ORIGINAL

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

ANNOTATED SUBMISSIONS OF THE DEFENDANT AND THE COMMONWEALTH ATTORNEY-GENERAL (INTERVENING)

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PART I PUBLICATION

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

PART II ISSUES

2. The Attorney-General of the Commonwealth intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth). Following are the joint submissions of the Defendant (**Minister**) and the Attorney-General (**Commonwealth**). The Commonwealth agrees with the Plaintiff's statement of issues.

PART III NOTICE OF CONSTITUTIONAL MATTER

3. The Commonwealth considers that the Plaintiff's notices under s 78B of the Judiciary Act are sufficient.

PART IV FACTS

4. The Commonwealth agrees with the statement of facts in [4] of the Plaintiff's Annotated Submissions (**PS**).

PART V APPLICABLE PROVISIONS

5. The Commonwealth accepts the Plaintiff's statement of the applicable provisions and would add s 3A of the *Migration Act 1958* (Cth) (**Act**) as an additional provision. That section is set out in the Annexure to these submissions.

PART VI ARGUMENT

Summary

6. Section 503A expresses the Parliament's judgment as to the appropriate balance between the competing public interests in, on the one hand, protecting the flow of information to the **Minister** that can be used to advance the object of regulating, in the national interest, the presence in Australia of non-citizens of character concern, and, on the other, the public interest in enabling non-citizens affected by decisions to refuse or cancel visas to be made aware of the basis for those decisions. In enacting s 503A, Parliament chose to prioritise the former public interest over the latter, by allowing gazetted agencies that hold information that is relevant to character decision-making to be confident that, if they disclose that information to the Minister, their information will not be required to be further disclosed.

7. The court remains the final arbiter of whether the statutory criteria upon which the immunity conferred by s 503A is enlivened are satisfied. While those criteria do not require the court to make its own assessment as to how the competing aspects of the public interest should be balanced, the capacity of a court to make such an assessment is not mandated by Ch III.

8. Nor does Ch III require that a court must have access to all material that is relevant to an issue to be litigated before that court. The rules of evidence routinely operate so that courts decide cases without regard to all such material. The potentially formidable forensic burden that might fall on a plaintiff in circumstances where the court proceeds on less than all the relevant material does not strike at any defining characteristic of a court, nor does it deprive the High Court of its entrenched judicial review jurisdiction under s 75(v) of the Constitution.

Statutory framework

9. The object of the Act is "to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens": s 4(1). To advance that object, the Act provides for visas permitting non-citizens to enter or remain in Australia and manifests an express legislative intention that the Act "be the only source of the right of non-citizens to so enter or remain": s 4(2). A non-citizen in the migration zone is a lawful non-citizen if he or she "holds a visa that is in effect" and is otherwise an unlawful non-citizen: ss 13(1) and 14(1).

10. Section 501 is about refusal or cancellation of visas on character grounds. Relevantly, s 501(3) provides that the Minister may cancel a visa if he "reasonably suspects that the [visa-holder] does not pass the character test" and is satisfied that the cancellation is "in the national interest". A person does not pass the "character test" if, relevantly, the Minister reasonably suspects: 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 that the group, organisation or person has been or is involved in criminal conduct: s 501(6)(b).

11. The rules of natural justice and the code of procedure set out in Subdiv AB of Div 3 of Pt 2 of the Act do not apply to a decision under s 501(3): s 501(5). There is, however, a mechanism for a visa applicant to seek revocation of a decision under s 501(3): s 501C. Specifically, the Minister, acting personally, may revoke a decision made under s 501(3) if the visa holder makes representations in accordance with the Minister's invitation to do so and the visa holder satisfies the Minister that he or she passes the character test: s 501C(4) (see also sub-ss (3)(b) and (5)).

12. Section 503A contemplates that the Minister, in exercising power under s 501(3), might rely on information communicated in confidence by "a gazetted agency", which may be, for example, an Australian law enforcement or intelligence body or a foreign law enforcement body: s 503A(9). An authorised migration officer may divulge or communicate such information only to the Minister or another authorised migration officer, and only for limited purposes. The Minister must not be required to divulge or communicate the information to a court or any other person or body: s 503A(2)(c). However, s 503A does not prevent the Court receiving such material. Nor is s 503A(2)(c) addressed to a case in which production of the relevant information is sought from a person other than the Minister or an

authorised officer (including from the gazetted agency itself, if the identity of that agency is known).

Section 503A is constitutionally valid

Applicable principles

13. The Parliament has ample powers to make laws regulating the processes and procedures of Ch III courts. Those legislative powers are, of course, subject to the requirements of Ch III, which include a requirement that Ch III courts retain their defining characteristics, and also that the High Court retain the original jurisdiction conferred upon it by s 75(v) of the Constitution.

14. The essential characteristics of a court are capable of being "adapted to protect the public interest in cases such as those involving national security, commercially sensitive documents and the protection of police informants" such that "constitutional limits do not prevent parliaments from making laws for the protection of the public interest in such areas".[1] Such laws reflect Parliament's assessment of the balance between competing public policy considerations, such as competing interests in, on the one hand, obtaining all potentially relevant information in the interests of accurate decision-making and, on the other hand, preventing the disclosure of information in aid of national security and law enforcement, or reducing the cost and length of litigation.

15. Articulating rules which govern non-amenability to production or compulsion of certain kinds of documents or witnesses necessarily involves balancing competing public interests based on "considerations of general policy".[2] That is why courts are slow to create new privileges at common law.[3] The creation of new privileges, adapted to the contemporary ascertainment of the public interest, is squarely within the competence of the legislative branch. The recent creation of journalist privilege illustrates the exercise of that power.[4] In striking a balance, it is unavoidable, and well within the legislative competence of Parliament, to "prefer"[5] one competing interest over another.[6]

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1 *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 (***Pompano***) at [5] (French CJ).

2 *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73 at 102-103 (Dixon J).

3 *R v Young* (1999) 46 NSWLR 681 at [91].

