the 'power to give a binding and authoritative decision'. Chief Justice Griffith's description, which has become a classic formulation of judicial power, makes plain that it is the power to decide controversies which lies at the heart of what a court does. Whether, in a particular case, the court decides the controversy before it through the finding of facts or not, does not detract from the fact that it is judicial power being exercised. Accordingly, the finding of facts is not an essential attribute of a court.

11. In support of their argument, the plaintiffs rely on three paragraphs in two High Court decisions – paragraphs 58 and 68 in *Wainohu*, and paragraph 444 in *South Australia v Totani* (***Totani***).[19] Of these, it is submitted that only one – paragraph 58 in *Wainohu* – is open to being read as supportive of the proposition that judicial fact-finding is itself an essential attribute of the exercise of judicial power. However, in Victoria's

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18 (1909) 8 CLR 330, 357.

19 Plaintiff's *Graham* Submissions at [15.2], referring to *Wainohu* (2011) 243 CLR 181, 215 [58], 219 [68] (French CJ and Kiefel J) and *Totani* (2010) 242 CLR 1, 162-163 [444] (Kiefel J).

submission, paragraph 58 (properly understood) does not go this far. Rather, the gravamen of the paragraph is that where a court engages in a process of finding facts, identifying the rules of law and applying the law to the facts as found, a judicial function has been performed and that process cannot be withheld from public scrutiny.

12. Finally, the plaintiffs' argument proceeds on the unstated assumption that a court should always have the ability to ascertain the facts. This assumption is incorrect. The capacity of the parties to garner and then deploy relevant material is limited by both procedural and substantive law sourced in both common law and statute. As Crennan J observed in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)*, 'the availability and accessibility of all relevant evidence in judicial proceedings is not absolute'.[20] Not only is it wrong to assume that a court should always have available to it all of the relevant facts, but further, the relevance of the underlying facts in any given proceeding must take into account the nature of the proceeding. Judicial review is 'concerned with whether the … decision was one which [the decision-maker] was authorised to make', and is not an appellate process.[21] Accordingly, the plaintiffs are wrong to assume (as they appear to do) that a court determining a judicial review application from a decision of the Minister under s 501(3) will need to have access to all of the facts underlying the Minister's decision in order to decide the application.

Plaintiffs' second argument – impairment of judicial independence

13. The plaintiffs' second argument is that the impugned provisions vest control in the Executive, and that this impairs the court's independence.[22] Precisely what the plaintiffs mean by the vesting of control in the Executive is not explained. Not only do the plaintiffs fail to explain precisely what the Executive is said to control, it is also unclear whether the plaintiffs seek to argue that the vesting of control in the Executive compromises judicial independence because it takes an essential function away from the judiciary, or whether the plaintiffs contend that the impugned provisions somehow permit the Executive control over the judiciary.

14. Notwithstanding the lack of clarity in the plaintiffs' argument, there is no foundation

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20 (2008) 234 CLR 532, 597 [189] (***Gypsy Jokers***), cited by French CJ in *Pompano* (2013) 252 CLR 38, 73 [70].

21 *Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50; (2015) ALJR 197, 203 [23] (French CJ, Bell, Keane and Gordon JJ) (***Plaintiff M64/2015***).

22 Plaintiff's *Graham* Submissions at [31.2].

for concluding that the impugned provisions impermissibly impair the independence of the courts. The concept of independence, in the context of the constitutionally mandated separation of powers, refers to independence from the other branches of government.[23] The independence of the courts might be interfered with as a result of impermissible intrusion by the legislature or the Executive. This would include impermissible attempts to control the judiciary by the legislature or the Executive. As to the former, one example was given by Brennan CJ in *Nicholas*, who said that 'the duty to act impartially is inconsistent with the acceptance of instructions from the legislature to find or not to find a fact or otherwise to exercise judicial power in a particular way'.[24] As to the latter, 'the courts cannot be required to act at the dictation of the Executive'.[25]

15. The legislation at issue in this case does not intrude upon or interfere with the separation of powers in this way. A court determining an application for judicial review of a decision of the Minister under s 501(3) is not instructed (whether directly by the impugned legislation or by the Executive) to find a fact or not to find a fact. The impugned provisions do not direct the courts as to the outcome of any proceeding.

