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

PLAINTIFF'S ANNOTATED SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. The issues presented by the Special Case are set out as questions of law.[1]

Part III: Section 78B notices

3. The Plaintiff has given notices under s 78B of the *Judiciary Act 1903* (Cth).[2]

Part IV: Facts

4. On 9 June 2016, the Minister was invited to cancel the Plaintiff's visa "without natural justice" under s 501(3)(b) of the *Migration Act 1958* (Cth) (the **Act**).[3] He was invited to base his decision on information in "Attachment ZZ", said to be "protected from disclosure under section 503A of the Act".[4] Later that day, he so cancelled the Plaintiff's visa and signed a statement of reasons[5] noting his understanding that the information in Attachment ZZ was protected by s 503A and proceeding to find, upon that information, that the Plaintiff failed the character test and that it was in the "national interest" to cancel his visa.[6]

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1 Special Case Book (**SCB**), **17**.
2 **SCB**, **10**.
3 Submission (**SCB, 21-25**); Special Case, [8] (**SCB, 16**).
4 Issues paper, [20]-[22] (**SCB, 28**).
5 Record of cancellation (**SCB, 21**); Reasons (**SCB, 275**); Special Case, [12]-[14] (**SCB, 16**).
6 Reasons, [7], [9] and [15] respectively (**SCB 274-75**).

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Part V: Argument

The statutory scheme

5. Sections 501(3) and 503A of the Act were introduced together as part of new "character" cancellation laws permitting the Minister to cancel a visa "without natural justice" and/or based on information "protected" from disclosure not only to the person whose visa was being cancelled, but also to any Court on judicial review of the Minister's decision.[7]

6. Section 503A purports to protect information that is "relevant to the exercise of a power under section 501" and "communicated to an authorised migration officer by a gazetted agency on condition that it be treated as confidential information".[8] An authorised migration officer who receives such information "must not divulge or communicate" it save to the Minister or another authorised migration officer "for the purposes of the exercise of a power under s 501" etc.[9] Authorised migration officers and the Minister "must not be required to divulge or communicate the information to a court, a tribunal, a parliament or parliamentary committee or any other body or person".[10]

7. The immediate consequences, for someone whose visa is cancelled by the Minister "without natural justice" under s 501(3) of the Act, are that the Minister is not required to provide the information as part of the procedure in s 501C (whereby the person is entitled to seek revocation of the decision),[11] and that the Minister cannot be compelled, on judicial review, to produce the information to a court. This immunity is lost only if the Minister, after consulting the gazetted agency, makes a declaration in writing under s 503A(3) permitting "disclosure of specified information in specified circumstances to … a specified court or a specified tribunal".[12]

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7 *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth) (the **1998 Act**).

8 Section 503A(1).

9 Section 503A(1).

10 Section 503A(2)(c).

11 See ss 503A(2) and (6); *Vella v Minister for Immigration and Border Protection* (2015) 230 FCR 61 (***Vella***), 76, [61], 80 [79], 81 [83] (Buchanan, Flick and Wigney JJ). See also *Evans v Minister for Immigration, Multicultural and Indigenous Affairs* (2003) 135 FCR 306, 312 [13] (Gray J), 321 [50] (Kenny J); *Minister for Immigration and Multicultural and Indigenous Affairs v Ball* (2004) 138 FCR 450, 459 [30] (Dowsett J), 471 [91] (Jacobson and Bennett JJ).

12 See *Vella*, 79 [74] (Buchanan, Flick and Wigney JJ).

8. In 2003, the statutory scheme was "strengthened" by making it clear that the s 501(3) discretion is non-compellable and that, even if provided to a tribunal, the "specified information" remains immune from production to the Federal Court or the Federal Circuit Court.[13]

9. The evident and stated purpose of the statutory scheme is to ensure that information can be received from gazetted agencies and then used to cancel a visa without the "threat" of disclosure in a court or tribunal.[14] This "threat" is avoided by ensuring that there is no need for the Minister to claim public interest immunity in respect of the information.[15] It is further avoided by basing protection on criteria that are not evaluative, viz:[16]

   9.1. communicated by a gazetted agency to an authorised migration officer;

   9.2. on condition that it be treated as confidential information;

   9.3. relevant to the exercise of power;

   9.4. communicated to the Minister by an authorised migration officer; and

   9.5. so communicated for the purposes of the exercise of power.

10. The role of a court or tribunal is simply to find whether these objective facts exist,[17] rather than to examine whether confidentiality is necessary or utile according to any standard.[18] Its "subjective views" regarding "the confidentiality or other qualities of the information", like those of the Minister or authorised migration officer,[19] are irrelevant.

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13 See, respectively, ss 501(3A) and (5A), inserted by the *Migration Legislation Amendment (Protected Information) Act 2003* (Cth) (the **2003 Act**).

14 The Minister's Second Reading Speech for the 1998 Act referred to this "threat" and noted that "law enforcement agencies are reluctant to provide sensitive information unless they are sure that both the information and its sources can be protected". See also *Vella*, 78 [69]-[70] (Buchanan, Flick and Wigney JJ).

15 See *Evans v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 135 FCR 306, 320 [47] (Kenny J). See also the Second Reading Speech for the 2003 Act, where the mischief identified by the Minister was that "...my department must rely on a claim of public interest immunity to protect the information from disclosure. If the court does not uphold the claim to immunity, then the information must be disclosed". (The Minister apparently had in mind a class of cases not already covered by s 503A; most likely judicial review of tribunal decisions based on information provided pursuant to a s 501(3) declaration.)

16 See *Vella v Minister for Immigration and Border Protection* [2014] FCA 1177, [33] (Wigney J).

17 See e.g. *Vella v Minister for Immigration and Border Protection* [2014] FCA 1177 (Wigney J). As that case illustrates, this can be done without looking at the information in question.

18 See *Peters v AAT* (2005) 144 FCR 417, 426 [33] (Marshall, Mansfield and Stone JJ).

19 *Vella*, 78 [69] (Buchanan, Flick and Wigney JJ).

The statutory scheme infringes the separation of powers

11. Essential to judicial power is its exercise according to the "judicial process".[20] Federally, the separation of powers demands that this process be free from interference.[21] As Brennan, Deane and Dawson JJ explained in *Lim*:[22]

> ...the grants of legislative power contained in s. 51 of the Constitution [do not] extend to the making of a law which requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power.

12. Their Honours added:[23]

> It is one thing for the Parliament ... to grant or withhold jurisdiction. It is a quite different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. ... The latter constitutes an impermissible intrusion into the judicial power which Ch III vests exclusively in the courts which it designates.

13. The same is true for a law purporting to authorise Executive interference.[24]

14. At State level, a related jurisprudence has evolved around the "Kable" principle whereby State Supreme Courts must remain fit to exercise the Federal judicial power reposed in them by Chapter III.[25] This principle is often applied by asking whether legislation substantially impairs a court's

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20 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 394 (Windeyer J); *Harris v Caladine* (1991) 172 CLR 84 (***Harris***), 150 (Gaudron J); *Re Nolan; Ex parte Young* (1991) 172 CLR 460 (***Nolan***), 496 (Gaudron J); *Leeth v Commonwealth* (1992) 174 CLR 455 (***Leeth***), 501-02 (Gaudron J); *Nicholas v R* (1998) 193 CLR 173 (***Nicholas***), 208 [73] (Gaudron J); *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 (***Bass***), 359 [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* (2008) 234 CLR 532 (***Gypsy Jokers***), 577-78 [103] (Kirby J); 594 [175] (Crennan J); *Cesan v R* (2008) 236 CLR 358 (***Cesan***), 380 [70] (French CJ); *Magaming v R* (2013) 252 CLR 381 (***Magaming***), 401 [65] (Gageler J).

21 *Nicholas*, 220 [111] (McHugh J); *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88, 96 (Gibbs CJ, Mason, Brennan Deane and Dawson JJ);

22 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 26-27 (***Lim***). See also *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 607 (Deane J), 689 (Toohey J), 703-05 (Gaudron J); *Leeth*, 470 (Mason CJ, Dawson and McHugh JJ), 486-87 (Deane and Toohey JJ); *Nicholas*, 185 [13] (Brennan CJ), 108 [73] (Gaudron J), 232 [146] (Gummow J); *Thomas v Mowbray* (2007) 233 CLR 307 (***Thomas***), 335 [30] (Gleeson CJ); 355 [111] (Gummow and Crennan JJ), 433 [362] (Kirby J).