4 See *Evidence Act 1995* (Cth) ss 126J, 126K.

5 *Nicholas v The Queen* (1998) 193 CLR 173 (***Nicholas***) at [167] (Gummow J).

6 See, for example, in the national security context, *Leghai v Director-General of Security* (2007) 241 ALR 141, quoting with approval *A v Secretary of State for the Home Department* [2005] 2 AC 68 at 128 (Lord Nicholls), stating "All Courts are acutely conscious that the government alone is able to evaluate and decide what counter-terrorism steps are needed. ... Courts are not equipped to make such decisions, nor are they charged with that responsibility". See also *Alister v The Queen* (1984) 154 CLR 404 at 455 (Brennan J).

16. The "method or burden of proving facts" has long been accepted as being amenable to statutory prescription.[7] As a result, Parliament may, without offending Ch III, alter standards of proof in civil and criminal proceedings,[8] and reverse the onus of proof.[9] Parliament may also abrogate or modify common law principles governing: the discretionary exclusion of evidence sought to be tendered before a court;[10] the need for corroboration of the evidence of a victim of a crime;[11] the availability of legal professional privilege;[12] and the availability of the privilege against self-incrimination.[13] In *Nicholas*, Brennan CJ explained why there was no impermissible interference with the judicial process in such contexts:[14]

> The practice and procedure of a court may be prescribed by the court in exercise of its implied power to do what is necessary for the exercise of its jurisdiction but subject to overriding legislative provision governing that practice or procedure. The rules of evidence have traditionally been recognised as being an appropriate subject of statutory prescription.

17. Laws regulating the method or burden of proving facts may have a profound impact on the outcome of proceedings. They typically, and quite unexceptionally, cast on one party an onus of proof in respect of particular issues. They typically, and quite unexceptionally, confine the evidence that may be adduced in relation to particular issues. They therefore typically, and quite unexceptionally, create forensic difficulties for the party who bears the onus of proof.

18. The extent of the forensic difficulties occasioned by the prescribed method and burden of proving facts will vary. Sometimes, the forensic difficulties might be very onerous, such that a party who bears the onus of proof is unlikely to be able to discharge it. That is particularly so where the law places limits on the capacity of one party to obtain evidence upon which they wish to rely in attempting to prove their case. For example, in *Gypsy*

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7 *Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1 at 12 (Knox CJ, Gavan Duffy and Starke JJ); *Williamson v Ah On* (1926) 39 CLR 95 at 122; *Milicevic v Campbell* (1975) 132 CLR 307 at 316; *Nicholas* (1998) 193 CLR 173 at [24], [55], [123], [152]–[156], [201], [235].

8 *Thomas v Mowbray* (2007) 233 CLR 307 at [113] (Gummow and Crennan J).

9 *Nicholas* (1998) 193 CLR 173 at [24] (Brennan CJ), [123] (McHugh J), [152]-[154] (Gummow J); *Milicevic v Campbell* (1975) 132 CLR 307 at 316-7 (Gibbs J), 318-319 (Mason J), 321 (Jacobs J); *Orient Steam Navigation Co Ltd v Gleeson* (1931) 44 CLR 254 at 263 (Dixon J).

10 *Nicholas* (1998) 193 CLR 173.

11 *Rodway v The Queen* (1990) 169 CLR 515 at 521; *Nicholas* (1998) 193 CLR 173 at [25] (Brennan CJ).

12 Cf *Daniels Corporation v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

13 *Sorby v Commonwealth* (1982) 152 CLR 281 at 308 (Mason, Wilson and Dawson JJ).

14 *Nicholas* (1998) 193 CLR 173 at [23].

Jokers Motorcycle Club Inc v Commissioner of Police (***Gypsy Jokers***),[15] Gummow, Hayne, Heydon and Kiefel JJ explained that a successful claim for public interest immunity might mean that a Court decides an application for review on less than all of the available material and that, while this creates a forensic disadvantage or "handicap" for an applicant, it does not mean that the court "cannot ... exercise its ordinary jurisdiction".[16] Their Honours said:

> A successful claim to [public interest] immunity ... would have the consequence that the material was not admitted into evidence and would be denied both to the Court and the applicant. The handicap to which an applicant (and the Court) thereby are subjected appears from the following observations by Mason J in *Church of Scientology Inc v Woodward*, which were made when dealing with matters of national security:
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> > Intelligence is relevant to security if it can reasonably be considered to have a real connexion with that topic, judged in the light of what is known to ASIO at the relevant time. This is a test which the courts are quite capable of applying. It is a test which presents a formidable hurdle to a plaintiff and not only because *a successful claim for Crown privilege may exclude from consideration the very material on which the plaintiff hopes to base his argument* — that there is no real connexion between the intelligence sought and the topic. *The fact that a successful claim for privilege handicaps one of the parties to litigation is not a reason for saying that the Court cannot or will not exercise its ordinary jurisdiction; it merely means that the Court will arrive at a decision on something less than the entirety of the relevant materials*.

19. In her separate judgment in *Gypsy Jokers*, Crennan J said that "the availability and accessibility of all relevant evidence in judicial proceedings is not absolute".[17]

20. The remarks extracted above from the joint reasons in *Gypsy Jokers* concerned common law public interest immunity. But the fact that they concerned the common law, rather than statute, is not presently significant. In *Pompano*, French CJ explained that Parliament is competent to qualify attributes of the judicial process in recognition of "public interest considerations such as the protection of sensitive information and the

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15 (2008) 234 CLR 532.

16 *Gypsy Jokers* (2008) 234 CLR 532 at [24] (emphasis added), quoting *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 61 (Mason J). See also *Sagar v O'Sullivan* (2011) 193 FCR 311 at [51]-[54], [93].

