IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S114 of 2013

BETWEEN:

BONANG DARIUS MAGAMING
Appellant

and

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

Filed on behalf of the appellant on 12 July 2013:

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PART I CERTIFICATION

1 The appellant certifies that these submissions are suitable for publication on the internet.

PART II ISSUES

2 The appellant appeals against the sentence imposed on him pursuant to s 236B(3)(c) of the *Migration Act 1958* (Cth) upon his conviction for the offence of people smuggling contrary to s 233C(1) of that Act.

3 Although s 236B of the Act applies where a person is convicted of an offence against ss 233B, 233C or 234A, this appeal is concerned only with the validity of s 236B(3)(c) in its application to a person convicted of an offence against s 233C.

4 The appeal raises two issues:

(a) Ch III of the Constitution requires the separation of judicial and prosecutorial functions. Sentencing is an exclusively judicial function, and the rule of law forbids arbitrary or capricious detention in custody. For a class of offenders of which the appellant is a member, ss 233A, 233C and 236B(3)(c) of the Act result in arbitrary imprisonment, a critical element of which is determined other than by a court, through a process that cannot reasonably be seen as necessary for the punishment of criminal guilt. Is the law repugnant to Ch III of the Constitution?

(b) Section 236B(3)(c) of the Act requires the court to deprive an offender of his or her liberty as part of an overall process in which sentencing decisions are made without the offender being heard; where the outcomes for co-offenders in like circumstances may be very different; by a sentence that will often be grossly disproportionate to the gravity of the offending; and by a process for which no reasons can be given. Does the law require the court to act contrary to accepted notions of judicial power?

5 The appellant submits that both issues should be answered "yes".

6 The minimum head sentence required by s 236B(3)(c) for a person convicted of an offence against s 233C is invalid. Section 236B(4)(b), which prescribes a minimum non-parole period for that head sentence, is also invalid to the same extent. The appellant should have been sentenced in accordance with Part IB of the *Crimes Act 1914* (Cth).

PART III SECTION 78B NOTICE

7 The appellant has given notices under s 78B of the *Judiciary Act 1903* (Cth).

PART IV CITATIONS

8 The judgments below have the following citations:

(a) *R v Magaming* (Unreported, Blanch J CJDC, District Court of New South Wales, 9 September 2011) (**Remarks on sentence**);

(b) *Karim v R; Magaming v R* [2013] NSWCCA 23 (Bathurst CJ, Allsop P, McClellan CJ at CL, Hall J and Bellew J) (**Magaming**).

PART V MATERIAL FACTS

9 Between 1 September 2010 and 6 September 2010, the appellant facilitated the bringing or coming to Australia of a group of 52 non-citizens, reckless as to whether those persons had a lawful right to come to Australia. On 6 September 2010, the appellant was detained by the Royal Australian Navy in the seas north of Ashmore Reef, and was taken to Christmas Island.

10 On 7 April 2011, the appellant was charged with an offence of people smuggling contrary to s 233C(1) of the *Migration Act 1958* (Cth) (**Migration Act**). On 18 July 2011, in the Local Court of New South Wales, the appellant pleaded guilty and was committed for sentence.

11 On 29 July 2011, the appellant was arraigned before the District Court of New South Wales exercising federal jurisdiction.[1] On 9 September 2011, the appellant was sentenced by Blanch J pursuant to s 236B(3)(c) of the Migration Act, and his Honour delivered remarks on sentence.[2]

12 There were six persons described as "crew members" on board the vessel, including the appellant, although two of the more senior crew members departed the vessel before it left Indonesian waters.[3] Of the four remaining crew members, all were charged with an offence under s 233C. The charge against one was withdrawn on the basis that he was less than 18 years old; the charge against another was withdrawn after a trial resulted in a hung jury; and the third co-accused was tried, convicted and sentenced to the minimum term under s 236B(3)(c).

13 At the time of the offence, the appellant was 19 years old. He had no criminal record. It was "perfectly clear" that he was "a simple Indonesian fisherman" who had been recruited by organisers of the smuggling activity "to help steer the boat".[4]

14 The Crown conceded an early plea, and his Honour found that the plea had been made at the earliest possible opportunity.[5] Having made those observations, his Honour concluded:

> The seriousness of [the appellant's] part in the offence therefore falls right at the bottom end of the scale. ... In the ordinary course of events, normal sentencing principles would not require a sentence to be imposed as heavy as the mandatory penalties that have been imposed by Federal Parliament. However, I am constrained by the legislation to impose that sentence.[6]

15 His Honour sentenced the appellant to a term of imprisonment for five years to commence on 6 September 2010 and expiring on 5 September 2015 with a non-parole period of three years.

16 On 29 June 2012, the appellant sought leave to appeal his sentence to the Court of Criminal Appeal. On 15 February 2013, the Court of Criminal Appeal granted leave to appeal but dismissed the appeal, principally by reason of existing authority in this court.[7]

17 On 7 June 2013, French CJ and Kiefel J granted special leave to appeal.[8]

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1 Sections 68 and 79 of the *Judiciary Act 1903* (Cth) picked up and applied the relevant laws of New South Wales, subject to relevant provisions of the *Crimes Act 1914* (Cth) (**Crimes Act**), and subject further to the more specific provisions of the *Migration Act 1958* (Cth).

2 The respondent conceded in the court below that his Honour's remarks on sentence incorrectly recorded the appellant's age as 26 rather than 19 and incorrectly recorded the number of passengers as 116 rather than 52.

3 Remarks on sentence, Blanch J, at 1.6.

4 Remarks on sentence, Blanch J, at 1.7.

5 Remarks on sentence, Blanch J, at 1.9.

6 Remarks on sentence, Blanch J, at 1-2.

7 *Karim v R; Magaming v R* [2013] NSWCCA 23.

8 *Magaming v The Queen* [2013] HCATrans 140.

PART VI ARGUMENT

Introduction

18 This appeal concerns the imprisonment of a person under the Migration Act ostensibly as punishment for a breach of a federal law. There are, however, limits on the ability of Parliament to mandate deprivation of liberty under the guise of criminal punishment, such limits deriving from Ch III of the Constitution and the rule of law to which Ch III gives practical effect.

19 The appellant objects to his sentence on the ground that s 236B(3)(c) of the Migration Act, in its application to a person convicted under s 233C, transgresses those limits and is invalid. Blanch J should have sentenced the appellant under s 16A(1) and Part IB of the Crimes Act by imposing a sentence that was of a severity appropriate in all the circumstances of the offence.

Legislative history

20 Federal offences relating to people smuggling have existed in various forms since Federation.[9] When first introduced, the maximum penalty was 100 pounds per "prohibited immigrant".[10] By 1958, the maximum penalty had increased to 200 pounds or six months' imprisonment.[11] By 1989, the maximum penalty was $5,000 or two years' imprisonment.[12]

21 On 22 July 1999, the maximum penalty for that offence (s 233) was increased to imprisonment for 10 years and 1,000 penalty units.[13] On the same day, the *Migration Legislation Amendment Act (No. 1) 1999* (Cth) created an offence of organising the entry into Australia of a group of five or more unlawful non-citizens (s 232A) and offences relating to false documents and misleading information in connection with the entry of such groups (s 233A). The maximum penalties for those offences were imprisonment for 20 years and 2,000 penalty units.