23 *Lim*, 36-37. See also *International Finance Trust Company Ltd v NSW Crime Commission* (2009) 240 CLR 319 (***International Finance***), 352 [50] (French CJ).

24 See *Totani*, 47-48 [69.4] (French CJ).

25 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. See also *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 CLR 569 (***NAAJA***), 593 [39.1] (French CJ, Kiefel and Bell JJ) and the cases there cited.

"institutional integrity" by detracting from its possession of "the defining or essential characteristics of a court".[26] This jurisprudence shares "a common foundation in constitutional principle" with that applicable to Federal laws,[27] but is more limited. Any law which would infringe the *Kable* principle in respect of State judicial power would necessarily contravene *Lim* if it concerned Federal judicial power.[28] However, there will be many laws that offend against the separation of powers but, applied to State Courts, do not substantially compromise their institutional integrity.[29]

The line between permissible regulation and impermissible interference

15. The Constitution refers to "courts" but does not define their "essential character" or "defining characteristics". It refers to "judicial power" but does not define it, nor the "judicial process" that lies at its heart. All of this must be ascertained from the common law.[30]

15.1. The High Court, in its *Kable* jurisprudence, has held the defining characteristics of courts to include independence, impartiality, procedural fairness, the open court principle and the provision of reasons.[31] But this is not an exhaustive list, for judicial power is incapable of exhaustive definition.[32] As Gageler J has observed, "institutional attributes can too readily be taken for granted until such time as they are seen to come under threat."[33]

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26 See e.g. *NAAJA*, 593 [39.2] (French CJ, Kiefel and Bell JJ); 618 [121] (Gageler J).

27 Namely in "the protection against legislative or executive intrusion upon the institutional integrity of the courts, whether federal or State": *Wainohu v NSW* (2011) 243 CLR 181 (***Wainohu***) 228 [105] (Gummow, Hayne, Crennan and Bell JJ).

28 *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 (***Pompano***), 89-90 [125]-[126] (Hayne, Crennan, Kiefel and Bell J); *South Australia v Totani* (2010) 242 CLR 1 (***Totani***), 66 [145] (Gummow J); *K-Generation Pty Ltd v Liquor Licencing Court* (2009) 237 CLR 501 (***K-Generation***), 529 [84] (French CJ).

29 See *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 (***Fardon***), 598 [36] (McHugh J), 655-56 [219] (Heydon J).

30 *Pompano*, 47 [2] (French CJ); *Nicholas*, 185 [14] (Brennan CJ); *Cheatle v R* (1993) 177 CLR 541, 552 (the Court). See also Sir Owen Dixon, "The Common Law as an Ultimate Constitutional Foundation", in *Jesting Pilate* (1965), 203, 205.

31 *NAAJA*, 29 [39] (French CJ, Kiefel and Bell JJ); *Pompano*, 71 [67] (French CJ); *Wainohu*, 208-09 [44] (French CJ and Kiefel J); see also *Totani* 43 [62] (French CJ).

32 *Forge v Australian Securities and Investments Commission* (2006) 229 CLR 45, 76 [64] (Gummow, Hayne and Crennan JJ); *Pompano* 71-72 [67] (French CJ).

33 *NAAJA*, 618 [121].

15.2. One such attribute is surely judicial fact-finding. In *Wainohu*, French CJ and Kiefel J described judicial power as involving "the resolution of justiciable controversies by ascertainment of the facts, application of the law and the exercise where appropriate of judicial discretion".[34] Their Honours observed that failing to give reasons "withholds from public scrutiny that which is at the heart of the judicial function" including "judicial ascertainment of facts".[35] If, as their Honours held, reasons are therefore an "essential incident of the judicial function",[36] then so, a fortiori, must be judicial fact-finding.

10 16. This is not to say that Parliament cannot regulate judicial fact-finding, for "the defining or essential characteristics of courts are not attributes plucked from a platonic universe of ideal forms", but "limits ... rooted in the text and structure of the *Constitution* informed by the common law, which carries with it historically developed concepts of courts and the judicial function".[37] Whether a law crosses these limits depends on the extent to which it permits or requires a court to depart "from the methods and standards which have historically characterised the exercise of judicial power".[38] This is to be assessed as a matter of substance and not form,[39] by reference to "its practical operation within the scheme of the Act".[40]

20 17. The case of *Nicholas* is illustrative. The impugned provision, s 15X of the *Customs Act 1901* (Cth), required courts, in certain circumstances, to ignore "the fact that a law enforcement officer committed an offence" in exercising

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34 At 214 [56], citing *Grollo v Palmer* (1995) 184 CLR 348 (***Grollo***), 394 (Gummow J). See also *Fencott v Muller* (1983) 152 CLR 570, 608 (Mason, Murphy, Brennan and Deane JJ; *Harris*, 150 (Gaudron J); *Nolan,* 196 (Gaudron J); *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *Nicholas*, 187 [19] (Brennan CJ), 208 [74] (Gaudron J); *Bass*, 359 [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Gypsy Jokers*, 577-78 [103] (Kirby J), 594 [175] (Crennan J); *Pompano*, 95 [142] (Hayne, Crennan, Kiefel and Bell JJ); *Magaming*, 401 [65] (Gageler J).

35 *Wainohu,* 215 [58]. See also *Totani*, 162-63 [444] (Kiefel J).

36 *Wainohu*, 219 [68].

37 *Pompano*, 72 [68] (French CJ).

38 *Thomas,* 355 [111] (Gummow and Crennan JJ), Callinan J agreeing at 509 [600]; Heydon J agreeing at 536 [651]; *International Finance*, 353 [52] (French CJ), *Totani*, 63 [131] (Gummow J) and 157 [427] (Crennan and Bell JJ); *NAAJA*, 638 [185] (Keane J).

39 See e.g. *Nicholas*, 189-90 [24] (Brennan CJ).

40 *Wainohu*, 229 [107] (Gummow, Hayne, Crennan and Bell JJ). See also *Totani*, 50 [74], 52 [81] (French CJ), 63 [134], 65 [138] (Gummow J); 67 [149], 84 [213] (Hayne J).

the *Ridgeway* discretion.[41] McHugh and Kirby JJ would have invalidated the provision on the basis that the *Ridgeway* discretion was protective of court process,[42] but the majority focused on the immediate practical effect of s 15X, which was not to determine criminal guilt, but rather to facilitate correct fact-finding by allowing relevant evidence to be admitted.[43]

Public interest immunity

18. Of present relevance, amongst the "methods and standards which have historically characterised the exercise of judicial power", are those of the common law relating to confidentiality and public interest immunity. The
10 starting point is the long standing principle that a witness is compellable to give evidence in breach of confidence.[44] However, where there is some public interest in non-disclosure, public interest immunity can be claimed.[45] In such cases, the "fundamental principle" has always been that otherwise admissible evidence shall be withheld "only if, and to the extent, that the public interest renders it necessary".[46] Importantly, the "foundation of the rule" is "that the information cannot be disclosed without injury to the public interests, and not that the documents are confidential or official, which alone is no reason for their non-production".[47] Similarly, equity will not, without

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41 *Nicholas*, 182 [5] (Brennan CJ). See *Ridgeway v R* (1995) 184 CLR 19.

42 *Nicholas*, 222 [115] (McHugh J), 266 [217] (Kirby J).

43 *Nicholas*, 188 [21] (Brennan CJ), 202 [53] (Tooohey J), 238 [162] (Gummow J), 274 [239] (Hayne J).

44 *Duchess of Kingston's Case* (1776) 20 Howell St Tr 355, 586-90, discussed in *McGuinness v A-G (Vic)* (1940) 63 CLR 73, 103 (Dixon J).