17 *Gypsy Jokers* (2008) 234 CLR 532 at [189].

identities of vulnerable witnesses, including informants in criminal matters".[18] Similarly, in *Kizon v Palmer*,[19] Lindgren J, with whom Jenkinson and Kiefel JJ agreed, said that "abrogation of rights, including procedural rights, by Commonwealth legislation has often been upheld notwithstanding its practical effect on the outcome of litigation", and that "[m]any Commonwealth statutory provisions deny the availability to courts and tribunals generally of particular evidence".[20] Their Honours listed a number of examples, many of which remain contemporary illustrations of the point.[21]

21. In the specific context of legislation that deprives a prospective litigant of information upon which they seek to base an application for judicial review, the High Court in *South Australia v Totani* (***Totani***)[22] rejected a holding of the Supreme Court of South Australia that a statutory power conferred on the Attorney-General to declare an organisation as a "declared organisation" (with certain statutory consequences) was "unreviewable". Hayne J explained why that power was not "unreviewable", notwithstanding the fact that the legislation in question placed significant forensic difficulties in the way of establishing any entitlement to relief:[23]

> [J]udicial review of the Attorney-General's decision ... would be governed by the principles ... in *Avon Downs Pty Ltd v Federal Commissioner of Taxation* ...
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> The forensic difficulties of mounting such a challenge to the decision of the Attorney-General ... would be very large. Those difficulties would be compounded if, as may well be the case, not all of the information before the Attorney-General could be inspected by the party seeking judicial review. *To the extent to which the Attorney-General acted upon criminal intelligence, [the legislation] would appear, on its face, to preclude a court from making that material available to the applicant for judicial review.* In addition, the Attorney-General may act upon information in respect of which it would be proper for the Attorney to claim public interest immunity from production. In such circumstances, for an applicant for judicial review to show that the Attorney-General's decision was affected by some mistake of law or that the Attorney-General took some extraneous reason into consideration, or excluded from consideration a factor which should affect the determination, would be very difficult. But the decision is not unexaminable for jurisdictional error.

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18 *Pompano* (2013) 252 CLR 38 at [68], [70].

19 (1997) 72 FCR 409.

20 *Kizon v Palmer* (1997) 72 FCR 409 at 446.

21 See, eg, s 35(8) of the *Ombudsman Act 1976* (Cth); s 66 of the *Administrative Appeals Tribunal Act 1975* (Cth); s 98E(2)(b) of the *National Health Act 1953* (Cth); s 53B of the *Federal Court of Australia Act 1976* (Cth); s 127(2) of the *Disability Discrimination Act 1992* (Cth); s 210(6) of the *Radio Communications Act 1992* (Cth).

22 (2010) 242 CLR 1.

23 *Totani* (2010) 242 CLR 1 at [194]–[195] (emphasis added).

22. French CJ agreed with this reasoning, as did Crennan and Bell JJ.[24] In dissent, Heydon J made the same point, explaining why the supervisory jurisdiction was not denied simply because "invoking judicial review is not made easy".[25]

23. *Totani* concerned the entrenched supervisory jurisdiction of the State Supreme Courts recognised in *Kirk v Industrial Court (NSW)*,[26] which shares a functional equivalence with the jurisdiction conferred by s 75(v). The reasoning in *Totani* illustrates that legislation that affects judicial review in State Supreme Courts may validly involve placing substantial obstacles in the path of a person in the position of the plaintiff. In its terms, the same reasoning is equally applicable to s 75(v). The Plaintiff makes no application to re-open *Totani*, which should therefore be applied.

24. The foregoing line of authorities has been applied by the New South Wales Court of Appeal to uphold the constitutional validity of a provision prohibiting certain persons connected with ICAC from being required to produce documents to a court, notwithstanding that those documents were centrally relevant to a judicial review application. The Court of Appeal recognised that the impugned provision could have the effect of imposing a constraint on the ability of a court to consider all of the material on which an applicant might wish to rely, but nonetheless had no difficulty in rejecting the submission that the provision was invalid.[27] The Court recognised that "a significant extension" of the principle concerning the protection of the supervisory jurisdiction of courts would be required in order to invalidate a provision that prevented the compulsory production of certain documents, and correctly held that no such extension was warranted.[28]

Application of principles to s 503A

25. Section 503A(2)(c) serves a legitimate public interest to which the procedures of the courts can properly be adapted. That public interest appears from the text and context of s 503A itself. The provision is, in terms, about information that is communicated to a migration officer "*on condition that it be treated as confidential information*". As such, the section contemplates that to attract s 503A a condition of confidentiality must have been imposed by the holder of the information, being a gazetted agency that is under no obligation to provide information to the Minister or authorised migration officer. Section 503A is manifestly concerned to "enhance the ability of the Minister or an authorised migration officer to

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24 *Totani* (2010) 242 CLR 1 at [27], [415].

25 *Totani* (2010) 242 CLR 1 at [269].

26 (2010) 239 CLR 531 at [98], [100].

27 *A v ICAC* (2014) 88 NSWLR 240 at [7] (Bathurst CJ), [47]–[53] (Basten JA), [179]–[184] (Ward JA).

28 *A v ICAC* (2014) 88 NSWLR 240 at [48] (Basten JA, Bathurst CJ agreeing), [180] (Ward JA). See also *Victoria v Intralot* [2015] VSCA 358 at [18], [49], [63], [103]-[108].

maintain the confidentiality of information supplied ... by criminal investigation organisations in Australia or overseas".[29]

26. As the Minister explained in his second reading speech in support of the Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1998 (Cth), which inserted s 503A:[30]

> Criminal intelligence and related information is critical to assessing the criminal background or associations of non-citizen visa applicants and visa holders. At present, it is difficult for the Department to use such information in making character decisions because its disclosure might be threatened. *Australian and international law enforcement agencies are reluctant to provide sensitive information unless they are sure that both the information and its sources can be protected.* (emphasis added)

27. That is a clear statement of a familiar public interest to which the procedures of Ch III courts have been readily able to adapt. Ch III does not prevent the Parliament from taking measures to protect the confidentiality of information such as that protected by s 503A(2)(c), where Parliament has determined that to be appropriate in pursuit of a wider, and clearly identified, public interest.