22 On 27 September 2001, the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) (**Border Protection Act**) commenced. Section 233C introduced minimum sentences for the people smuggling offences created by ss 232A and 233A. The stated purpose was to "limit conviction and sentencing options for the people smuggling offences"[14] and to send "a very important red light to would-be people smugglers".[15] The minimum head sentences were eight years for a repeat offence or five years in any other case, with minimum non-parole periods of five years and three years respectively.[16] Section 233B excluded the discretion that otherwise existed under s 19B of the Crimes Act to discharge an adult offender without conviction.

23 On 16 January 2003, the *Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002* (Cth) introduced parallel offences into Div 73 of the *Criminal Code* (Cth). These provisions focused upon facilitating entry into a foreign country (whether or not via Australia) and have never been subject to minimum sentences.

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9 The earliest such provisions appear to be ss 9 and 12(1) of the *Immigration Restriction Act 1901* (Cth). See also s 30 of the *Migration Act 1958-1973* (Cth), which later became s 233.

10 *Immigration Restriction Act 1901* (Cth) s 9.

11 *Migration Act 1958-1973* (Cth) s 30.

12 *Migration Legislation Amendment Act 1989* (Cth) Sch 1, which amended s 30 of the *Migration Act 1958* (Cth) and renumbered that provision to s 80.

13 *Migration Legislation Amendment Act (No. 1) 1999* (Cth). Section 80 was renumbered to s 233 by the *Migration Legislation Amendment Act 1994* (Cth).

14 Explanatory memorandum, Border Protection (Validation and Enforcement Powers) Bill 2001 (Cth) 11-12.

15 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 September 2001, 30870.

16 But note the penalty at the foot of the offence provisions: imprisonment for 20 years "or" 2,000 penalty units or both.

24 On 1 June 2010, the provisions introduced by the Border Protection Act were further amended and renumbered by the *Anti-People Smuggling and Other Measures Act 2010* (Cth) (**APS Act**). The APS Act repealed ss 232A-233C and enacted the present ss 233A-233E, with people smuggling simpliciter retaining a maximum penalty of 10 years imprisonment and 1,000 penalty units (s 233A). It also enacted offences of people smuggling in cases of exploitation or danger of death or serious harm (s 233B); involving a group of at least five unlawful non-citizens (s 233C); and involving false documents or misleading information in connection with such groups (s 234A). The maximum penalty is 20 years imprisonment and 2,000 penalty units.

25 The latter two offences are subject to the same minimum sentences that had been imposed under the Border Protection Act (s 236B) as well as the exclusion of the discretion to discharge adult offenders without conviction (s 236A). Section 233B attracts a higher minimum sentence of eight years (s 236B(3)(a)). In his second reading speech, the Attorney-General described the object of the amended minimum sentencing provisions as follows:

> The use of mandatory minimum penalties reflects the seriousness of the activity being prosecuted. It allows the court to determine an appropriate penalty within the minimum and maximum set by parliament.[17]

26 On 25 November 2011, the *Deterring People Smuggling Act 2011* (Cth) defined "no lawful right to come to Australia" (ss 233A, 233C) as meaning no lawful right under Australian domestic law, applicable from 16 December 1999. The intention was to eliminate doubt whether the law prohibited the 'smuggling' of persons in respect of whom Australia owes protection obligations.

Construction of section 236B

27 Ordinarily, a statutory minimum penalty, like a statutory maximum, is to be regarded as "a legislative direction as to the seriousness of the offence".[18] The approach to the construction of a valid minimum penalty is now settled:[19]

> Where there is a minimum mandatory sentence of imprisonment the question for the sentencing judge is where, having regard to all relevant sentencing factors, the offending falls in the range between the least serious category of offending for which the minimum is appropriate and the worst category of offending for which the maximum is appropriate.[20]

28 The introduction of a minimum sentence thus involves a transformation of the whole distribution of sentences towards the statutory maximum, the effect of which is most pronounced at the minimum and which diminishes as the sentence approaches the maximum.[21]

The offence of "people smuggling"

29 The offences created by ss 233A and 233C proscribe, in broad terms, conduct facilitating the movement of unlawful non-citizens to Australia. Although the prohibited conduct is described as "people smuggling", that expression suggests a degree of covertness or ill intent that need not be involved in offences contrary to these provisions. The provisions "are cast widely and generally": *Magaming* at [115]. Both ss 233A and 233C are sufficiently broad to capture

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17 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 February 2010, 1646.

18 *Bahar v R* [2011] WASCA 249 at [46], [49] (McLure P with whom Martin CJ and Mazza J agreed).

19 *Bayu v The Queen* [2013] HCATrans 144 at 7 (French CJ and Kiefel J).

20 *Bahar v R* [2011] WASCA 249 at [58] (McLure P with whom Martin CJ and Mazza J agreed); *R v Karabi* [2012] QCA 47; *R v Nitu* [2012] QCA 224; *R v Latif* [2012] QCA 278; *Karim v R* [2013] NSWCCA 23 at [40]-[45]. Cf *R v Pot, Wetangky and Lande* (Remarks on sentence, NTSC, Riley CJ, 18 January 2011).

21 *Atherden v Western Australia* [2010] WASCA 33 at [43]-[44] (Wheeler JA).

humanitarian endeavours to assist refugees or nationals of a neighbouring country fleeing a crisis there to seek asylum in Australia in accordance with Australian law.[22] The offence is still committed where those who are 'smuggled' are persons in respect of whom Australia owes protection obligations and who are, even before charges are laid, granted protection visas.[23] Conviction may have further consequences for the offender beyond the sentence imposed.[24]

30 The offences created by ss 233A and 233C may be contrasted with that created by s 233B. Although s 233B is defined in part by reference to s 233A, defined as "the underlying offence", it requires proof of further elements not falling within s 233A. Those elements presently[25] include an intention to subject a person to cruel, inhuman or degrading treatment, or recklessness as to a danger of death or serious harm to the person smuggled arising from the smuggler's conduct. An offence such as s 233B can be said to involve an irreducible level of seriousness.

31 This in no sense denies the potential gravity of the offending that falls within ss 233A and 233C. Commercial people smuggling is financed through funds raised in the source countries by persons generally of very limited means, and its clients channelled through a potentially perilous sea voyage. Section 233B illustrates some scope for the creation of aggravated offences to deal with the darker manifestations of people smuggling. But the range of seriousness of offending within ss 233A and 233C is very wide and this case "falls right at the bottom end of the scale".