45 See also *Evidence Act 1995* (Cth), s 130, which relevantly reflects the common law.

46 *Sankey v Whitlam* (1978) 142 CLR 1 (***Sankey***), 41 (Gibbs ACJ). See also *Taylor on Evidence* (10th ed., 1906), §939: "The principle of the rule of exclusion in ... concern for the public interest and the rule will accordingly be applied no further than the attainment of that object requires"; cited in: *Marconi's Wireless Telegraph Co Ltd v Commonwealth* (1913) 16 CLR 178 (***Marconi***), 192 (Barton J); *Robinson v South Australia (No 2)* [1931] AC 704 (***Robinson***), 714 (Lord Blanesburgh); and *Conway v Rimmer* [1968] AC 910 (***Conway***), 977E (Lord Hodson).

47 *Asiatic Petroleum Co Ltd v Anglo-Persian Oil Co Ltd* [1916] 1 KB 822, 830 (Swinfen-Eady LJ). See also *Duncan v Cammell, Laird & Co* [1942] 1 AC 624 (***Duncan***), 642 (Viscount Simon LC); *Conway*, 957B, 962C (Lord Morris), 991C (Lord Upjohn); *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1974] 1 AC 405, 433G (Lord Cross); *Sankey*, 43-44 (Gibbs ACJ), 100 (Mason J).

more, intervene to protect confidential governmental information. Again, the essential criterion is the public interest.[48]

19. Who determines what is in the public interest? As at Federation, the answer was unclear, as many of the old authorities were apt to be read in different ways.[49] Thus, in *Marconi*, Griffith CJ (Barton J agreeing) held that the Court, faced with an affidavit that did not explain how the public interest would be damaged, would be "abdicating its duty" if it did not "inquire into the facts so far as to ascertain what is the nature of the alleged State secret".[50] But Isaacs J, relying on the same cases, held that an assurance from the relevant Minister was to be regarded by the courts as "conclusive".[51] The Privy Council in *Robinson* agreed with Griffiths CJ and Barton J, but the House of Lords in *Duncan* took the opposite view. Then, in *Conway*, the Lords revisited the question and emphatically overruled itself. As Lord Reid explained, the "public interest" has two aspects:[52]

> There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.

20. Lord Reid then reviewed the authorities since *Duncan*,[53] concluding that "the due administration of justice may be impaired for quite inadequate reasons" if courts were required to act on the view of a Minister "who has no duty to balance these conflicting public interests.[54] His Lordship noted that the US Supreme Court had likewise concluded that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers".[55]

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48 *Attorney-General v Jonathan Cape Ltd* [1976] 1 QB 752, 765D, 770G (Lord Widgery CJ); *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 52 (Mason J); *Attorney-General (UK) v Heinemann Publishers Pty Ltd* (1987) 10 NSWLR 86, 191A (McHugh JA).

49 See *Conway*, 970F (Lord Morris), 978C (Lord Hodson).

50 *Marconi*, 186 (Griffith CJ), 194-95 (Barton J).

51 *Marconi*, 208.

52 *Conway*, 940C (Lord Reid), cited in *Sankey*, 38 (Gibbs ACJ).

53 See at 948E-950E. Lord Pearce also reviewed cases since *Duncan* and agreed with Professor Wade (*Administrative Law*, 2nd ed., p. 285) "that the Crown, having been given a blank cheque, yielded to the temptation to overdraw": see at 984F-86F.

54 At 951A. See too *Glasgow Corporation v Central Land Board* [1956] SC(HL) 1, preceding *Conway* by declaring that *Duncan* was not the law in Scotland: cf. at 18-19 (Lord Radcliffe).

55 At 951C, citing *United States v Reynolds* (1953) 345 US 1, 9 (Vinson CJ, for the Court).

21. *Conway* was emphatically applied in *Sankey v Whitlam*, where Gibbs ACJ held that the balancing of competing public interests was "in all cases the duty of the court, and not the privilege of the executive government".[56] Later, in *Alister v R*, his Honour recognised that there will be cases in which the State is effectively required to choose between its desire to maintain secrecy and its desire to use the documents, observing: "[i]f the public interest demands that material capable of assisting an accused be withheld, then the proper course may be to abandon the prosecution or for the court to stay proceedings".[57]

22. Whilst the law took some time to settle, the fundamental importance of the balancing exercise has never been doubted. Isaacs J in *Marconi* referred to "a most important branch of law touching the relative functions of the Executive and the Judiciary".[58] Viscount Simon LC in *Duncan* considered the question to be "of high constitutional importance".[59] Lord Reid in *Conway* considered that he was dealing with "the proper relation between the powers of the executive and the powers of the courts".[60] In the same case, Lords Morris and Pearce both saw the court's role in determining public interest immunity claims as a matter of "inherent power".[61] The High Court has also confirmed that public interest immunity is no mere rule of evidence.[62]

23. This is not to constitutionalise public interest immunity. The Courts have historically considered themselves well-placed to balance the competing public interests (in the process according due weight to the opinion of the responsible part of the Executive),[63] but Parliament may wish to strike a different balance. Or it may wish to alter the procedure. In either case,

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56 *Sankey*, 38-39 (Gibbs ACJ); also at 58-59 (Stephen J), 95-96 (Mason J). See also *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582 (***ANAC***), 592 (Mason J).

57 *Alister v R* (1984) 154 CLR 404, 431 (Murphy J). In practice, courts have tended to make the former conditional upon the latter: see e.g. *R v Bersinic*, [2007] ACTSC 46, [12] (Connolly J); *R v Lappas* [2001] ACTSC 115, [30] (Gray J). See also *Evidence Act 1995* (Cth), s 130(5)(f).

58 *Marconi*, 202.

59 *Duncan*, 629.

60 *Conway*, 938C.

61 *Conway*, 964B, 971C (Lord Morris), 982A, 983D (Lord Pearce).

62 *Jacobson v Rogers* (1995) 182 CLR 572, 589 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ), referring to *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 52.

63 See e.g. *Conway*, 952A-C (Lord Reid), 956F-957B, 972A (Lord Morris), 987B-E (Lord Pearce).

however, the power of Parliament is not at large. The test in *Lim* remains to be applied and the common law provides the essential baseline.[64]

Authorities

24. *Lodhi*[65] concerned a statutory scheme that modified common law public interest immunity by providing that courts, in balancing "prejudice to national security" against "the defendant's right to receive a fair hearing" and any other factors, must give "greatest weight" to the former.[66] The Attorney-General, in defence of the statutory scheme, noted that its stated purpose was to protect national security "except to the extent that preventing the disclosure would seriously interfere with the administration of justice" and that it expressly preserved the option of a permanent stay.[67] He also noted that giving "greatest weight" to prejudice to national security did not mean that this factor could not be outweighed by the impact upon the right to a fair hearing, in particular where the former was low and the latter substantial.[68] Spigelman CJ, accepting this submission,[69] observed that it was not unknown for the Legislature, or even the common law itself, to provide guidance by way of "a thumb on the scales".[70] Such guidance "will affect the balancing exercise" but "does not change the nature of the exercise".[71]

25. Other statutory schemes aim not to keep information out of court, but to allow it to be used confidentially. The scheme in *Gypsy Jokers* permitted this in the context of applications for judicial review of certain decisions of the WA Commissioner of Police if disclosure "might prejudice the operations of the Commissioner".[72] The High Court's decision turned on two factors. First, the Court held that it was not for the Commissioner to "dictate", but rather for a

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64 Cf. *Totani*, 48-49 [71] (French CJ), 63 [133]-[134] (Gummow J).
65 *Lodhi v R* (2007) 179 A Crim R 470 (NSW Court of Criminal Appeal) (***Lodhi***).
66 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), s 31(8).
67 *Lodhi*, 481-82 [25]-[29].
68 *Lodhi*, 482 [34].
69 *Lodhi*, 483 [38], Barr J agreeing at 500 [121], Price J agreeing at 528 [215].
70 *Lodhi*, 484 [41], Barr J agreeing at 500 [121], Price J agreeing at 528 [215].
71 *Lodhi*, 484-85 [45], 488 [73], Barr J agreeing at 500 [121], Price J agreeing at 528 [215].
72 *Gypsy Jokers*, 558 [30] (Gummow, Hayne, Heydon and Kiefel JJ).