28. Material that has been supplied to the Minister in confidence by a gazetted law enforcement or intelligence agency on the basis that it is relevant to a character decision concerning a non-citizen, is material that Parliament could rationally judge requires special protection. That is so whether or not a court would itself have decided that any particular information to which s 503A applies is objectively confidential.

29. Section 503A is the mechanism by which the Parliament – the democratically elected assembly – has made a judgment as to the balance that should be struck between the competing public interests in, on the one hand, the confidentiality of specific kinds of information and, on the other hand, the accessibility of that information in curial proceedings. Viewed within the character refusal and cancellation regime of which it forms part, s 503A can be seen to be a conventional exercise of Parliament's well-established power to strike a balance of competing public interests for and against the disclosure of particular kinds of information. To accept the Applicant's argument would be to hold that Parliament is not constitutionally competent to strike that balance at the intersection of curial procedure and administrative decision-making based on sensitive information. That cannot be right. The balance reflected in s 503A encourages law enforcement agencies to provide information to the Minister so as to facilitate fully

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29 *Evans v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 135 FCR 306 at [47] (Kenny J).

30 Senate, *Parliamentary Debates*, 11 November 1998 at 60. See also *Vella v Minister for Immigration and Border Protection* (2015) 230 FCR 61 at [71].

informed decisions as to the grant or refusal of visas on character grounds, thereby advancing the objects in s 4 of the Act. It does so by removing the need for gazetted agencies to attempt to predict the way that a court would rule on a public interest immunity claim in order to assess whether any information that is provided to the Minister will ultimately be disclosed (being uncertainty that, if it exists, may cause gazetted agencies to prioritise the protection of their information over the national interest in the Minister making fully informed decisions). While s 503A *does* create a forensic impediment to success in judicial review proceedings brought by that subset of persons who are affected by character decisions that are based on information that is protected under s 503A, it *does not* exclude judicial review or strike at any essential characteristic of a court. It is therefore valid.

The Plaintiff's arguments should be rejected

30. The Plaintiff advances two arguments against the foregoing analysis. ***First***, he submits that s 503A "infringes the separation of powers" because it does not permit a court to engage in any balancing of competing public interests in deciding whether the immunity applies: PS [11]–[32]. ***Secondly***, he submits that s 503A "infringes s 75(v)" because it has the practical effect of impairing the High Court's entrenched judicial review function: PS [33]–[37]. Neither submission should be accepted.

No infringement of the separation of powers

31. The Plaintiff accepts, correctly, that Parliament can regulate judicial fact-finding: PS [16]. He submits that the limits on that legislative power depend in unspecified ways on "the methods and standards which have historically characterised the exercise of judicial power": PS [16]. He submits that s 503A operates differently from public interest immunity (which is true), but then expressly disavows any submission that public interest immunity sets the relevant constitutional baseline: PS [23]. Ultimately, the Plaintiff submits that s 503A is repugnant to Ch III because it is said to allow a "fundamental principle" — namely, that admissible evidence should be withheld only if and to the extent the public interest requires it — to be "bypassed on the ipse dixit of a gazetted agency": PS [31].

32. As a matter of policy, the proposition that admissible evidence should be withheld only if and to the extent the public interest requires may be accepted. But no constitutional principle requires that the *courts* be the arbiter of what the public interest requires. While questions of "public policy" or the "public interest" might now be considered by courts "to a degree which was never seen when earlier habits of thought respecting Ch III were formed",[31] it remains the case that such matters are "particularly" for the legislative and executive branches of government to adopt and propose.[32] There is, in this area, an analogy between the judicial and legislative tasks

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31 *Thomas v Mowbray* (2007) 233 CLR 307 at [88] (Gummow and Crennan JJ).

32 *Thomas v Mowbray* (2007) 233 CLR 307 at [80] (Gummow and Crennan JJ).

in formulating guidance for balancing between incommensurable interests (correctly said to be pertinent to the issue of validity).[33] Where Parliament determines that it would be contrary to a public interest that a defined category of otherwise admissible evidence be compellable, no constitutional principle prevents Parliament from so enacting. On the contrary, this is another example of a particular governmental function or power that is not peculiarly legislative, executive or judicial. In such a case, the legislature has authority to determine where its exercise shall be vested (including by exercising that function for itself).[34]

33. The above point is powerfully illustrated by *Nicholas*,[35] where this Court upheld the validity of s 15X of the *Crimes Act 1914* (Cth), by which Parliament had altered the balance of public interests that the High Court had struck in *Ridgeway*,[36] so as to prevent evidence from being ruled inadmissible on the basis established by that decision (see similarly, *R v Cheikho*[37]).

34. It is likewise illustrated by *Northern Territory v GPAO.*[38] In that case, this Court held that s 97(3) of the *Community Welfare Act 1983* (NT), which provided that an authorised person must not be required to produce in court certain kinds of documents, provided an answer to a subpoena issued by the Family Court.[39] The case illustrates that the capacity for Parliament to enact legislation that prevents a court from compelling the production of particular information is so well established that a power to compel production under *Commonwealth* law was properly construed as operating subject to a *territory* statute preventing compulsory production in a specific case.

35. The absence of any constitutional requirement that *courts* determine the balance between competing public interests is further confirmed by *Gypsy Jokers*. In that case, the High Court dismissed a challenge to the validity of a statutory provision that left it to the Court to decide *whether* the precondition in a statutory provision that prevented the disclosure of information was satisfied,[40] but that gave the court *no role* in balancing the competing public interests.[41] The case demonstrates that, while it may readily be accepted that a public interest immunity claim under the general

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33 *Lodhi v R* (2007) 179 A Crim R 470 (***Lodhi***) at [48] (Spigelman CJ).

34 *Thomas v Mowbray* (2007) 233 CLR 307 at [12] (Gleeson CJ).

35 (1998) 193 CLR 173.

36 *Ridgeway v The Queen* (1995) 184 CLR 19

37 (2008) 75 NSWLR 323 at [93]-[111] (Spigelman CJ).