16. Rather, in determining the application for judicial review, the impugned provisions prevent the disclosure of certain information to the court, which means that that information will not form part of the evidence before the court in its determination of the judicial review application. In this way, the impugned provisions may be characterised as doing no more than authorising a limitation on the material that is available to be put before the court as evidence in court proceedings arising from decisions made under s 501(3) (including applications for judicial review). As such, the impugned provisions do not alter the jurisdiction of federal courts. The result is not relevantly different from that which occurs when a party succeeds in a public interest immunity claim.

17. The fact that a particular ground of review may be harder to establish by reason of the provision does not evidence an impermissible intrusion into the judicial process. The hurdle imposed by s 503A to success in judicial review may be less than that which

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23 *Pompano* (2013) 252 CLR 38, 89 [125] (Hayne, Crennan, Kiefel and Bell JJ).

24 (1998) 193 CLR 173, 188 [20].

25 *Pompano* (2013) 252 CLR 38, 89-90 [125] (Hayne, Crennan, Kiefel and Bell JJ), citing *Totani* (2010) 242 CLR 1, 52 [82], 67 [149], 92-93 [236], 160 [436], 173 [481].

arises where a decision maker is under no obligation to give reasons for decision or the decision record is inscrutable. Yet the common law imposes no obligation to give reasons.[26]

18. In *State of Victoria v Intralot Australia Pty Ltd*,[27] the Victorian Court of Appeal reached a similar conclusion (albeit in relation to a different constitutional question) in relation to the proper characterisation of statutory secrecy provisions in the *Gambling Regulation Act 2003* (Vic). Those provisions, ss 10.1.30 and 10.1.31, relevantly provide that a 'regulated person' must not disclose 'protected information' to someone else, and provide that a regulated person is not permitted or required to produce or disclose protected information to a court. The proscription against disclosure to a court is subject to exceptions, and s 10.1.31(2) authorises disclosure in certain circumstances (including where the Minister certifies that disclosure is necessary in the public interest). The provisions do not, however, authorise a court to compel disclosure.

19. The Court of Appeal said that ss 10.1.30 and 10.1.31 'do no more than create a single, defined category of documents which, subject to certain stated exceptions, will be exempt from inspection or production (though not from discovery) in legal proceedings'.[28] The Court went on to say:[29]

> The function of the Supreme Court in relation to discovery, inspection and production in this case is no different from what it would be in any other case where privilege or immunity is claimed or otherwise arises. In each such case, the Court must consider and determine whether the claim or immunity is made out. If it is, the Court must give effect to it. Nothing more than that is involved in the present case.

20. The same conclusion applies here. On judicial review, a court faced with a claim that s 503A(2)(c) or (d) applies to prevent disclosure of protected information must (and can) consider whether the claim is made out, and if it is, the court must give effect to it in the same way it would give effect to a valid claim of public interest immunity.

21. The plaintiffs' second argument (and the inconsistency contention generally) is difficult to reconcile with the result and the reasoning of the majority justices in *Nicholas*. In *Nicholas*, the Court upheld the validity of s 15X of the *Crimes Act 1914*

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26 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 (***Osmond***).
27 [2015] VSCA 358.
28 [2015] VSCA 358, [103] (the Court).
29 [2015] VSCA 358, [105].

(Cth), a provision that altered the common law principle established in *Ridgeway v The Queen*.[30] The effect of s 15X was significant – it meant that in exercising the discretion to decide whether or not to admit evidence of the importation of narcotic goods in an authorised controlled operation, the court was 'directed to disregard the fact that a law enforcement officer committed an offence in importing those narcotic goods'.[31] Mr Nicholas challenged the validity of s 15X on several grounds, including that it purported to direct a court to exercise its discretionary power in a manner or to produce an outcome inconsistent with the essential character of a court.

22. By a majority of five, the Court held that s 15X was valid.[32] In so holding, each member of the majority expressly rejected Mr Nicholas's inconsistency argument.[33] The majority justices characterised s 15X as a law governing the admission of evidence.[34] Four members of the majority observed that, historically, it had been considered appropriate for the legislature to enact laws concerning the rules of evidence or procedure.[35] The fact that in a particular instance the effect of a statutory provision was to make the case for the accused 'that much more difficult' did not mean it was invalid.[36] There is no basis for concluding that it is the exclusive province of the courts to determine 'what the public interest requires'.[37] For Brennan CJ and Gaudron J, an essential aspect of their reasoning was that the exercise of a discretion to admit or reject evidence is not itself an exercise of judicial power for the purposes of Ch III of the Constitution.[38]

23. Consistently with *Nicholas*, Victoria submits that while the impugned provisions (where they apply) mean that certain material will not be before the court in its determination of the judicial review application, in conducting the review the court is not subject to any direction from any other branch of government concerning the facts

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30 (1995) 184 CLR 19.