court to determine, whether the information had this characteristic.[73] Second, the Court observed that the scheme "has an outcome comparable with that of the common law respecting public interest immunity, but with the difference that the Court itself may make use of the information".[74] This, as Gleeson CJ observed, actually benefited applications for judicial review that were otherwise "bound to fail" for want of information.[75]

26. As in the present case, the statutory scheme in *K-Generation* aimed to facilitate the flow of information from law enforcement agencies to a decision-maker.[76] It required the Licencing Court of South Australia "to take steps to maintain the confidentiality of information classified by the Commissioner [of Police] as criminal intelligence", which was defined as "information relating to actual or suspected criminal activity ... the disclosure of which could reasonably be expected to prejudice criminal investigations, or to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement".[77] The High Court upheld the scheme on the basis that it was for courts to determine whether information so classified by the Commissioner in fact had one of these characteristics,[78] as well as what "steps" to take and how much weight to give any evidence that could not, on account of steps taken, be properly tested.[79]

27. The scheme in *Pompano* allowed the Queensland Commissioner of Police to apply ex parte to the Supreme Court for a declaration that information was "criminal intelligence", which information could then be used confidentially on an application to have the court declare an organisation to be a "criminal organisation".[80] In upholding the law, the High Court emphasised the need to

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73 *Gypsy Jokers*, 551-52 [7] (Gleeson CJ); 558 [33] (Gummow, Hayne, Heydon and Kiefel JJ); cf. 575 [96], 578-79 [108] (Kirby J).

74 *Gypsy Jokers*, 559 [36] (Gummow, Hayne, Heydon and Kiefel JJ), see also 550-51 [5] (Gleeson CJ).

75 *Gypsy Jokers*, 550-51 [5].

76 See *K-Generation*, 522 [55] (French CJ).

77 *K-Generation*, 539-40 [135] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

78 *K-Generation*, 512 [10], 524 [62], 527 [76], 531 [93]-[94] (French CJ), 540 [136], 542 [143]-[144] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); 576-77 [257] (Kirby J).

79 *K-Generation*, 527 [73]-[77], 532 [97]-[98] (French CJ), 542-43 [146]-[148] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), 577-80 [257] (Kirby J).

80 *Pompano*, 83-86 [100]-[110] (Hayne, Crennan, Kiefel and Bell JJ).

examine, as a whole, all relevant features of the statutory scheme.[81] These included:

27.1. the scheme being based on familiar public interest immunity criteria;[82]

27.2. it being for the Court, based on proper evidence as opposed to "conclusionary statements",[83] and having regard to any unfairness that may later ensue on an application to declare a criminal organisation, to decide whether to declare information to be criminal intelligence;[84]

27.3. any application to declare a criminal organisation then needing to be particularised as regards the activities relied upon, who engaged in those activities and their alleged membership of the organisation;[85]

27.4. the criteria for such a declaration depending on the Court's own assessment of the evidence,[86] with the Court determining, having regard to any unfairness, whether to receive criminal intelligence and, if so, what weight to give it;[87] and

27.5. the Court otherwise retaining the inherent powers necessary to mitigate unfairness,[88] including to permanently stay "any case in which practical unfairness to a respondent becomes manifest".[89]

28. As these cases show, laws are less likely to be regarded as unconstitutional if they have a common law analogue[90] or if they ensure that courts have the

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81 *Pompano*, 78 [87] (French CJ), 99 [155] (Hayne, Crennan, Kiefel and Bell JJ).

82 *Pompano*, 63 [46], 74 [73] (French CJ), 97 [148] (Hayne, Crennan, Kiefel and Bell JJ). "Criminal intelligence" was defined as "information relating to actual or suspected criminal activity ... the disclosure of which could reasonably be expected to (a) prejudice a criminal investigation; or (b) enable the discovery of the existing or identity of a confidential source of information relevant to law enforcement; or (c) endanger a person's life or physical safety": see at 84-85 [107] (Hayne, Crennan, Kiefel and Bell JJ).

83 *Pompano*, 74 [75] (French CJ).

84 *Pompano*, 75 [78], 79 [87.2] (French CJ); 101 [162] (Hayne, Crennan, Kiefel and Bell JJ).

85 *Pompano*, 83-84 [103]-[104], 101 [163] (Hayne, Crennan, Kiefel and Bell JJ); also French CJ at 79 [87.4] and [87.5].

86 *Pompano*, 79 [87.3] (French CJ).

87 *Pompano*, 79 [87.6], 80 [88] (French CJ), 102 [166] (Hayne, Crennan, Kiefel and Bell JJ).

88 *Pompano*, 62 [44], 79-80 [88] (French CJ).

89 *Pompano*, 115 [212] (Gageler J).

90 See also *Thomas*, 357-58 [122]-[124] (Gummow and Crennan JJ); *Totani*, 105 [269] (Heydon J). See also, in the context of the open court principle: *Hogan v Hinch* (2011) 243 CLR 506, 534 [27], 542 [46] (French CJ); cf. *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).

power (whether statutory or inherent) to maintain their independence and impartiality and safeguard the administration of justice.[91]

Legislative choices

29. It may be relevant to consider what other courses were available to Parliament if it wished to better protect, and thus secure the flow of, sensitive information.[92] When this is done, it becomes clear that the statutory scheme is not a response to difficult legislative choices.

    29.1. If Parliament's concern was that, in the judicial review context, ultimate control over secrecy is lost to the courts before it is known whether the Minister's public interest immunity claim will be upheld, then it could have legislated some mechanism for the decision under review to be rescinded at this juncture.[93]

    29.2. If Parliament's concern was that courts were getting the balance wrong, it could have "put a thumb on the scales", as it did, for example, when it enacted the scheme that survived challenge in *Lodhi*.[94]

    29.3. More boldly, Parliament might have abolished *Sankey* by placing the balancing of competing public interests in the Minister's hands. (Whether or not constitutionally need not be decided.)[95]

30. In the event, the statutory scheme is more radical still. The criterion of public interest, with its familiar content, is supplanted not by some other evaluative criterion, but by the factum of confidentiality simpliciter. What matters is not whether there is (or ever was)[96] any need, howsoever assessed, for secrecy.

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91 See also, in the context of ex parte proceedings: *Thomas* 335 [30] (Gleeson CJ); *Director of Public Prosecutions (Cth) v Kamal* (2011) 248 FLR 64 (WA Court of Appeal); cf. *International Finance*, 364 [89] (Gummow and Bell JJ), 385 [154] (Heydon J); *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 40.

92 *Wainohu*, 229 [107] (Gummow, Hayne, Crennan and Bell JJ); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 158 [13]-[14] (Gleeson CJ); *Gypsy Jokers*, 550 [5] (Gleeson CJ). See also *Thomas*, 329 [17], 335 [30] (Gleeson CJ); *Fardon*, 586 [2] (Gleeson CJ); *Grollo*, 367 (Brennan CJ, Deane, Dawson and Toohey JJ).

93 Cf. *Acts Interpretation Act 1901* (Cth), s 33(3).

94 See at [24] above.

95 Such an approach may be invalid for permitting the Minister to "dictate" to the Court: cf. *Gypsy Jokers*, 559 [36] (Gummow, Hayne, Heydon and Kiefel JJ), 568-69 [68]-[69] (Kirby J).

96 In the present case, the Minister relied on the information some 18 months after it had been communicated in confidence: see the Plaintiff's annotated chronology.

Still less that this need, on any view, outweighs the public interest in the administration of justice. What matters is that the information, at some stage, was passed in confidence by one type of bureaucrat to another.

Repugnance

31. To allow the "fundamental principle" described by Gibbs ACJ in *Sankey* to be bypassed on the ipse dixit of a gazetted agency is to require the courts to exercise judicial power in a manner inconsistent with its essential character.[97] Institutional integrity suffers in multiple ways.

31.1. Information that is by definition "relevant" to the "exercise of power" under review is immunised from production. This strikes at the heart of the court's ability to **ascertain the facts**.

31.2. Vesting control in gazetted agencies, and ultimately in the Minister, a member of the Executive, impairs the **independence** of the court.