38 (1999) 196 CLR 553.

39 (1999) 196 CLR 553at [17], [84]-[85] (Gleeson CJ and Gummow J), [139]-[145] (Gaudron J), [195]-[199] (McHugh and Callinan JJ).

40 The precondition being whether the disclosure of the information "might prejudice the operations of the Commissioner".

41 *Gypsy Jokers* (2008) 234 CLR 532 at 559 [36].

law will be determined by a court balancing the competing public interests, there is no constitutional dimension to that procedure.

36. As with the regime upheld in *Gypsy Jokers*, the court is the arbiter of whether the statutory preconditions necessary to engage s 503A have been satisfied. In any case where the matter is in issue, the Minister must establish by evidence that the four preconditions to the operation of s 503A exist in relation to information that is sought to be protected under s 503A.[42] Those preconditions are not merely formal. They include that an officer of an agency of a specified kind (law enforcement or intelligence) must have supplied information to the Minister for use in making a character decision on "condition" that the material be "treated as confidential".

37. Under this regime, as with a public interest immunity claim, it is the court that decides whether information must be produced. The difference is that, in making a decision as to whether information is protected under s 503A, instead of applying the common law the court applies a statutory rule containing different criteria, Parliament having determined that legislative modification of the common law was appropriate in order to facilitate the provision to the Minister of information relevant to achieving the purposes of the Act.

38. Legislative substitution of a different test for the common law public interest immunity test is familiar, and unproblematic. For example, in *Lodhi*, the *National Security (Information and Intelligence) Act 2004* (Cth) provided for a procedure whereby the Attorney-General could certify that disclosure of information in a proceeding was likely to prejudice national security and further provided that the certificate was to be "conclusive evidence" of that fact. In determining what protective orders should be made in respect of that material the Court was required to have regard to, amongst other things, the risk to national security and the effect on a defendant's right to a fair hearing, but was required to give "greatest weight" to the former. Referring to the approach in *Nicholas*, Spigelman CJ observed (at [67]):

> A similar approach is, in my opinion applicable to s 31(8) of the NSI Act. The legislature has "struck a different balance". It has, to some degree, "put to one side" the public and private interest in obtaining all potentially relevant information, "in favour of" the public interest in national security. This, in my opinion, is constitutionally permissible.

39. Similarly, as was noted above, in *Gypsy Jokers* the High Court dismissed a challenge to a provision where the court was required not to permit access to certain material that "might prejudice the operations of the Commissioner", without any need to balance that potential prejudice against

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[42] See, e.g., *Vella v Minister for Immigration and Border Protection* [2014] FCA 1177 at [33]–[53] (Wigney J).

any countervailing public interest in the administration of justice.[43] That regime therefore constituted a major departure from common law public interest immunity.

40. Furthermore, the balancing role that the court performs in resolving a common law public interest immunity claim is a recent evolution. That balancing role was not at Federation, and is not now, a defining characteristic of a Ch III court. That is not surprising in light of the observations of Gummow and Crennan JJ in *Thomas v Mowbray*[44] regarding the relative novelty in the notion that matters of public policy or the public interest were properly matters for determination by Ch III courts. *Griffin v South Australia*[45] illustrates the point. In that case, a plaintiff sought inspection of certain government documents. The government proved a Ministerial minute which recorded that "the disclosure of the said documents is contrary to public policy and that the interests of the State and of the public service and the public interest will be prejudiced by the production of the said documents".[46] The plaintiff argued that the Court should inspect the documents for the purpose of deciding the validity of the government's objection.[47] Knox CJ said:

> The Minister to whose department a document belongs, or the head of the department in whose custody it is, is the exclusive judge as to whether such document is or is not protected from production on grounds of State policy, and if he claims such protection the Court will not go behind the claim, or inquire whether the document be or be not one which can properly be the subject of such a claim ... [T]he question, whether the production of the documents would be injurious to the public service, must be determined, not by the Judge but by the head of the department having the custody of the paper.[48]

41. That restrictive historical position, in which the public interest immunity claim of the Executive was regarded as conclusive, was not overturned until *Conway v Rimmer*.[49] It was that case that caused Gibbs ACJ to observe in

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43 *Gypsy Jokers* (2008) 234 CLR 532 at 559 [36].

44 (2007) 233 CLR 162 at [88].

45 (1925) 36 CLR 378.

46 (1925) 36 CLR 378 at 382-383.

47 (1925) 36 CLR 378 at 383-384.

48 (1925) 36 CLR 378 at 385. See also at 388-9 (Isaacs J), 396 (Higgins J), 397 (Rich J). See similarly *Commonwealth v Baume* (1905) 2 CLR 405 at 416 (Griffith CJ). While *Griffin v South Australia* was disapproved by the Privy Council in *Robinson v South Australia* (No 2) [1931] AC 704 at 718, the basis for that disapproval turned on the nature of the evidence advanced to support the claim. The Privy Council did not hold that the Court itself should balance the competing public interests. That was not the law in the United Kingdom, as is clear from *Duncan v Cammell Laird & Co* [1942] AC 624.

49 [1968] AC 910.

Sankey v Whitlam[50] that an affidavit from a Minister or departmental head "is *no longer* conclusive" (emphasis added).