The statutory scheme erected by ss 233A, 233C and 236B: no irreducible seriousness

32 The elements of the offences created by ss 233A and 233C are identical save for the number of unlawful non-citizens concerned. Section 233A is the broader offence, which is contravened in every instance of people smuggling. The narrower offence, s 233C, applies to a subset of the conduct proscribed by s 233A, and will be contravened in conjunction with s 233A in those instances where the number of non-citizens concerned is five or more.

33 In respect of that category of offending, ss 233A and 233C are coextensive, with the result that "[t]wo provisions of the same polity's legislation have criminalised the same conduct with significantly different penalties": *Magaming* at [56]. The same conduct is facilitating the entry of at least five non-citizens, and the different penalties are:

(a) in respect of s 233A—a maximum penalty of 10 years with sentencing in accordance with Part IB of the Crimes Act; and

(b) in respect of s 233C—a maximum penalty of 20 years with minimum head sentences and non-parole periods under s 236B of the Migration Act.

34 Parliament has not prescribed two offences, one of 'smuggling' between one and four non-citizens, and another of smuggling five or more. It follows that there is not in this statute any legislative conclusion as to the irreducible seriousness of the conduct proscribed by ss 233A and 233C. The same conduct "is viewed divergently by the Parliament": *Magaming* at [57].

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22 See, for example, *R v Pot, Wetangky and Lande* (Transcript of proceedings, NTSC, Riley CJ, 18 January 2011), where the three defendants sentenced were openly "transporting the non-citizens to Australia for presentation to Australian authorities" with "no attempt to hide from the authorities or disguise what they had done". It has been said that, apart from this law, there is no "moral culpability in helping to transport willing passengers to a place where they want to go": *R v Nafi* (Remarks on sentence, NTSC, Kelly J, 19 May 2011). See also s 233D.

23 See, for example, *R v Pulendren* [2010] NSWDC 335 at [31] (Tupman DCJ), where 180 of the 194 people smuggled were recognised before sentencing as refugees, with the status of the remaining 14 unknown.

24 If an unlawful non-citizen, the person is liable for the costs of their detention: s 262. If a citizen sentenced to the minimum term, the person cannot vote at the next federal election: s 93(8AA) *Commonwealth Electoral Act 1918*.

25 On 7 March 2013, the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth) amended s 233B(1) to omit exploitation, and added related offences to the Criminal Code.

35 Accordingly, s 236B does not proceed from a legislative assumption about the minimum punishment that should be imposed on a person who has 'smuggled' at least five non-citizens. The uncertain application of the minimum term to persons who are convicted having engaged in the conduct proscribed by ss 233A and 233C denies that assumption. The only certain legislative assumption is that, where fewer than five non-citizens are involved, subject to the applicable maximum penalty, any term of imprisonment should always be at the discretion of the court. Parliament has stated different, and inconsistent, rules as to whether there should be the same discretion where five or more non-citizens are concerned.

36 At the time an offender engages in the conduct proscribed by ss 233A and 233C, it cannot be determined from the statute whether the offender's conduct necessarily requires a sentence of imprisonment upon conviction. However, at the moment the judicial process is engaged, it will become apparent whether the offender must be sentenced to imprisonment upon conviction.

37 Thus at the time the appellant engaged in the proscribed conduct, the appellant offended against both ss 233A and 233C, and the law did not provide an answer to the question of whether his conduct required a sentence of imprisonment upon conviction. Upon his arraignment, that uncertainty about possible outcomes respecting liability collapsed into the certain outcome that the appellant would be sentenced to imprisonment for at least five years upon conviction. That outcome was not reached by the exercise of judicial power.

The Attorney-General's direction

38 The manifest vice of the legislative provisions has been recognised and an attempt made to ameliorate it through a direction given by the Attorney-General.[26] That direction illustrates that there is no irreducible seriousness in the offence created by s 233C, and that the determination of the critical element in most sentences will be made by a process outside judicial control.

39 The Attorney-General's direction divides the statutorily recognised class of persons who have offended against ss 233A and 233C into two further subclasses: those who will be sentenced to imprisonment for at least five years upon conviction and those who will not. The division is effected through the prescription of a test not found in the statute.[27]

40 An offender who now commits an offence contrary to ss 233A and 233C, and to whom the extra-statutory element does not apply, will have the whole of their sentence determined by a court under Part IB of the Crimes Act. That stands in contrast to offenders who had previously committed offences contrary to ss 233A and 233C, including the appellant, who were always (but need not have been) punished by imprisonment for at least five years.

41 The Attorney-General's direction not only permits but requires certain persons who have offended against ss 233A and 233C to be sentenced otherwise than under s 236B. The direction confirms that the Act does not proceed from a legislative assumption about the irreducible seriousness of offences against ss 233A and 233C. Had the appellant been sentenced one year later, the direction would have applied, and obliged the prosecution not to proceed under s 233C and s 236B. A lesser sentence would certainly have been imposed.[28]

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26 Attorney-General, 'Director of Public Prosecutions—Attorney-General's Direction 2012' in Commonwealth, *Gazette*, No GN 35, 5 September 2012, 2318-2319. The direction was given on 27 August 2012 pursuant to s 8 of the *Director of Public Prosecutions Act 1983* (Cth).

27 The test involves the Director of Public Prosecutions being satisfied of one of the criteria stated in paragraph 1 of the direction based on the then perceived seriousness of the offender's conduct.

28 Remarks on sentence, Blanch J, at 2.

SECTION 236B(3)(C) IS CONTRARY TO CHAPTER III OF THE CONSTITUTION

Chapter III of the Constitution

42 It is "axiomatic"[29] that the legislative powers of the Commonwealth Parliament and the Parliaments of the States are subject to the Constitution, including Ch III. Diceyan notions of absolute parliamentary supremacy are, to that extent, necessarily denied, with the result that the appellant's arguments respecting the validity of s 236B(3)(c) cannot be met by an assertion that the law represents the will of Parliament.[30] The real question is whether Parliament's will, manifested by the text of the law construed by the application of rules of interpretation accepted by Parliament,[31] is consistent with the Constitution and the limitations imposed by Ch III.

The criminal process and the separation of powers doctrine

43 In the unanimous judgment in *Elias v The Queen*, this court reinforced the constitutional significance of the separation of judicial and prosecutorial functions.[32] The independence and impartiality of the courts, mandated by Ch III, would be impermissibly jeopardised if the courts were to be concerned with decisions as to the particular charge to be laid or prosecuted in individual cases.[33] It is constitutional considerations of that kind that lead to the general unavailability of judicial review of prosecutorial discretions.[34]

44 Those propositions do not, however, deny the possibility of limits on federal legislative power. Recognition of limits on the extent to which Parliament may disturb the distribution of judicial and prosecutorial functions strengthens rather than weakens the constitutional separation of those functions, and does not intrude upon the exercise of prosecutorial discretion validly conferred.