31.3. The Minister, moreover, is both "the subject and object of the judicial review".[98] His non-compellable discretion to determine what (if any) information to release to the court indirectly threatens the appearance of judicial **impartiality** by giving him, as a party to the litigation, the capacity to affect judicial decision-making by disclosing favourable material while withholding unfavourable material.[99]

31.4. It is also not to be forgotten that the applicant too is denied access to the information. This is not offset by any protections of the type discussed in *Pompano*. The Minister is not required to particularise anything. The Court, itself denied the protected information, cannot have regard to unfairness in deciding if and how to use it. And finally, as the Minister seeks no relief, the court cannot safeguard its processes by declining to exercise a discretion, or by staying the proceedings. The scope for "**practical injustice**" is manifest.[100]

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97 Cf. *Lim*, discussed at [11] above.

98 *Gypsy Jokers*, 583 [122] (Kirby J).

99 See *Cesan*, 380-81 [71]-[72] (French CJ). Such unfairness is apt to undermine "public confidence in the administration of justice": cf. *ANAC*, 593-94 (Mason J).

100 Cf. *Pompano*, 100 [157] (Hayne, Crennan, Kiefel and Bell JJ), 114 [212] (Gageler J).

32. This repugnance is the more evident in light of what is at stake, viz, the liberty of someone rendered an "unlawful non-citizen" by the Minister's decision.[101]

The statutory scheme infringes s 75(v)

33. Liberty, in the Australian constitutional setting, is protected by the rule of law, which in turn necessitates the separation of judicial power.[102] Most particularly, s 75(v) of the *Constitution* assures people "that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them".[103] Section 75(v) was intended "to make it constitutionally certain that there would be jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power".[104] It "places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action".[105]

34. An example of such an attempt is *Bodruddaza*. The case concerned a time limit for seeking judicial review that was incapable of extension beyond 84 days, so as to shut out even those who were unaware, through no fault of their own, of the decision or of a potential ground of review. The Court held the section to be invalid for this very reason, remarking that:[106]

> ...a law with respect to the commencement of proceedings under s 75(v) will be valid if, whether directly or as a matter of practical effect, it does not so curtail or limit the right or ability of applicants to seek relief under s 75(v) as to be inconsistent with the place of that provision in the constitutional structure, as explained in *Plaintiff S157/2002*.

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101 Cf. *Totani*, 20 [1], 50-51 [76] (French CJ), 75 [180] (Hayne J), 156 [424] (Crennan and Bell JJ). Liberty, as Gleeson CJ observed in *Al Kateb v Godwin* (2004) 219 CLR 562, at 577 [19], is "the most basic" of human rights.

102 *Wilson*, 11-12 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *APLA Ltd v Legal Services Commissioner of NSW* (2005) 224 CLR 322, 351-52 [30] (Gleeson CJ and Heydon J); *Thomas*, 342 [61] (Gummow and Crennan JJ); *Totani*, 21 [4] (French CJ), 62-63 [131] (Gummow J), 91 [232]-[233] (Hayne J), 155 [423]-[424] (Crennan and Bell JJ).

103 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 (***Plaintiff S157***), 513-14 [103]-[104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), also 482-83 [5] (Gleeson CJ). Cited with approval in *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 (***Bodruddaza***), 669 [46] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ). See also *Church of Scientology v Woodward* (1982) 154 CLR 25, 70-71 (Brennan J); A. M. Gleeson, *The Rule of Law and the Constitution* (2000), 87.

104 *Bank of NSW v Commonwealth* (1948) 76 CLR 1 (***Bank Nationalisation Case***), 363 (Dixon J).

105 *Plaintiff S157*, 513-14 [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

106 *Bodruddaza*, 671 [53]-[54] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ) (emphasis added), citing *Plaintiff S157*, 482-83 [5] (Gleeson CJ), 513-14 [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

35. This statement of principle, affirmed in the *Remitter Case*,[107] provides the framework against which the present statutory scheme falls to be considered. It is an example of the broader principle that "constitutional guarantees and prohibitions ... are concerned with substance not form".[108] What matters is the "substance or practical effect" of the statutory scheme.[109]

    35.1. This is a question of degree, with the borderline between validity and invalidity defined in terms of inconsistency with the place of s 75(v) "in the constitutional structure".[110]

    35.2. Whilst the facts in *Bodruddaza* concerned the ability to invoke court processes, it is not to be supposed that this marks the outer limits of the protective principle. For judicial review can be frustrated not only at the threshold, but also in the exercise of jurisdiction.

36. The practical effect of the present statutory scheme is to impair the judicial review of administrative action by denying the information upon which this depends. It does this not at the margins, but by withholding from a court information that is by definition "relevant" to the very exercise of power that the court is attempting to review. This, as demonstrated by the submissions filed in proceeding P58 of 2016,[111] can stymie judicial review. For these reasons, even if the statutory scheme does not interfere with the judicial process to such an extent as to offend against the separation of powers,[112] it is invalid because of this interference with this Court's entrenched judicial review function.

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107 *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 (***Remitter Case***), 613-14 [4] (Gleeson CJ, Gummow and Hayne JJ).

108 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, 305 (Mason CJ, Deane and Gaudron JJ); *Ha v Commonwealth* (1997) 189 CLR 465, 498 (Brennan CJ, McHugh, Gummow and Kirby J); *Leeth*, 484 (Deane and Toohey JJ). Thus it is sometimes said that Parliament cannot "do indirectly what is prohibited directly": *Caltex Oil (Australasia) Pty Ltd v Best* (1990) 170 CLR 516, 522 (Mason CJ, Gaudron and McHugh JJ), cited with approval in *NSW v Commonwealth* (1996) 229 CLR 1, 130 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). See also *Bank Nationalisation Case*, 349-50 (Dixon J); *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232, 308 (Dawson J, Toohey J agreeing); *Wragg v NSW* (1953) 88 CLR 353, 387-88 (Dixon CJ); *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 491 (Isaacs J).

109 *Bodruddaza*, 671 [53] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

110 *Bodruddaza*, 671 [53]-[54] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

111 At [17]-[20].

112 *Contra* [31] above.

37. Finally, there is the wider constitutional context. The statutory scheme exists to facilitate Executive decision-making in secret. As such, what have been called the ordinary constitutional means of constraining governmental power—namely, those of representative and responsible government—are not so readily engaged. This is not an occasion for judicial deference, least of all to an unexaminable obligation of confidentiality imposed by one bureaucrat upon another. The Court should be vigilant in giving real content to the notion of an "entrenched minimum provision of judicial review".[113]

Consequences of invalidity

10 38. As the statutory scheme is unconstitutional, the Court must consider whether it can be given a more limited operation consistent with Legislative intent.

39. The answer does not lie in s 503A.

39.1. It is trite law "that a provision, though in itself unobjectionable constitutionally, must share the fate of so much of the statute ... as is found to be invalid" if, without that portion, it "would operate differently "upon the persons, matters or things falling under it".[114] Here, the thing upon which s 503A operates is information of a particular type, conveyed in a particular way. It operates by protecting the information through the *cumulative* effect of the prohibitions in s 503A(1) and the
20 immunities in s 503A(2). If any one of these protections is stripped out, the section operates differently upon the information.

39.2. Nowhere is this truer than in the case of the immunity in respect of production to a court, for the simple reason that every person whose visa is cancelled under s 501 can seek judicial review and, in that context, seek to compel production. The Minister would then be forced back to a claim of public interest immunity. Such an outcome cannot be imputed to the Legislature when the whole point of s 503A is to

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[113] *Plaintiff S157*, 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); cited with approval in *Bodruddaza*, 668-69 [46] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Remitter Case*, 613-14 [4] (Gleeson CJ, Gummow and Hayne JJ).