42. The Plaintiff's suggestion that the position at Federation was "unclear" is incorrect: PS [19]. *Marconi's Wireless Telegraph Co Ltd v Commonwealth*[51] (***Marconi***) does not stand for the propositions for which the Plaintiff says it stands. The majority of the Court, as well as Isaacs J in dissent, in fact endorsed the "well known doctrine that the production of documents relating to affairs of State will not be compelled if it is claimed by the head of the department having custody of them that their production would be injurious to the public interest",[52] and that "communications relating to State matters made by one officer of State to another in the course of his official duty are treated as secrets of State and are absolutely privileged".[53] In relation to State documents, it was regarded as settled that it was "for the 'responsible servant of the Crown in whose custody the paper is' to determine whether the production of a State Paper would be injurious to the public service".[54]

43. *Marconi* was a case about inspection not of government *documents*, but of certain physical objects in the nature of wireless telegraphy apparatus. The relevant holding was that the settled rule in relation to documents would not necessarily apply to objects unless it were shown that inspection of the object could disclose a State secret — indeed, it was determinative in the case that the apparatus was "the subject of a patent of which the complete specification [was] before [the court]".[55] In *Griffin*, Knox CJ explained that *Marconi* "recognize[d] the existence" of the "rule" set out above at [40], "in cases in which the Court is satisfied that the document in question is within that class". His Honour also recorded the view of the Lord Chancellor in an application for leave to appeal from the decision in *Marconi*: "Of course the Minister's statement or certificate must be conclusive on a particular document. How can it be otherwise?"[56]

44. The Plaintiff is therefore not correct to say that "the law took some time to settle": PS [22]. *Conway v Rimmer*, as reflected in Australia in *Sankey v Whitlam*, changed the common law position that had until then, including at the time of the Constitution's enactment, been regarded as settled.

45. The historical common law position therefore confirms that there is no constitutional impediment to the Parliament enacting a particular confidentiality regime that settles the balance of the competing public interests without leaving that balancing task to the courts. It is sufficient for

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50 (1978) 142 CLR 1 at 44.

51 (1913) 16 CLR 178.

52 (1913) 16 CLR 178 at 185 (Griffith CJ).

53 (1913) 16 CLR 178 at 191 (Barton J).

54 (1913) 16 CLR 178 at 193 (Barton J). See also at 202 (Isaacs J).

55 (1913) 16 CLR 178 at 195 (Barton J). See also at 188 (Griffith CJ).

56 (1925) 36 CLR 378 at 386.

constitutional purposes that the court remains, at all times, the arbiter of whether the statutory criteria for the engagement of the immunity are met in a given case. It is not necessary that those criteria reserve to the courts the final say on what the public interest requires either generally, or in relation to the particular documents in issue.

46. Contrary to PS [29], none of the posited legislative alternatives would have achieved the purpose of s 503A. Provision for rescinding a challenged decision would effectively deprive the Minister of the capacity to rely upon protected information and would render s 503A largely ineffective: PS [29.1]. Provision for a "thumb on the scales" would be a different balance of competing public interests, certainly open to Parliament, but not the balance that it has determined to be appropriate: PS [29.2]. Placing the balance of competing interests in the Minister's hands would also have been open, but would not have achieved Parliament's purpose of striking the balance for itself (and likely would also have failed in the objective of encouraging the provision of information by gazetted agencies, who would not have been able to be certain that confidentiality of that information would be preserved): PS [29.3].

47. In any event, the posited alternatives are no more than an impermissible attempt to introduce a form of proportionality analysis into the inquiry for determining whether Ch III is infringed. But "questions of proportionality do not arise in the Ch III context".[57] A law does not infringe Ch III merely because a plaintiff can imagine a different law that would also not infringe Ch III.

48. Contrary to PS [31], s 503A is not repugnant to Ch III.

    48.1. In relation PS [31.1]: The Court is not prevented from ascertaining the facts that are relevant under the statute, namely, the facts going to the preconditions to the operation of s 503A (see above at [36]).

    48.2. In relation to PS [31.2]: There is no objectionable "control" vested in the gazetted agency or the Minister.

    48.3. In relation to PS [31.3]: The rhetorical spectre of the Minister "disclosing favourable material while withholding unfavourable material" does not arise in the present case. It is in any event difficult to imagine how, in practice, a forensic advantage could be achieved by such a selective disclosure. Given that the court is not concerned with the merits, the concept of "favourable" material is unclear. Further, the Plaintiff does not explain how the actions of *the Minister* could bear upon the appearance of impartiality of the Court.

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57 *Re Woolley* (2004) 225 CLR 1 at [78] (McHugh J). See also, eg, *Magaming v The Queen* (2013) 252 CLR 381 at [51]-[52] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [103], [107]-[108] (Keane J).

48.4. In relation to PS [31.4]: It is true that the Court "cannot have regard to unfairness in deciding if and how to use" the protected information, but that is of no consequence because the Court does not *use* the protected information. To the extent that it might be said that it is "unfair" for the *Minister* to have used the information without disclosing it to the affected person, that wrongly implies that there is a constitutional entitlement to procedural fairness in the making of *administrative* decisions. Absent such a constitutional entitlement, the point is wholly answered by s 501(5), which abrogates in relevant cases (including this case) any obligation for the Minister to afford procedural fairness in decision-making under s 501(3) of the Act.

No infringement of s 75(v)

49. There is a distinction between, on the one hand, a law that would deprive a court of supervisory jurisdiction, or prevent an individual from invoking that jurisdiction to compel the observance by an officer of the Commonwealth of the limits of his or her jurisdiction, and, on the other hand, a law that regulates, structures, guides or informs the court's exercise of its jurisdiction — even if in so doing it creates forensic difficulties or disadvantages for the individual. This is a distinction borne out in the applicable case law.

50. *Bodruddaza v Minister for Immigration and Multicultural Affairs* (***Bodruddaza***),[58] on which the Plaintiff relies virtually exclusively on this limb of his case, involved an inflexible time limit, after which an applicant was wholly prevented from seeking judicial review remedies in the supervisory jurisdiction. The time limit meant that a plaintiff would be shut out from invoking s 75(v): even if error was discoverable only after the expiration of the time limit;[59] and even if the failure to commence proceedings within the time limit was not the plaintiff's fault or could otherwise be explained.[60] The time limitation was therefore seen to be a hard-edged deprivation of jurisdiction, in the sense that it "subvert[ed] the constitutional purpose of the remedy provided by s 75(v)".[61]

51. The Plaintiff emphasises the need to consider the substance and practical effect of s 503A: PS [35]. But when the Court in *Bodruddaza* emphasised the need to consider the validity of a law said to curtail s 75(v) "in terms of [the] substance or practical effect of the provision, not merely of its form",[62] it did not mean that something less than a true deprivation of jurisdiction would transgress the constitutional limit. It meant only that a true deprivation might be achieved by a provision that is not, in its form, framed as such.