45 One such limit imposed by Ch III, "at its most important in relation to criminal matters",[35] is the strict separation and independence of judicial power.[36] In *Chu Kheng Lim*, Brennan, Deane and Dawson JJ (who with Gaudron J formed the majority) said:

> There are some functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character. The most important of them is the adjudgment and punishment of criminal guilt under a law of the Commonwealth. That function appertains exclusively to and "could not be excluded from" the judicial power of the Commonwealth. That being so, Ch III of the Constitution precludes the enactment, in purported pursuance of any of the subsections of s 51 of the Constitution, of any law purporting to vest any part of that function in the Commonwealth Executive.[37]

46 Their Honours stated that "the Constitution's concern is with substance and not mere form".

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29 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 262 (Fullagar J).

30 *R v Moffatt* [1998] 2 VR 229 at 251 (Hayne JA). Cf *Magaming* at [129], [133] (McClellan CJ at CL).

31 *Zheng v Cai* (2009) 239 CLR 446 at [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

32 *Elias v The Queen* [2013] HCA 31 at [33] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

33 *Maxwell v The Queen* (1996) 184 CLR 501 at 513 (Dawson and McHugh JJ), 534 (Gaudron and Gummow JJ).

34 *Likiardopoulos v The Queen* (2012) 86 ALJR 1168 at [2]-[4] (French CJ), [37] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

35 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 581 (Deane J).

36 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

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

47 That passage echoes the statement of Deane J in *Re Tracey* that "the liability of the citizen ... to the State, can be conclusively determined only by a Ch III court acting as such".[38] A law that removes that function from the courts "will be invalidated as a usurpation of judicial power".[39]

48 Section 236B(3)(c), in its application to a person who has offended against ss 233A and 233C, removes from the courts a critical part of the judicial sentencing function and is invalid. It denies to the sentencing court any power to avoid the imposition of a sentence that is arbitrary and capricious, a power that may be confined, even closely, but not removed: *Magaming* at [105]. And it is not reasonably capable of being seen as necessary for criminal punishment.

The separation of powers doctrine and judicial power in sentencing

49 In *Deaton v Attorney General*,[40] the Supreme Court of Ireland considered a customs law that made it an offence to be knowingly concerned in dealing with certain goods with intent to evade importation restrictions on those goods. By way of penalty, the law provided that an offender:

> shall for each such offence forfeit either treble the value of the goods, including the duty payable thereon, or one hundred pounds, at the election of the Commissioners of Customs

50 The law was unanimously held invalid. Delivering the judgment of the court, the Chief Justice held that it was "inconceivable" that "a Constitution which is broadly based on the doctrine of the separation of powers ... could have intended to place in the hands of the Executive the power to select the punishment to be undergone by citizens" (at 183). Such a system of government was "one of arbitrary power" (at 183). The Chief Justice drew upon statements of his predecessor to the effect that judicial power is exercised not only in determining guilt but "in determining the punishments to be inflicted upon persons found guilty of offences charged against them" (at 184).

51 Similarly, in *Liyanage v The Queen*,[41] the Privy Council held invalid a law that aimed to "ensure that judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences" and "compelled [judges] to sentence the offender to not less than ten years' imprisonment" (at 290). That law also suffered from further vices, but it is apparent that what concerned their Lordships was a violation of the separation of powers doctrine through an erosion of judicial power (at 291-292).

52 In *Hinds v The Queen*,[42] Lord Diplock expressed approval of those decisions and added:

> What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body ... a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders. (at 226-227)

53 That line of authority culminated in the Privy Council's decision in *Ali v The Queen*.[43] Sentencing laws for a drug importation offence provided that, if prosecuted in the Intermediate Court or the District Court, the offender was liable upon conviction to a maximum penalty involving a fine and imprisonment, but if prosecuted in the Supreme Court, the offender upon conviction must be sentenced to death (at 98). The discretion thereby given to the Director of Public Prosecutions enabled him "to select the penalty to be imposed in a particular case" and was a "constitutional vice" inconsistent with the separation of powers doctrine (at 104).

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38 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580 (Deane J).

39 *Nicholas v The Queen* (1998) 193 CLR 173 at [112] (McHugh J).

40 *Deaton v Attorney General* [1963] IR 170.

41 *Liyanage v The Queen* [1967] AC 259.

42 *Hinds v The Queen* [1977] AC 195.

43 *Ali v The Queen* [1992] 2 AC 93.

54 Sections 233A, 233C and 236B(3)(c) have the same effect as the laws in *Deaton* and *Ali* and involve a vice of the kind of which the Privy Council was highly critical in *Liyanage*, *Hinds* and subsequent cases.[44] It requires the conclusion that part of the sentencing function has been removed from the courts, and reveals that the critical element of the appellant's sentence was "conclusively determined" otherwise than by "a Ch III court acting as such".[45]

55 The reasoning in *Deaton* would have been regarded as constitutional orthodoxy in this country but for the decisions in *Fraser Henleins* and *Ex parte Coorey*, in which a cognate statutory scheme was upheld as constitutionally valid. Both decisions preceded *Boilermakers* and the conception of the separation of powers doctrine espoused in *Lim*. For the reasons given later in these submissions, they should not be followed on this appeal.

The rule of law and limits on involuntary detention in custody

56 One of the assumptions on which the Constitution is based is the rule of law.[46] Chapter III of the Constitution, which confers and denies judicial power in accordance with its express terms and its necessary implications, "gives practical effect" to that assumption.[47] Furthermore, the implication drawn from Ch III in *Kable* about State legislative power is to be seen as giving practical effect to the same assumption. The content of the rule of law and its "abhorrence of arbitrary detention or imprisonment"[48] thus inform Ch III.

57 Chapter III entrenches the separation of powers "necessary for the protection of ... individual liberty",[49] that being "the most basic" human right or freedom.[50] This and other "basic rights" are protected by "ensuring that those rights are determined by a judiciary independent of the parliament and the executive".[51] In this way, Ch III advances "two constitutional objectives: the guarantee of liberty and, to that end, the independence of Ch III judges".[52] Legislation adjudging guilt "or imposing punishment" on a person is therefore repugnant to Ch III.[53] And it is for the judiciary to determine "the placing from time to time of that boundary line which marks off a category of deprivation of liberty from the reach of Ch III".[54]

58 Accordingly, Ch III places limits on the extent to which Parliament may require a court to order the involuntarily detention in custody of a person, such a requirement being lawful only where

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44 *Browne v The Queen* [2000] 1 AC 45 at 48-48; *Director of Public Prosecutions of Jamaica v Mollison* [2003] 2 AC 411 at 423-424. See also *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 at 890-891 [50], where *Deaton* was cited alongside the later decisions of this court in *Re Tracey*, *Lim* and *Nicholas*.

45 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580 (Deane J).

46 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193 (Dixon J); *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476 at [31] (Gleeson CJ), [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

47 *South Australia v Totani* (2010) 242 CLR 1 at [131] (Gummow J), [233] (Hayne J), [423] (Crennan and Bell JJ); *Momcilovic v The Queen* (2011) 245 CLR 1 at [593] (Crennan and Kiefel JJ).

48 *Commonwealth v Fernando* (2012) 200 FCR 1 at [99] (Gray, Rares and Tracey JJ).