[114] *Bank Nationalisation Case* (1948) 76 CLR 1, 371 (Dixon J); *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, 493 (Barwick CJ); *Re Dingjan; ex parte Wagner* (1995) 183 CLR 323, 339 (Brennan J); *Industrial Relations Act Case* (1996) 187 CLR 416, 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

circumvent public interest immunity so as to be "sure" that information will not be "threatened" by courts that the Minister cannot control.[115]

40. The statutory scheme can only be saved by reading down the general terms of s 501 (along with ss 501A, 501B and 501C) so as to preclude decision-making in reliance on protected information. However, whilst this would avoid the perils of judicial review, it would also render the statutory scheme largely (although not wholly) inutile.[116] For this reason, it may be that this outcome too should not be ascribed to the Legislature. Section 503A may have been "intended to operate fully and completely according to its terms, or not at all",[117] in which case it must be invalidated in its entirety.[118]

41. Question 1 should be answered: "yes".

Jurisdictional error

42. In the event that s 501(3) is to be read down,[119] the Minister did not have jurisdiction to cancel the visa in reliance on protected information and question 3(a) should be answered: "yes".

43. Otherwise, if s 503A is to be invalidated in its entirety,[120] or even in part,[121] the Minister's decision is nevertheless affected by jurisdictional error in that it involved an error of law and a misunderstanding of the statutory scheme but for which he may have made a different decision, or no decision at all.[122] Question 3(b) should be answered: "yes".

43.1. The Minister repeatedly relied upon the "protected" information in the knowledge that it had been provided by a gazetted agency in

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115 See f.n. 14 above.

116 For example, the information could be used to select individuals for "character consideration", but it could not then be provided to the decision-maker.

117 *Pidoto v Victoria* (1943) 68 CLR 87, 108 (Latham CJ).

118 Together with ss 503B, 503C and 503D, all of which are premised upon the proposition that a court cannot compel production of the information contained in s 503A.

119 Cf. at [40] above.

120 Cf. at [40] above.

121 *Contra* [39] above.

122 Cf. *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 353 (Mason CJ); *Re: Patterson; ex parte Taylor* (2001) 207 CLR 391, 455 [196] (Gummow and Hayne JJ), Gleeson CJ agreeing at 398 [1], Gaudron J agreeing at 420 [83]; McHugh J agreeing at 420 [87]).

confidence and in the understanding that it was for that reason protected from disclosure.

43.2. If this misunderstanding had been corrected, the Minister would doubtless have consulted with the gazetted agency that provided the information before relying on it and thereby exposing it to disclosure under s 501C or the perils of a public interest immunity claim.

43.3. It cannot be presumed: that the gazetted agency would have agreed to this; that, absent agreement, the Minister would have relied upon the information; or that, absent such reliance, the Minister would not have made a different decision (or no decision at all).

Additional ground of review

44. The Minister, in cancelling the Plaintiff's visa, relied on s 501(6)(b) of the "character test", viz:

> the Minister reasonably suspects: (i) that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and (ii) that the group, organisation or person has been or is involved in criminal conduct

45. This limb of the character test was substituted in 2014 to overcome *Haneef*, where the Full Federal Court held that, in its earlier form, it required "some sympathy with, or support for, or involvement in, the criminal conduct".[123] The law was changed to ensure that "membership of the group or organisation alone is sufficient to cause a person to not pass the character test".[124]

46. The net having been cast so wide, it was incumbent upon the Minister not to leap uncritically from suspicion of membership to a conclusion that visa cancellation "is in the national interest, in that it will contribute to the national effort to disrupt, disable and dismantle the activities of Outlaw Motorcycle Gangs".[125] His statement of reasons discloses no basis for this conclusion, nor does it support an inference that the critical finding or reasoning was unable to be disclosed on account of s 503A. In these circumstances, the

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123 *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414, 447 [130] (the Court).

124 Explanatory Memorandum to the *Migration Amendment (Character and General Visa Cancellation) Bill 2014* (Cth), [41].

125 Reasons, [24] (**SCB, 227**).

Court should infer from the Minister's reasons that there was no such finding or reasoning. Question 3(c) should be answered: "yes".

Part VII: Statutory provisions

47. See Annexure.

Part VIII: Orders sought

48. The Plaintiff seeks:

    48.1. A writ of prohibition directed to the Defendant to prevent action upon his decision made on 9 June 2016 to cancel the Plaintiff's Class TY Subclass 444 Special Category (Temporary) visa.

    48.2. A writ of certiorari directed to the Defendant quashing that decision.

    48.3. Costs.

    48.4. Such other orders as the Court deems appropriate.

49. In the event that question 1 is answered "yes" but questions 3(a) and (b) are answered "no", and the Court is unable, on the evidence, to answer question 3(c) in the affirmative, the Plaintiff would wish to pursue (subject to public interest immunity) the information that has not yet been disclosed to him. He would accordingly seek:

    49.1. An order remitting the proceeding to the Federal Court of Australia.

    49.2. Costs.

    49.3. Such other orders as the Court deems appropriate.

Part IX: Oral argument

50. It is estimated that the Plaintiff will require 2½ hours to present his oral argument, including in reply. This includes oral argument in P58 of 2016.

Dated: 12 December 2016

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Annexure: Statutory provisions

The following provisions were in force on 9 June 2016:

- *Constitution*, ss 71, 75
    - Remain in force, in this form
- *Migration Act 1958* (Cth), ss 501, 501C, 503A
    - Remain in force, in this form
- *Crimes Act 1914* (Cth), ss 3 (definition of "Commonwealth officer"), 70
    - Remain in force, in this form
- Notice under section 503A of the *Migration Act 1958* – 16/001 – dated 22 March 2016 [commenced 1 April 2016]
    - Remains in force, in this form

Commonwealth of Australia Constitution Act

(The Constitution)

This compilation was prepared on 4 September 2013
taking into account alterations up to Act No. 84 of 1977

[Note: This compilation contains all amendments to the Constitution made by the Constitution Alterations specified in Note 1
Additions to the text are shown in bold type
Omitted text is shown as ruled through]

Prepared by the Office of Parliamentary Counsel, Canberra

Chapter III—The Judicature

71 Judicial power and Courts

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

72 Judges' appointment, tenure, and remuneration

The Justices of the High Court and of the other courts created by the Parliament:

(i) shall be appointed by the Governor-General in Council;

(ii) shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity;

(iii) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has attained that age.

The appointment of a Justice of a court created by the Parliament shall be for a term expiring upon his attaining the age that is, at the time of his appointment, the maximum age for Justices of that court and a person shall not be appointed as a Justice of such a court if he has attained the age that is for the time being the maximum age for Justices of that court.

Subject to this section, the maximum age for Justices of any court created by the Parliament is seventy years.

from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

74 Appeal to Queen in Council [*see* Note 12]

No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.

75 Original jurisdiction of High Court

In all matters:

(i) arising under any treaty;

(ii) affecting consuls or other representatives of other countries;

(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;

(iv) between States, or between residents of different States, or between a State and a resident of another State;

(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

the High Court shall have original jurisdiction.

76 Additional original jurisdiction

The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

(i) arising under this Constitution, or involving its interpretation;

(ii) arising under any laws made by the Parliament;

(iii) of Admiralty and maritime jurisdiction;

(iv) relating to the same subject-matter claimed under the laws of different States.

77 Power to define jurisdiction

With respect to any of the matters mentioned in the last two sections the Parliament may make laws:

(i) defining the jurisdiction of any federal court other than the High Court;

(ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;

(iii) investing any court of a State with federal jurisdiction.

78 Proceedings against Commonwealth or State

The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.

79 Number of judges

The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes.

80 Trial by jury

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence

Migration Act 1958

No. 62, 1958

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Volume 1:	sections 1–261K
Volume 2:	**sections 262–507** **Schedule** **Endnotes**

Each volume has its own contents

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

501 Refusal or cancellation of visa on character grounds

Decision of Minister or delegate—natural justice applies

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

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

(2) The Minister may cancel a visa that has been granted to a person if:
(a) the Minister reasonably suspects that the person does not pass the character test; and
(b) the person does not satisfy the Minister that the person passes the character test.

Decision of Minister—natural justice does not apply

(3) The Minister may:
(a) refuse to grant a visa to a person; or
(b) cancel a visa that has been granted to a person;
if:
(c) the Minister reasonably suspects that the person does not pass the character test; and
(d) the Minister is satisfied that the refusal or cancellation is in the national interest.