31 (1998) 193 CLR 173, 184-185 [11] (Brennan CJ).

32 (1998) 193 CLR 173, 198 [39] (Brennan CJ), 204 [60] (Toohey J), 212 [84] (Gaudron J), 239 [168]-[170] (Gummow J), 279 [256] (Hayne J). Justices McHugh and Kirby dissented.

33 (1998) 193 CLR 173, 185-191 (Brennan CJ), 200-203 [48]-[55] (Toohey J), 206-211 [67]-[82] (Gaudron J), 230-233 (Gummow J), 272-276 (Hayne J).

34 (1998) 193 CLR 173, 191 [26] (Brennan CJ), 202 [53] (Toohey J), 234 [150]-[151] (Gummow J), 273 [235] (Hayne J). See also 207-208 [70]-[71], 210-211 [79]-[80] (Gaudron J).

35 (1998) 193 CLR 173, 189 [23] (Brennan CJ), 203 [55] (Toohey J), 234-236 (Gummow J), 273 [235] (Hayne J).

36 (1998) 193 CLR 173, 238 [162] (Gummow J). See also 274 [238] (Hayne J).

37 (1998) 193 CLR 173, 272 [233] (Hayne J).

38 (1998) 193 CLR 173, 188 [22], 191 [26] (Brennan CJ), 207-208 [70]-[71] (Gaudron J). Justice Hayne took a contrary view: at 272 [232].

to be found or the outcome of the application. For these reasons, there is no impairment of judicial independence.

Plaintiffs' third argument – threat to appearance of judicial impartiality

24. The plaintiffs' third argument is that the Minister's discretion under s 503A(3) threatens the appearance of judicial impartiality.[39] It is accepted that the impugned provisions result in a situation where, unless the Minister makes a declaration under s 503A(3) to enable disclosure of all protected information relied upon by the Minister in making a decision under s 501(3), there will be information relied upon by the Minister that will not be admissible in evidence before the court on the judicial review application. However, the plaintiffs have not explained how this limitation on production (or the Minister's role in deciding whether to permit disclosure) threatens the appearance of judicial impartiality. The Minister's decision in relation to making a declaration under s 503A(3) is made independently from the court. The decision has an impact on the material that is available from the Minister or officer (but not other parties that may hold the information) for the hearing of the application for judicial review, but the court has no role at all in the decision. Moreover, once the court embarks on its judicial review, as already stated, the impugned provisions do not in any way seek to influence or direct the court in the exercise of judicial power. In these circumstances, it cannot be said that the existence of the Minister's power under s 503A(3) in any way compromises the appearance of the court's impartiality. The fact that a statutory provision creates a hurdle or impediment for one party involved in litigation (but not its opposing party) does not lead to the conclusion that the court charged with determining the dispute between them is not impartial.

Plaintiffs' fourth argument – scope for practical injustice

25. The plaintiffs' fourth argument is that the 'scope for "practical injustice" [created by the impugned provisions] is manifest'.[40] It should be noted that the avoidance of 'practical injustice' is not itself an essential attribute of a court, although the concept is connected to procedural fairness (which is an essential attribute of a court). The connection between the two concepts is that the rules of procedural fairness have been

39 Plaintiff's *Graham* Submissions at [31.3].
40 Plaintiff's *Graham* Submissions at [31.4].

developed out of the law's concern to avoid practical injustice.[41] Accordingly, although the plaintiffs have given prominence to the concept of practical injustice, the real question is whether 'taken as a whole, the court's procedures for resolving the dispute accord both parties procedural fairness and "avoid practical injustice"'.[42] In answering this question, it is important to give attention to the precise features of the court process said by the plaintiffs to be unfair or unjust. The plaintiffs appear to focus on two features of the process: that the applicant in a judicial review proceeding is denied access to the protected information; and that the process does not include the kinds of safeguards or protections discussed in *Pompano*.[43]

10 26. As to the first feature (the denial to the applicant of access to protected information), the authorities do not support the proposition that denial to one party of particular information is (in and of itself) constitutionally impermissible. In *Pompano*, French CJ said: '[t]hat a law imposes a disadvantage on one party to proceedings in order to restrict, mitigate or avoid damage to legitimate competing interests does not mean that the defining characteristics of the court required to administer such a law are impermissibly impaired'.[44] As his Honour observed, the constitutional validity of such a law was upheld in *K-Generation*.[45] In the same way, the Court has observed (in the context of privilege claims) that the fact one party might be handicapped as a result of a successful privilege claim does not mean that 'the Court cannot or will not exercise
20 its ordinary jurisdiction; it merely means the Court will arrive at a decision on something less than the entirety of the relevant materials'.[46]