49 *R v Davison* (1954) 90 CLR 353 at 380-381 (Kitto J).

50 *South Australia v Totani* (2010) 242 CLR 1 at [423] (Crennan and Kiefel JJ), citing *Al-Kateb v Godwin* (2004) 219 CLR 562 at [19] (Gleeson CJ).

51 *R v Quinn; Ex parte Consolidated Foods Corp* (1977) 138 CLR 1 at 11 (Jacobs J with whom Gibbs, Stephen and Mason JJ agreed); *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [40] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

52 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

53 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 536 (Mason CJ).

54 *Al-Kateb v Godwin* (2004) 219 CLR 562 at [140] (Gummow J).

detention is a consequential step in the adjudication of criminal guilt for past acts, and in certain "exceptional cases".[55] Gummow J in *Fardon* formulated the principle in the following terms:

> I would prefer a formulation of the principle derived from Ch III in terms that, the "exceptional cases" aside, the involuntary detention of a citizen in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts.[56]

59 His Honour noted that this "constitutional principle" was applied as a step in the reasoning in *Kable* of Toohey J and Gummow J, and is reflected in that of Gaudron J and McHugh J.[57] It is consistent with the holding in *Polyukhovich*[58] and has been adopted in later decisions.[59]

60 Gummow J went on to deal with the submission of the Commonwealth Attorney-General, intervening in that case, that the Commonwealth Parliament could pass a law in terms identical to the challenged Queensland legislation. His Honour said:

> It is not to the present point, namely, consideration of the Commonwealth's submissions, that federal legislation, drawing its inspiration from the Act, may provide for detention without adjudication of criminal guilt but by a judicial process of some refinement. *The vice for a Ch III court and for the federal laws postulated in submissions would be in the nature of the outcome, not the means by which it was obtained.*[60] (Emphasis added.)

61 The forbidden outcome was involuntary detention in custody unsupported by a sufficient constitutional factum, such as adjudication of criminal guilt. An example was provided in *Fardon* in relation to a legislative scheme that provided for the indefinite incarceration of certain prisoners, upon expiry of their sentences, if the particular prisoner was considered to be "a serious danger to the community". Gummow J noted, as a "matter[] of significance", that:

> the factum upon which the attraction of the Act turns is the status of the appellant to an application by the Attorney-General as a "prisoner" (s 5(6)) who is presently detained in custody upon conviction for an offence of the character of those offences of which there is said to be an unacceptable risk of commission if the appellant be released from custody. *To this degree there remains a connection between the operation of the Act and anterior conviction by the usual judicial processes. A legislative choice of a factum of some other character may well have imperilled the validity of s 13.*[61] (Emphasis added.)

62 The possibility of such limits with respect to the factum for the operation of a sentencing law was foreshadowed by Barwick CJ's acceptance in *Palling v Corfield* that "[t]here may be limits to the choice of the Parliament in respect of such contingencies" (at 59). More recently, Hayne J identified the character of the factum in past schemes as typically having a personal dimension:

> all of the circumstances considered in *Chu Kheng Lim* and *Fardon*, in which there can be the involuntary detention of a citizen, whether within or without the class of "exceptional cases",

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55 *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 27-29 (Brennan, Deane and Dawson JJ).

56 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [80] (Gummow J).

57 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 97-98 (Toohey J), 131-132 (Gummow J), 106-107 (Gaudron J), 121-122 (McHugh J); *South Australia v Totani* (2010) 242 CLR 1 at [208] (Hayne J).

58 *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

59 *Vasiljkovic v Commonwealth* (2006) 227 CLR 614 at [37] (Gleeson CJ), [84] (Gummow and Hayne JJ), [193] (Kirby J), [222] (Heydon J); *Thomas v Mowbray* (2007) 233 CLR 307 at [114]-[115] (Gummow and Crennan JJ).

60 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [85] (Gummow J).

61 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [108] (Gummow J).

> *depend for their engagement upon one or more factors specific to the person who is to be detained.*[62] (Emphasis added.)

63 The statements referred to in the cases above point to the following conclusions. The exceptional cases aside, detention in custody can be required only as a consequential step in the adjudication and punishment of criminal guilt. The adjudication and punishment must be "for past acts". There must be a sufficient "connection" between the operation of the law and anterior conviction "by the usual judicial processes". Relevant also is whether the factum is "specific to the person who is to be detained". And adapting what was said in *Lim* to accord with the statement of principle in *Fardon*, consideration of those matters may be guided by asking whether the deprivation of liberty "is reasonably capable of being seen as necessary for",[63] or "appropriate and adapted to",[64] the adjudication and punishment of criminal guilt. It is not here.

The deprivation of liberty mandated by s 236B(3)(c) is arbitrary

64 This court has considered in other contexts the constitutional need for laws imposing liability not to do so in a manner that is arbitrary or capricious.[65] A law will only satisfy that requirement where "[l]iability is imposed by reference to criteria which are sufficiently general in their application and which mark out the objects and subject-matter" of the law.[66]

65 The differentiation of a permissible liability from an impermissible arbitrary liability "can only be done by reference to the criteria by which liability ... is imposed":

> Not only must it be possible to point to the criteria themselves, but it must be possible to show that the way in which they are applied does not involve the imposition of liability in an arbitrary or capricious manner.[67]

66 Thus the criteria must be "ascertainable" and have "a sufficiently general application", and cannot involve the imposition of liability "as a result of some administrative decision based upon individual preference unrelated to any test laid down by the legislation".[68]

67 Although stated in a different context, the principle which lies behind that doctrine is "more a general one of elementary constitutional law".[69] The requirement is constitutionally necessary because in the absence of objective criteria that can be objectively assessed, the imposition of liability can never be judicially reviewed, with the impermissible result that the validity of administrative action taken under the law depends on the opinion of the administrator. Accordingly, for any review of the imposition of liability to be "judicial", there must be criteria for

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62 *South Australia v Totani* (2010) 242 CLR 1 at [211] (Hayne J).

63 *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 33 (Brennan, Deane and Dawson JJ), 58 (Gaudron J), 65, 71 (McHugh J); *Kruger v Commonwealth* (1997) 190 CLR 1 at 162 (Gummow J).

64 *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 58 (Gaudron J).

65 *W R Carpenter Holdings Pty Ltd v Commissioner of Taxation* (2008) 237 CLR 198 at [9] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).

66 *Roy Morgan Research Pty Ltd v Commissioner of Taxation* (2011) 244 CLR 97 at [38] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Federal Commissioner of Taxation v Hipsleys Ltd* (1926) 38 CLR 219 at 236.

67 *Roy Morgan Research Pty Ltd v Commissioner of Taxation* (2011) 244 CLR 97 at [38] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 639.

68 *Deputy Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678 at 684 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ), 688 (Brennan J).