(3A) The Minister must cancel a visa that has been granted to a person if:
(a) the Minister is satisfied that the person does not pass the character test because of the operation of:
(i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or
(ii) paragraph (6)(e) (sexually based offences involving a child); and

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

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

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

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

Character test

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

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

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

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

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

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

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

(b) the Minister reasonably suspects:

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

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

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

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

(ii) an offence of trafficking in persons;

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

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

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

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

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

the person is not of good character; or

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

(i) engage in criminal conduct in Australia; or

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

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

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

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

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

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

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

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

(i) the crime of genocide;

(ii) a crime against humanity;
(iii) a war crime;
(iv) a crime involving torture or slavery;
(v) a crime that is otherwise of serious international concern; or

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

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

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

Substantial criminal record

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

(a) the person has been sentenced to death; or
(b) the person has been sentenced to imprisonment for life; or
(c) the person has been sentenced to a term of imprisonment of 12 months or more; or
(d) the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more; or
(e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or
(f) the person has:
(i) been found by a court to not be fit to plead, in relation to an offence; and
(ii) the court has nonetheless found that on the evidence available the person committed the offence; and
(iii) as a result, the person has been detained in a facility or institution.

Concurrent sentences

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

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

Periodic detention

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

Residential schemes or programs

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

(a) a residential drug rehabilitation scheme; or

(b) a residential program for the mentally ill;

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

Pardons etc.

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

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

(b) both:

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

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

Conduct amounting to harassment or molestation

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

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

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

Definitions

(12) In this section:

court includes a court martial or similar military tribunal.

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

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

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

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

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

501A Refusal or cancellation of visa—setting aside and substitution of non-adverse decision under subsection 501(1) or (2)

(1) This section applies if:

(a) a delegate of the Minister; or

(b) the Administrative Appeals Tribunal;

makes a decision (the ***original decision***):

(c) not to exercise the power conferred by subsection 501(1) to refuse to grant a visa to the person; or

Minister's exercise of power

(4) The power under subsection (2) may only be exercised by the Minister personally.

Decision not reviewable under Part 5 or 7

(5) A decision under subsection (2) is not reviewable under Part 5 or 7.

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

501C Refusal or cancellation of visa—revocation of decision under subsection 501(3) or 501A(3)

(1) This section applies if the Minister makes a decision (the ***original decision***) under subsection 501(3) or 501A(3) to:

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

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

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

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

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

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

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

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

(ii) particulars of the relevant information; and

(b) except in a case where the person is not entitled to make representations about revocation of the original decision (see subsection (10))—invite the person to make representations to the Minister, within the period and in the manner

ascertained in accordance with the regulations, about revocation of the original decision.

(4) The Minister may revoke the original decision if:
  (a) the person makes representations in accordance with the invitation; and
  (b) the person satisfies the Minister that the person passes the character test (as defined by section 501).

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

(6) If the Minister revokes the original decision, the original decision is taken not to have been made. This subsection has effect subject to subsection (7).

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

(8) If the Minister makes a decision (the ***subsequent decision***) to revoke, or not to revoke, the original decision, the Minister must cause notice of the making of the subsequent decision to be laid before each House of the Parliament within 15 sitting days of that House after the day on which the subsequent decision was made.

(9) If the person does not make representations in accordance with the invitation, the Minister must cause notice of that fact to be laid before each House of the Parliament within 15 sitting days of that House after the last day on which the representations could have been made.

(10) The regulations may provide that, for the purposes of this section:
  (a) a person; or

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

is not entitled to make representations about revocation of an original decision unless the person is a detainee.

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

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

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

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

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

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

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

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

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

(ii) particulars of the relevant information; and

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

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

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

(2) A decision under subsection (1) must be taken by the Minister personally.

(3) If the Minister makes a decision under subsection (1), the Minister must cause notice of the making of the decision to be laid before each House of the Parliament within 15 sitting days of that House after the day on which the decision was made.

503 Exclusion of certain persons from Australia

(1) A person in relation to whom a decision has been made:

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

(b) under section 501, 501A or 501B; or

(c) to refuse under section 65 to grant a protection visa relying on subsection 5H(2) or 36(1C);

is not entitled to enter Australia or to be in Australia at any time during the period determined under the regulations.

(2) The period referred to in subsection (1) commences, in the case of a person who has been deported or removed from Australia, when the person is so deported or removed.

(3) Different periods may be prescribed under subsection (1) in relation to different situations.

(4) This section does not apply to a holder of a criminal justice visa or to a holder of a permanent visa that was granted by the Minister acting personally.

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

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

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

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

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

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

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

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

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

(2) If:

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

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

then:

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

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

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

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

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

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

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

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

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

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

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

(d) subsection 503B(6).

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

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

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

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

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

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

(d) subsection 503B(6).

(6) This section has effect despite anything in:

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

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

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

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

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

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

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

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

(9) In this section:

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

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

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

Note: A Minister is not a Commonwealth officer.

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

gazetted agency means:

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

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

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

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

Crimes Act 1914

No. 12, 1914

Compilation No. 111

Compilation date:	10 March 2016
Includes amendments up to:	Act No. 4, 2016
Registered:	18 May 2016

This compilation is in 2 volumes

Volume 1:	**sections 1–23W**
Volume 2:	sections 23WA–91
	Schedule
	Endnotes

Each volume has its own contents

Prepared by the Office of Parliamentary Counsel, Canberra

An Act relating to Offences against the Commonwealth

Part I—Preliminary

1 Short title

This Act may be cited as the *Crimes Act 1914*.

3 Interpretation

(1) In this Act, unless the contrary intention appears:

Aboriginal person means a person of the Aboriginal race of Australia.

ACC means the Australian Crime Commission.

associated offence means:

(a) in relation to an offence against section 233B of the *Customs Act 1901*—an ancillary offence (within the meaning of the *Criminal Code*) that relates to the offence; or

(b) in relation to an offence against section 10, 11, 12, 13 or 14 of the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990*—an ancillary offence (within the meaning of the *Criminal Code*) that relates to the offence; or

(c) in relation to an offence against a law of a State or Territory—an offence:

(i) under a provision of a law of that State or Territory that corresponds to a provision of Part 2.4 of the *Criminal Code*; and

(ii) that relates to the offence.

Australian law enforcement officer means a law enforcement officer other than a member of a police force, or other law enforcement agency, of a foreign country.

child sex offences: see Schedule 2 to the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010*.

Commonwealth offence, except in Part IC, means an offence against a law of the Commonwealth.

Commonwealth officer means a person holding office under, or employed by, the Commonwealth, and includes:

(a) a person appointed or engaged under the *Public Service Act 1999*;

(aa) a person permanently or temporarily employed in the Public Service of a Territory or in, or in connection with, the Defence Force, or in the Service of a public authority under the Commonwealth;

(b) the Commissioner of the Australian Federal Police, a Deputy Commissioner of the Australian Federal Police, an AFP employee or a special member of the Australian Federal Police (all within the meaning of the *Australian Federal Police Act 1979*); and

(c) for the purposes of section 70, a person who, although not holding office under, or employed by, the Commonwealth, a Territory or a public authority under the Commonwealth, performs services for or on behalf of the Commonwealth, a Territory or a public authority under the Commonwealth; and

(d) for the purposes of section 70:

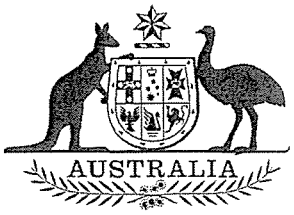
(i) a person who is an employee of the Australian Postal Corporation;

(ii) a person who performs services for or on behalf of the Australian Postal Corporation; and

(iii) an employee of a person who performs services for or on behalf of the Australian Postal Corporation.

confiscation proceedings has a meaning affected by subsection 16AC(5).

constable means a member or special member of the Australian Federal Police or a member of the police force or police service of a State or Territory.



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Prepared by the Office of Parliamentary Counsel, Canberra

Part VI—Offences by and against public officers

70 Disclosure of information by Commonwealth officers

(1) A person who, being a Commonwealth officer, publishes or communicates, except to some person to whom he or she is authorized to publish or communicate it, any fact or document which comes to his or her knowledge, or into his or her possession, by virtue of being a Commonwealth officer, and which it is his or her duty not to disclose, commits an offence.