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58 (2007) 228 CLR 651.

59 *Bodruddaza* (2007) 228 CLR 651 at [56].

60 *Bodruddaza* (2007) 228 CLR 651 at [57].

61 *Bodruddaza* (2007) 228 CLR 651 at [58].

62 *Bodruddaza* (2007) 228 CLR 651 at [54].

52. A similar distinction was drawn by Gageler and Keane JJ (with whom Nettle J relevantly agreed) in *Wei v Minister for Immigration and Border Protection* (***Wei***)[63] between the (impermissible) imposition of a hard-edged "condition precedent" to the invocation of the Court's jurisdiction under s 75(v) and a (permissible) regulation of the exercise of that jurisdiction.

53. There is a parallel to be drawn with the older authorities dealing with s 92 and "barring" clauses: in both cases, the requirements of the Constitution cannot be defeated by a legislative provision that renders wholly "illusory" the relevant constitutional constraint.[64]

54. Section 503A(2)(c), neither in form nor in substance, deprives any court of jurisdiction to grant constitutional writs for jurisdictional error. It is not akin to the strong privative clause considered in *Kirk*, such a clause being the paradigm example of a legislative deprivation of supervisory jurisdiction. Further, unlike the time limitation provision struck down in *Bodruddaza*, s 503A(2)(c) does not give rise to *any* circumstance in which an applicant will be unable to commence proceedings to seek review of a Commonwealth officer's exercise of power. To use the language of *Wei*, there is no "condition precedent" to the invocation of the Court's jurisdiction.

55. It is true that s 503A may place forensic obstacles in the path of an applicant in a proceeding concerning a decision made in part in reliance on information to which it applies. Those obstacles are real, but should not be overstated. An applicant for review of such a decision will still have access to the reasons for a decision, and s 503A leaves entirely untouched this Court's compulsory process, save in one respect: being that none of the persons identified in s 503A(2)(c) can be required to divulge information within the scope of the section to a court. The existence of that obstacle plainly does not render the availability of judicial review illusory.[65]

56. While s 503A(2)(c) will, in some cases, have the effect that a court will determine a challenge to a decision under s 501 on less than all of the material upon which the Minister relied, the same is true in any case where a claim of public interest immunity is upheld over part of the material that was before the Minister. Where s 503A produces that same consequence, that is a wholly unexceptional incident of the long-established legislative power to regulate the procedure of a Ch III court.

57. The constitutional principle that the Plaintiff invites the Court to accept (to the effect that s 75(v) requires a court to have access to all of the information on which an administrative decision is based) would affect not

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63 (2015) 327 ALR 28 at [41]-[42].

64 See A Robertson "Commentary on the entrenched minimum provision of judicial review and the rule of law" (2010) 21 PLR 40 at 41; *Commissioner for Motor Transport v Antill Ranger and Co Ltd* (1956) 94 CLR 180.

65 As is illustrated, for example, by *Taulahi v Minister for Immigration and Border Protection* [2016] FCAFC 177; *Roach v Minister for Immigration and Border Protection* [2016] FCA 750.

only character decisions by the Minister, but also national security decisions made by ASIO[66] and by government in reliance on evidence from other intelligence agencies,[67] defence decisions and Cabinet decisions on current and controversial topics (where in practical terms a court would in all but exceptional circumstances refuse to order the production of documents without inspecting them, meaning that it would not examine the information upon which the Executive acted).[68] There is no warrant for treating s 75(v) as grounding such a principle.

Submissions on consequences of invalidity

58. If s 503A(2)(c) has an invalid operation in the present case, the only consequence is that that provision does not immunise the Minister from being required to divulge or communicate Attachment ZZ to *this Court* if appropriate compulsory process is issued. Further, if such process were to issue, it would remain open to the Minister to seek to rely on *other* sources of immunity to resist production (such as common law public interest immunity).

59. Contrary to PS [40], there is no occasion to read down s 501 "to preclude decision-making in reliance on protected information": PS [40]. Such a construction would be contrary to the manifest legislative intention reflected in s 503A to permit character decision-making based on such information. It would not be a sensible reading of any of the actual words of s 501. Section 501(3), the relevant provision in this case, is engaged by the Minister having the specified suspicion (s 501(3)(c)) and the specified satisfaction (s 501(3)(d)). There is no textual basis to read that down to exclude the Minister's capacity to have regard to particular kinds of information in forming the suspicion or satisfaction.

60. Contrary to PS [38]-[40], there is also no occasion to invalidate s 503A in its entirety. Section 3A of the Act makes clear that if s 503A has at least one valid operation it is to have that valid operation. Nothing in the Plaintiff's challenge to the validity of s 503A attacks the operation that the section can have in respect of disclosure to a tribunal, a parliament or parliamentary committee or any other body or person apart from a court: s 503A(2)(c). Equally, to the extent that the Plaintiff's argument depends upon the entrenched jurisdiction of the High Court, there is a question not presently arising for determination whether any demonstrated invalidity would have equivalent consequences for the operation of s 503A upon the non-

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66 Cf *Sagar v O'Sullivan* (2011) 193 FCR 311 at [51]–[54], [93].

67 Cf *Plaintiff B60 v Minister for Foreign Affairs and Trade* (2013) 219 FCR 109, denying access to evidence concerning the proliferation of weapons of mass destruction upon which the Minister relied in making a decision.

68 *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 617-618, where the High Court doubted that "the disclosure of the records of Cabinet deliberations upon matters which remain current or controversial would ever be warranted in civil proceedings".

entrenched jurisdiction of the Federal Court under s 476A(1) of the Act (which section is expressly subordinated to s 503A by s 503A(6)).