69 *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 639 (Gibbs CJ, Wilson, Deane and Dawson JJ), 658-659 (Brennan J).

imposing the liability that are susceptible of judicial consideration. That is one way in which the judicial process required by Ch III "protects the individual from arbitrary punishment".[70]

68 The only criterion for the operation of s 236B(3)(c) is the conviction of a person for an offence against s 233C. However, for the class of persons who have offended against ss 233A and 233C, the way in which that criterion is applied cannot be shown not to involve the imposition of liability in an arbitrary or capricious manner. The operation of s 233A is relevantly identical but for the liability imposed.

69 The identity of the members of that class who are to be subject to the application of the criterion is not determined by the statute. Whether the criterion for the operation of s 236B applies with respect to a particular offender therefore depends on matters which must necessarily be the result of a decision "unrelated to any test laid down by the legislation".[71] That aspect of the operation of s 236B answers Kitto J's description of a law that "purports to authorize an administrative officer to exclude from the application of a law any case in which he disapproves of its application".[72] The law thus imposes an arbitrary liability: imprisonment for five years.

70 The truth of those observations may be seen from the Attorney-General's direction, which is presently the only instrument prescribing criteria for the imposition of liability under s 236B.

71 The deprivation of liberty mandated by s 236B(3)(c) thus cannot be shown to be reasonably necessary for the adjudication or punishment of criminal guilt. For all of the foregoing reasons, the deprivation of liberty required by that section is contrary to Ch III.

SECTION 236B(3)(C) IS INCOMPATIBLE WITH ACCEPTED NOTIONS OF JUDICIAL POWER

Judicial power and the judicial process

72 Judicial power must be exercised through proceedings "conducted in accordance with the judicial process".[73] The judicial process "necessitates that a court not be required or authorised to proceed in a manner that does not ensure":[74]

> equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her ... and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law. It means, moreover, that a court cannot be required or authorised to proceed in any manner which ... brings or tends to bring the administration of justice into disrepute.

73 To those requirements may be added the duty to give reasons for the exercise of judicial power,[75] and the extension of fairness in criminal proceedings to the whole criminal process.[76]

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70 *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 497 (Gaudron J).

71 *Deputy Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678 at 684 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ), 688 (Brennan J).

72 *Giris Pty Ltd v Commissioner of Taxation* (1969) 119 CLR 365 at 379 (Kitto J). See also *Plaintiff M79-2012 v Minister for Immigration and Citizenship* [2013] HCA 24 at [87]-[88] (Hayne J), noting "the protest recorded in *The Bill of Rights* (1 Will & Mar Sess 2 c 2) against the assumed 'Power of Dispensing with and Suspending of Lawes and the Execution of Lawes without Consent of Parlyament'".

73 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

74 *Nicholas v The Queen* (1998) 193 CLR 173 at [74] (Gaudron J).

75 *Wainohu v New South Wales* (2011) 243 CLR 181 at [57]-[59], [68] (French CJ and Kiefel J), [98]-[104] (Gummow, Hayne, Crennan and Bell JJ).

In considering whether those requirements have been infringed, the approach described by Allsop P and approved by Bathurst CJ should be borne in mind (*Magaming* at [110]):

> To the extent, however, that any relevant Constitutional limitation rests in whole or in part on human and legal conceptions such as fairness, justice and equality, the assessment of the content and reach of any such Constitutional limitation cannot be concluded, forestalled or foreclosed by Parliament's statement or assertion of the social norm or of its satisfaction of those conceptions.

74 Section 236B(3)(c), in its application to a person who has offended against ss 233A and 233C, requires courts to act contrary to accepted notions of judicial power.

Natural justice

75 Natural justice, like equal justice, "lies at the heart of the judicial process" and "is an incident of the judicial power".[77] A statutorily mandated departure from procedural fairness is incompatible with the exercise of judicial power.[78] Historically, natural justice had an "indispensable" place in sentencing, even where sentences were mandatory, by administration of the allocutus.[79]

76 Consideration of whether the process required of the court is procedurally fair extends beyond "[t]he nature of the jurisdiction exercised and the statutory provisions governing its exercise" to "the whole of the circumstances in the field of inquiry".[80] The inquiry cannot be limited to the law applied or the sentence imposed. In that regard, it is instructive to recall Gageler J's recent restatement of the proper inquiry:

> It is not enough that a decision reached by an unfair process be "correct" in the result. The relevant inquiry is always "what procedures should have been followed?", never "what decision should the decision-maker have made[?]" or "what reasons did the decision-maker give for the conclusion reached[?]". The application of the principle to a court is stronger because the appearance of a fair hearing in a court and the maintenance of confidence in the curial process are constitutionally mandated.[81]

77 The function required of the court must be, at least, "a step in an overall process that, viewed in its entirety, entails procedural fairness".[82] In this case, the overall criminal process of charging, prosecuting and sentencing, viewed in its entirety, did not entail procedural fairness for the appellant. It was not a necessary consequence of his conduct that he be imprisoned for five years upon conviction; that became a consequence only because of decisions made in respect of which he was not heard. And like the unidentified material placed before the committee that

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76 *X7 v Australian Crime Commission* [2013] HCA 29 at [38] (French CJ and Kiefel J).

77 *South Australia v Totani* (2010) 242 CLR 1 at [62] (French CJ); *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [54] (French CJ); *R v Carroll* (2010) 77 NSWLR 45 at [33] (Allsop P and Johnson J with whom Spigelman CJ, Kirby and Howie JJ agreed).

78 *Condon v Pompano Pty Ltd* [2013] HCA 7 at [194] (Gageler J); *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [54] (French CJ); *Leeth v Commonwealth* (1992) 174 CLR 455 at 470 (Mason CJ, Dawson and McHugh JJ); *Western Australia v Ward* (1997) 76 FCR 492 at 497-498.

79 Sir John Baker, 'Criminal Courts and Procedure at Common Law 1550-1800' in Cockburn (ed), *Crime in England: 1550-1800* (London, 1977) at 40-42, citing *R v Geary* (1688) 2 Salk 630.

80 *Coulter v The Queen* (1988) 164 CLR 350 at 356 (Mason CJ, Wilson and Brennan JJ).

81 *Condon v Pompano Pty Ltd* [2013] HCA 7 at [209] (Gageler J), citing *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [19] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

82 *Condon v Pompano Pty Ltd* [2013] HCA 7 at [192] (Gageler J).

appears to have led to the more serious charge in *Ex parte Gerard*,[83] those decisions may have been based on information which the appellant never saw and had no opportunity to challenge. His sentence was reached by an unfair process. Section 236B(3)(c) mandated that process.

78 If the constitutional separation of prosecutorial and judicial functions requires that pre-trial decisions involving prosecutorial discretion be impervious to judicial review[84] for a denial of procedural fairness,[85] that requirement must be counterbalanced by the constitutional preservation of the capacity of the courts to stay proceedings in which practical unfairness becomes manifest,[86] including in sentencing. The intractable mandatory language of s 236B(3) is inconsistent with the preservation of that capacity.