(2) A person who, having been a Commonwealth officer, publishes or communicates, without lawful authority or excuse (proof whereof shall lie upon him or her), any fact or document which came to his or her knowledge, or into his or her possession, by virtue of having been a Commonwealth officer, and which, at the time when he or she ceased to be a Commonwealth officer, it was his or her duty not to disclose, commits an offence.

Penalty: Imprisonment for 2 years.

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GOVERNMENT NOTICES

Commonwealth of Australia

Migration Act 1958

NOTICE UNDER SECTION 503A OF THE *MIGRATION ACT 1958* – 16/001

(*Subsection 503A(9)*)

I, *PETER DUTTON* Minister for Immigration and Border Protection, acting under section 503A(9) of the *Migration Act 1958* (the Act):

1. REVOKE the Gazette notice made under subsection 503A(9) of the Act, signed on 14 August 2003 (F2006B00213); and

2. SPECIFY for the purposes of paragraph 503A(9)(a) of the Act, each of the:
   a. Australian law enforcement body; or
   b. Australian intelligence bodies,
   listed in Schedule 1 to this notice, as a gazetted agency as defined in 503A(9) of the Act;

3. SPECIFY for the purposes of paragraph 503A(9)(b) of the Act, each of the
   a. foreign law enforcement body countries, or
   b. parts of foreign law enforcement body countries,
   listed in Schedule 2 to this notice, as foreign law enforcement body countries, or parts of foreign law enforcement body countries.

This Gazette notice, Notice Under Section 503A of the Migration Act 1958 - 2016/028, GAZ 16/001 commences on 1 April 2016.

Dated: 22 March 2016

Peter Dutton

THE HON PETER DUTTON MP

Minister for Immigration and Border Protection

SCHEDULE 1

LIST OF LAW ENFORCEMENT AGENCIES OR AUSTRALIAN INTELLIGENCE BODIES

1. Attorney-General's Department
2. AUSTRAC
3. Australian Commission for Law Enforcement Integrity
4. Australian Crime Commission
5. Australian Federal Police
6. Australian Secret Intelligence Service
7. Australian Security Intelligence Organisation
8. Australian Securities and Investments Commission
9. Australian Sports Anti-Doping Authority
10. Australian Taxation Office
11. CrimTrac
12. Department of Defence
13. Department of Foreign Affairs and Trade
14. Department of Human Services
15. Department of the Prime Minister and Cabinet
16. Department of Social Services
17. Department of the Treasury
18. Director of Public Prosecutors
19. Interpol National Central Bureau, Canberra
20. The police force of a State or Territory
21. The corrective or correctional services department of a State or Territory
22. A parole board or authority or prisoner review board of a State or Territory
23. Australian Capital Territory Department of Justice and Community Safety
24. Australian Capital Territory Government Community Services
25. Department of Justice – New South Wales
26. New South Wales Crime Commission
27. Department of Family and Community Services New South Wales
28. Department of the Attorney-General and Justice Northern Territory
29. Department of Children and Families Northern Territory
30. Department of Justice and Attorney-General – Queensland
31. Crime and Corruption Commission Queensland

32. Department of Communities, Child Safety and Disability Services
33. Attorney-General's Department South Australia
34. Department of Education and Child Development – South Australia
35. Department of Justice – Tasmania
36. Department of Health and Human Services Tasmania
37. Department of Justice and Regulation – Victoria
38. Independent Broad-Based Anti-Corruption Commission Victoria
39. Family and Community Services Victoria
40. Department of the Attorney-General Western Australia
41. Crime and Corruption Commission Western Australia
42. Department for Child Protection and Family Support Western Australia

SCHEDULE 2

LIST OF FOREIGN LAW ENFORCEMENT COUNTRIES OR PARTS OF FOREIGN LAW ENFORCEMENT COUNTRIES

A Abu Dhabi, Afghanistan, Ajman, Albania, Alderney, Algeria, American Samoa, Andorra, Angola, Anguilla, Antarctica, Antigua and Barbuda, Argentina, Armenia, Aruba, Ashmore and Cartier Islands, Austria, Azad Jammu and Kashmir, Azerbijan

B Bahamas, Bahrain, Baker Island, Bangladesh, Barbados, Belarus, Belau, Belgium, Belize, Benin, Bermuda, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Bouvet Island, Brazil, Brechou, British Indian Ocean Territory, British Virgin Islands, Brunei, Bulgaria, Burhou, Burkina Faso, Burundi

C Cambodia, Cameroon, Canada, Cape Verde,Casquets, Cayman Islands, Central African Republic, Ceuta, Chad, Channel Islands, Chile, China People's Republic of, Christmas Island, Colombia, Comoros, Congo Democratic Republic, Congo Republic, Cook Islands, Coral Sea Islands Territory, Costa Rica, Cote d'Ivoire, Crevichon, Croatia, Cuba, Curacao, Cyprus, Czech Republic

D Democratic People's Republic of Korea (North Korea), Denmark, Djibouti, Dominica, Dominican Republic, Dubai

E Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia

F Falkland Islands, Faroe Islands, Federated States of Micronesia, Fiji, Finland, France, French Guiana, French Polynesia, Fajairah

G Gabon, Gambia, Georgia, Germany, Ghana, Gibraltar, Grande Amfroque, Great Britain, Greece, Greenland, Grenada, Guadeloupe, Guam, Guatemala, Guernsey, Guinea, Guinea-Bissau, Guyana

H Haiti, Herm, Heard Island and McDonald Islands, Honduras, Hong Kong, Howland Island, Hungary

I Iceland, India, Indonesia, Iran, Iraq, Ireland, Ireland (Northern), Isle of Man, Israel, Italy

J Jamaica, Japan, Jarvis Island, Jersey, Jethou, Johnston Atoll, Jordan

K Kazakhstan, Kenya, Kingman Reef, Kiribati, Kuwait, Kyrgyzstan, Kosovo

L Laos, Latvia, Lebanon, Les Houmets, Lesotho, Liberia, Libya, Leichtenstein, Lihou, Lithuania, Luxembourg

M Macau, Macedonia, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall

Islands, Martinique, Mauritania, Mauritius, Mayotte, Melilla, Mexico, Midway Island, Moldova, Monaco, Mongolia, Montenegro, Montserrat, Morocco, Mozambique, Myanmar

N Namibia, Nauru, Navassa Island, Nepal, Netherlands, New Caledonia, New Zealand, Nicaragua, Niger, Nigeria, Niue, Norfolk Island, Northern Mariana Islands, Norway

O Oman, Ortac

P Pakistan, Palau, Palestinian Territories, Palmyra Atoll, Panama, Papua New Guinea, Paraguay, Paracel Islands, Peru, Philippines, Pitcairn Islands, Poland, Portugal, Puerto Rico

Q Qatar

R Ras al-Khaimah, Renonquet, Republic of Korea (South Korea), Reunion Island, Romania, Russian Federation, Rwanda

S Saint Barthelemy, Saint Helena, Saint Kitts and Nevis, Saint Lucia, Saint Martin, Saint Pierre and Miquelon, Saint Vincent and the Grenadines, Samoa, San Marino, Sark, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia, Seychelles, Sharjah, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, South Georia and the South Sandwich Islands, Spain, Spanish North Africa, Spratly Islands, Sri Lanka, South Sudan, Sudan, Suriname, Svalbard, Swaziland, Sweden, Switzerland, Syria

T Taiwan, Tajikistan, Tanzania, Thailand, Timor-Leste, Tobago, Togo, Tokelau, Tonga, Trinidad and Tobago, Tristan da Cunha, Tunisia, Turkey, Turkmenistan, Turks and Caicos Islands, Tuvalu

U Uganda, Ukraine, Umm al-Qaiwain, United Arab Emirates, United Kingdom, United States of America, US Virgin Islands, Uruguay, Uzbekistan

V Vanuatu, Vatican City, Venezuela, Vietnam

W Wake Island, Western Sahara

Y Yemen

Z Zambia, Zimbabwe