Submissions on jurisdictional error

61. As submitted above, s 501 should not be read down. If, contrary to that submission, it is read down such that the Minister was not entitled to rely on the protected information, then the Minister accepts that his decision would have been affected by jurisdictional error: PS [42].

62. As submitted above, s 503A is not invalid. If it is invalid, it does not follow that the Minister's decision was affected by jurisdictional error simply because the Minister proceeded on the basis that s 503A was valid. While that may be accepted, in the counterfactual, to have been an error of law, it cannot be said to have been a material error of law. The Minister's suspicion and satisfaction engaging s 501(3) did not depend on the validity of s 503A. The Plaintiff speculates, without any foundation, that the Minister might not have acted on the information if he knew that it would or could be disclosable: PS [43]. One could equally speculate about whether the gazetted agency would have provided the information in the first place. Such speculation is not appropriate. The gazetted agency and the Minister, by proceeding on an assumption that s 503A was valid, can be taken both to have assumed whatever risk there was that s 503A was in fact invalid. The assumption as to the validity of the procedure that might subsequently be followed in the event of legal challenge was not material to the substantive decision.

Submissions on Plaintiff's additional ground of review

63. Ground 3 of the Plaintiff's Application for an Order to Show Cause depends on the factual allegation that the Minister made no finding as to how removing the Plaintiff from Australia would advance the national interest. That allegation cannot be sustained. The Minister clearly found that cancelling the Plaintiff's visa (which would necessarily precipitate the Plaintiff's removal) was in the national interest "in that it will contribute to the national effort to disrupt, disable and dismantle the criminal activities of Outlaw Motorcycle Gangs" and also because the Plaintiff's criminal history was "serious".[69] There was open source material to support those findings.[70]

64. The Plaintiff appears to submit that the Minister "leap[ed] uncritically from suspicion of membership to a conclusion that visa cancellation is in the national interest": PS [46]. That is not so. The Minister plainly had regard to more than the Plaintiff's mere membership of the Rebels OMCG. In particular, he considered the Plaintiff's criminal history, including firearm

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69 SCB 277 [24].

70 SCB 276-277 [14]-[23]; SCB 30-32 [35]-[51].

and weapons offences and assault for which he was sentenced to 15 months' imprisonment.[71]

65. The effect of the Plaintiff's submission is that the matters referred to by the Minister were not sufficient to sustain the Minister's satisfaction that cancellation of the Plaintiff's visa would be in the national interest. What is in the national interest is, of course, "largely a political question".[72] The question of what is or is not in the national interest "is entrusted by the legislature to the Minister".[73] The Court should not add to the statutory specification of that criterion mandatory considerations or pre-requisite findings that are not based on the statutory text.

66. The Plaintiff appears to suggest further that the Minister could not be satisfied that cancellation of the Plaintiff's visa would be in the national interest without making a finding as to the Plaintiff's knowledge of, opinion of, support for or participation in the suspected criminal conduct of the Rebels OMCG. The Plaintiff accepts, correctly, that no such finding is required in relation to the character test, s 501(6)(b) having been substituted in 2014 to overcome the effect of the decision of the Full Court of the Federal Court in *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414: PS [45]. The amendments removed any *necessary* requirement that a person exhibit sympathy with, support for, involvement in or knowledge of the group's criminal conduct before that person will fail the character test. That being so, it would be a most surprising construction, bordering on the perverse, which rendered such sympathy, support, involvement or knowledge a necessary element of the national interest criterion.

Conclusion

67. For the foregoing reasons, the questions of law stated for the opinion of the Full Court should be answered as follows:

Question 1: No.

Question 2: Yes.

Question 3: No.

Question 4: None.

Question 5: The Plaintiff.

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71 SCB 276-277 [19]-[22].

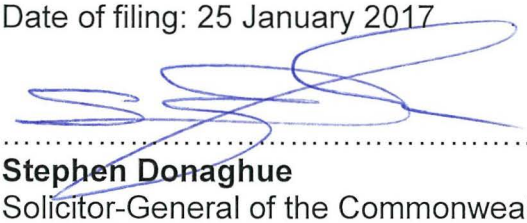
72 *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at [40].

73 *Madafferi v Minister for Immigration and Multicultural Affairs* (2002) 118 FCR 326 at [89], citing *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 447, 698.

PART VII ESTIMATE OF TIME

68. The Commonwealth estimates that it will require 2 hours for the presentation of oral argument in this matter and in P58 of 2016 (*Te Puia v Minister for Immigration and Border Protection*).

Date of filing: 25 January 2017



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Annexure

Migration Act 1958

No. 62, 1958

Compilation No. 133

Compilation date: 17 November 2016

Includes amendments up to: Act No. 67, 2016

Registered: 18 November 2016

3A Act not to apply so as to exceed Commonwealth power

(1) Unless the contrary intention appears, if a provision of this Act:

(a) would, apart from this section, have an invalid application; but

(b) also has at least one valid application;

it is the Parliament's intention that the provision is not to have the invalid application, but is to have every valid application.

(2) Despite subsection (1), the provision is not to have a particular valid application if:

(a) apart from this section, it is clear, taking into account the provision's context and the purpose or object underlying this Act, that the provision was intended to have that valid application only if every invalid application, or a particular invalid application, of the provision had also been within the Commonwealth's legislative power; or

(b) the provision's operation in relation to that valid application would be different in a substantial respect from what would have been its operation in relation to that valid application if every invalid application of the provision had been within the Commonwealth's legislative power.

(3) Subsection (2) does not limit the cases where a contrary intention may be taken to appear for the purposes of subsection (1).

(4) This section applies to a provision of this Act, whether enacted before, at or after the commencement of this section.

(5) In this section:

application means an application in relation to:

(a) one or more particular persons, things, matters, places, circumstances or cases; or

(b) one or more classes (however defined or determined) of persons, things, matters, places, circumstances or cases.

invalid application, in relation to a provision, means an application because of which the provision exceeds the Commonwealth's legislative power.

valid application, in relation to a provision, means an application that, if it were the provision's only application, would be within the Commonwealth's legislative power.