10 **Equality before the law and equal justice**

79 Equality before the law is among the "essential attributes of judicial power, State or federal".[87] It is an aspect of the rule of law,[88] and is embodied by "fundamental principles of equal justice":

> Equal justice requires identity of outcome in cases that are *relevantly* identical. It requires *different* outcomes in cases that are different in some relevant respect.[89]

80 Equal justice "lies at the heart of the judicial power",[90] "inheres in the exercise of judicial power",[91] and "is a fundamental element in any rational and fair system of criminal justice".[92] In *Elias*, this court confirmed that the administration of criminal justice "should be systematically fair" and consonant with "reasonable consistency".[93] Section 236B is incompatible with that requirement. To mandate different outcomes for co-offenders whose circumstances are
20 relevantly identical is to depart from equal justice. It is not a relevant difference that, all other things being equal, one person has been convicted under s 233A and a co-offender has been convicted under s 233C: they are, in substance, the same offence. Both provisions proscribe the offending conduct, but in a way which leads to outcomes that are irreconcilably different.

81 In this case, notwithstanding the appellant's plea of guilty at the earliest possible opportunity, the outcome for the appellant was the same as that for his co-offender, Daeng Taru Ali, who pleaded not guilty and was convicted.[94] Other departures from equal justice may be readily envisaged, especially where different processes are engaged based on proofs of evidence or other material about the respective roles of different offenders. If such a decision is based on

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83 *Ex parte Gerard & Co Pty Ltd; Re Craig* (1944) 44 SR (NSW) 370 at 373 (Jordan CJ), 379 (Davidson J); *Ex parte Coorey* (1944) 45 SR (NSW) 287 at 314 (Davidson J).

84 *Likiardopoulos v The Queen* (2012) 86 ALJR 1168 at [37] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

85 Notwithstanding the prosecutorial duty of fairness in the exercise of "important public functions": *Elias v The Queen* [2013] HCA 31 at [35] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

86 *Condon v Pompano Pty Ltd* [2013] HCA 7 at [187]-[212] (Gageler J).

87 *R v Carroll* (2010) 77 NSWLR 45 at [33] (Allsop P and Johnson J; Spigelman CJ, Kirby and Howie JJ agreeing).

88 *Green v The Queen* (2011) 244 CLR 462 at [28] (French CJ, Crennan and Kiefel JJ); *Taikato v The Queen* (1996) 186 CLR 454 at 465 (Brennan CJ, Toohey, McHugh and Gummow JJ).

89 *Wong v The Queen* (2001) 207 CLR 584 at [65] (Gaudron, Gummow and Hayne JJ).

90 *Cameron v The Queen* (2002) 209 CLR 339 at [44] (McHugh J).

91 *Adams v R* [2011] VSCA 77 at [76] (Nettle and Redlich JJA and Kyrou AJA); *Farrugia v R* [2011] VSCA 24 at [29] (Redlich and Bongiorno JJA).

92 *Green v The Queen* (2011) 244 CLR 462 at [28] (French CJ, Crennan and Kiefel JJ); *Lowe v The Queen* (1984) 154 CLR 606 at 610-611 (Mason J).

93 *Elias v The Queen* [2013] HCA 31 at [28] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

94 Cf *Atherden v Western Australia* [2010] WASCA 33 at [42]-[43] (Wheeler JA).

human source intelligence identifying a person as an organiser, it will constrain the court to sentence one co-offender on an assumption that his or her conduct has been singled out for condign punishment while the identical conduct proved in court against other co-offenders is to be punished on its merits unconstrained by any statutory minimum.

82 In *Green* (2011) 244 CLR 462, this court held that "[u]njustifiable disparity is an infringement of the equal justice norm" (at [32]). Disparity is only "justifiable" by reason of "differences between co-offenders such as age, background, criminal history, general character and the part each has played in the relevant criminal conduct or enterprise" (at [31]). The disparity that will inevitably ensue from ss 233A, 233C and s 236B is not based on justifiable differences.

10 83 In *Leeth* (1992) 174 CLR 455, by different processes of reasoning, all members of the court accepted that discrimination between, and different treatment of, classes of federal offenders could lead to invalidity. The majority looked for support in the head of power (at 469, 475, 480). Gaudron J relied on the judicial process (at 502-503). Deane and Toohey JJ found a doctrine of substantive legal equality (at 488-489). In *Cameron* (2002) 209 CLR 339, the answer given by the majority to McHugh J's concern (at [44]) about the compatibility of a departure from equal justice with Ch III was that differential treatment of persons in sentencing should be the product of a distinction which is appropriate and adapted to the attainment of a proper objective (at [15]). Decisions elsewhere also point to the requirement that the factum adopted as constituting the dissimilarity or point of departure must not be purely arbitrary and must bear a reasonable
20 relation to the object of the law.[95] For the reasons previously given, s 236B operates by reference to an arbitrary criterion disconnected from the object of the law.

Reasons

84 For courts exercising federal jurisdiction, the duty to give reasons for the exercise of judicial power has a constitutional dimension.[96] The duty extends to the sentencing of offenders,[97] and in that context is inextricably interlinked with equal justice:

> To focus on the result of the sentencing task, to the exclusion of the reasons which support the result, is to depart from fundamental principles of equal justice.[98]

85 That is because the use of predetermined numerical sentences "cannot avoid outcomes which fail to reflect the circumstances of the offence *and* the offender (with absurd and unforeseen
30 results)".[99] The use of predetermined sentences is also apt to result in an opaque sentencing outcome that cannot be "assessed according to its own terms" and that utilises confidence in the impartial decision-making of judges "to support inscrutable decision-making".[100]

86 The sentencing process in this case was wholly inscrutable. Blanch J's only reason for imposing a sentence "as heavy as the mandatory penalties" was that his Honour was "constrained by the

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95 *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 at 673-674 (Lord Diplock).

96 Constitution s 73(ii); *Wainohu v New South Wales* (2011) 243 CLR 181 at [57]-[59], [68] (French CJ and Kiefel J), [98]-[104] (Gummow, Hayne, Crennan and Bell JJ); *Dinsdale v The Queen* (2000) 202 CLR 321 at [21] (Gaudron and Gummow JJ).

97 *R v Thomson and Houlton* (2000) 49 NSWLR 383 at [42]-[44] (Spigelman CJ with whom Wood CJ at CL, Foster A-JA, Grove and James JJ agreed); *Harris v The Queen* [2005] NSWCCA 432 at [22] (Studdert J with whom Grove and Whealy JJ agreed).

98 *Wong v The Queen* (2001) 207 CLR 584 at [65] (Gaudron, Gummow and Hayne JJ).

99 *Wong v The Queen* (2001) 207 CLR 584 at [78] (Gaudron, Gummow and Hayne JJ).

100 *Wainohu v New South Wales* (2011) 243 CLR 181 at [94], [109] (Gummow, Hayne, Crennan and Bell JJ).

legislation to impose that sentence."[101] That reason assumes the validity of the legislation challenged. His Honour was unable to give reasons for that which determined the critical component of the appellant's sentence, being the matters that led to the invocation of the process under ss 233C and 236B. That no reasons could be given for the most important aspect of the sentence, the minimum term, emphasises that the function was non-judicial.