27. As to the second feature (the lack of protections or safeguards), the plaintiffs' argument proceeds on the assumption that a discussion of protections in *Pompano* is relevant here. The relevance is difficult to see, however, given the statutory scheme at issue in this case is entirely different to the scheme in *Pompano*. Moreover, the plaintiffs' reference to safeguards and protections assumes not only that the process is so unfair that safeguards are required, but also that the fact the legislation could have

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41 *Pompano* (2013) 252 CLR 38, 99 [156] (Hayne, Crennan, Kiefel and Bell JJ) (citing Gleeson CJ in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 14 [37]).

42 *Pompano* (2013) 252 CLR 38, 100 [157] (Hayne, Crennan, Kiefel and Bell JJ).

43 Plaintiff's *Graham* Submissions at [31.4]. See also Plaintiff's *Te Puia* Submissions at [19].

44 *Pompano* (2013) 252 CLR 38, 78 [86].

45 *Pompano* (2013) 252 CLR 38, 78 [86].

46 *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 61 (Mason J), quoted with approval in *Gypsy Jokers* (2008) 234 CLR 532, 556 [24] (Gummow, Hayne, Heydon and Kiefel JJ).

been drafted differently (presumably, to afford more protection to persons in the position of the plaintiffs) should lead to the conclusion that the process in its current form is constitutionally impermissible. Neither assumption is correct.

28. A further point should be made in relation to the plaintiffs' emphasis on the provision of particulars as a necessary safeguard. As French CJ, Bell, Keane and Gordon JJ observed in *Plaintiff M64/2015*:[47]

> It is well settled that in the context of administrative decision-making, the court is not astute to discern error in a statement by an administrative officer which was not, and was not intended to be, a statement of reasons for a decision that is a broad administrative evaluation rather than a judicial decision.

In light of this, of what assistance could it be, to an applicant seeking judicial review from a decision of the Minister under s 501(3), to be provided with 'particulars'?

29. The impugned provisions do not prevent the court from administering justice in a way that is procedurally fair. The impugned provisions do not permit one party to use, in any court proceeding, information that the other party or parties are not permitted to use. Rather, absent a declaration by the Minister under s 503A(3), information protected under the impugned provisions is not available to be used in the proceeding by any party, and the court cannot require disclosure of the information. In a result that is consonant with the application of public interest immunity, the applicant in a judicial review proceeding is not able to utilise the protected information in the court process. Importantly, however, neither is the Minister.

30. In contending that the process is unfair, the plaintiffs submit that the impugned provisions may result in situations where the Minister's decision is 'practically unexaminable'.[48] The gravamen of the contention is that, in circumstances where the Minister's decision substantially or wholly relies on protected information, an applicant will not know the reasons for the decision and the substance of the case against him or her. Yet, the same outcome arises in the context of a decision made by an administrative decision-maker under statute where the statute imposes no requirement to provide reasons. In light of the fact that there is no general requirement at common law to provide reasons,[49] a person affected by such a decision who wished

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47 [2015] HCA 50; (2015) ALJR 197, 204 [25].
48 Plaintiff's *Te Puia* Submissions at [17]-[20].
49 *Osmond* (1986) 159 CLR 656.

to seek judicial review would have to do so in the absence of reasons. In such a case, the applicant would face the same kinds of difficulties faced by a person seeking judicial review of a decision made under s 501(3). The plaintiffs' 'practically unexaminable' submission is inconsistent with the established position that there is no general rule requiring the giving of reasons at common law. Just as the requirement for administrative decision-makers to give reasons is a policy-based decision for the legislature (not the courts),[50] so too the policy decision underlying the impugned provisions properly falls to the Commonwealth Parliament.

31. For the same reasons, the plaintiffs' argument that the provisions impair the constitutional judicial review function embodied in s 75(v) must also fail.

PART VI: ESTIMATE

32. Victoria estimates it will require approximately 15 minutes for the presentation of its oral submissions.

Dated: 2 February 2017

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50 *Osmond* (1986) 159 CLR 656, 668-669 (Gibbs CJ). The balance of the Court agreed with the Chief Justice's orders. Justices Wilson and Dawson also agreed with the Chief Justice's reasons.