Proportionality in sentencing

87 This court has accepted that proportionality in sentencing is a "basic"[102] and "fundamental"[103] precept[104] that sets limits on the level of permissible retribution based on the seriousness of the offence.[105] That cardinal principle has been applied at least since the Bill of Rights 1688.[106]

10 88 The provenance of the principle means that even the most ardent supporters of mandatory sentences accept that "it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime".[107] The "appropriate" punishment may vary with time, but it remains subject to limits:

> That the common law and legal punishment in earlier eras exhibited a severity that might shock today, does not mean that by the values and political and legal structures of the time any severity could not be justified, nor does it mean that contemporary conceptions of punishment need embrace any such severity.[108]

89 It is for the same reason that the relevance of a maximum penalty may diminish over time.[109] Fixed minimum sentences "have been in general decline for the last two centuries".[110]
20 Imprisonment is now "the most serious penalty known to law" and, at common law, a full-time custodial sentence "is only a last resort".[111] It is also now accepted that the "administration of the criminal law involves individualised justice, the attainment of which is acknowledged to involve the exercise of a wide sentencing discretion".[112] Thus "the punishment to be exacted should reflect what an offender has done" and "should not be affected by the way in which the boundaries of particular offences are drawn".[113]

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101 Remarks on sentence, Blanch J, at 2.

102 *Hoare v The Queen* (1989) 167 CLR 348 at 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ).

103 *Chester v The Queen* (1988) 165 CLR 611 at 618 (Mason CJ, Brennan, Deane, Toohey and Gaudron JJ).

104 *Muldrock v The Queen* (2011) 244 CLR 120 at [60] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

105 *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 472-474 (Mason CJ, Brennan, Dawson and Toohey JJ), 485-486 (Wilson J); *Baumer v The Queen* (1988) 166 CLR 51 at 57-58 (Mason CJ, Wilson, Deane, Dawson and Gaudron JJ).

106 Anthony Granucci, 'Nor Cruel and Unusual Punishments Inflicted: The Original Meaning' (1969) 57(4) *California Law Review* 839 at 847, 860.

107 *Palling v Corfield* (1970) 123 CLR 52 at 58 (Barwick CJ); *R v Geddes* (1936) 36 SR (NSW) 554 at 555 (Jordan CJ).

108 *Karim v R; Magaming v R* [2013] NSWCCA 23 at [119] (Allsop P with whom Bathurst CJ agreed).

109 *Elias v The Queen* [2013] HCA 31 at [27] (French CJ, Hayne, Kiefel, Bell and Keane JJ), citing *Markarian v The Queen* (2005) 228 CLR 357 at [30] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

110 *Hili v The Queen* (2010) 242 CLR 520 at [74] (Heydon J).

111 *Parker v Director of Public Prosecutions* (1992) 28 NSWLR 282 at 296 (Kirby P with whom Handley and Sheller JJA agreed), citing *R v James* (1985) 14 A Crim R 364.

112 *Elias v The Queen* [2013] HCA 31 at [27] (French CJ, Hayne, Kiefel, Bell and Keane JJ). See also *South Australia v Totani* (2010) 242 CLR 1 at [232] (Hayne J).

113 *Pearce v The Queen* (1998) 149 CLR 610 at [40] (McHugh, Hayne and Callinan JJ).

90 In *Veen* (1988) 164 CLR 465, it was held there is a "clear" (at 474) distinction between an exercise of the sentencing discretion "having regard to the protection of society among other factors", which is permissible, and extending a sentence beyond what is appropriate to the crime "merely to protect society", which is impermissible (at 473). The practical observance of that distinction "calls for a judgment of experience and discernment" (at 474). Section 236B(3)(c) requires the court to extend a sentence "merely to protect society" without that judgment.

91 It does so by elevating general deterrence above all else and attributing to it a specific numerical value; a process which "distorts the already difficult balancing exercise".[114] Without due regard for "the gravity of the offence viewed objectively", "the other factors requiring consideration in order to arrive at the proper sentence to be imposed cannot properly be given their place".[115] It also reverses the principle that general deterrence should be given "very little weight" in sentencing an offender who "is not an appropriate medium for making an example to others".[116]

92 Sentencing judges have decried the sentences this law requires them to impose. The provisions have been described as "savage";[117] "too severe";[118] "a glaring example of how mandatory penalties can sometimes prohibit a court in delivering a fair and just result";[119] and, for repeat offences, "completely out of kilter" with offences involving higher maximum penalties and "far greater moral culpability".[120] At least one judge has expressly held that the sentences are often "arbitrary" and may involve a breach of the prohibition on arbitrary detention imposed by art 9(1) of the *International Covenant on Civil and Political Rights*.[121]

93 Accepted notions of judicial power have developed to a point whereby it can be said that the judicial function in sentencing necessarily entails a sufficient element of evaluative discretion to enable the court to avoid an unjust, arbitrary or cruel sentence. Judicial review of sentences upon the facts for manifest excess or plain injustice has a long history.[122] The potentiality of injustice in mandatory punishment is "impossible to gainsay", and the minimum sentences under s 236B are "harsh": *Magaming* at [105], [116]. They inevitably involve the imposition of grossly disproportionate sentences having regard to the nature of the offending: *Magaming* at [115].

94 Section 236B(3)(c) abrogates traditional concepts of proportionality and individualised justice to such an extent that it is "inconsistent with civilised standards of humanity and justice"[123] with the sentences required to be imposed by courts "contrary to accepted notions of judicial power".[124]

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114 *Wong v The Queen* (2001) 207 CLR 584 at [76]-[77] (Gaudron, Gummow and Hayne JJ). The exercise is even more difficult where the offender is convicted of multiple offences: *DPP (Cth) v Haidari* [2013] VSCA 149.

115 *R v Dodd* (1991) 57 A Crim R 349 at 354 (Gleeson CJ, Lee CJ at CL and Hunt J).

116 *Muldrock v The Queen* (2011) 244 CLR 120 at [63] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

117 *R v Hasim* (Remarks on sentence, QDC, Martin DCJ, 11 January 2012).

118 *R v Nguyen* (Remarks on sentence, WADC, Yeats DCJ, 5-6 May 2004).

119 *R v Karim* (Remarks on sentence, NSWDC, Conlon DCJ, 27 July 2011).

120 *R v Nafi* (Remarks on sentence, NTSC, Kelly J, 19 May 2011).

121 *R v Mahendra* (Remarks on sentence, NTSC, Blokland J, 1 September 2011).

122 Constitution s 73(ii); *House v The King* (1936) 55 CLR 499 at 505 (Dixon, Evatt and McTiernan JJ).

123 The Hon Michael McHugh AC, 'Does Chapter III of the Constitution protect substantive as well as procedural rights?' in Perram and Pepper (eds), *The Byers Lectures 2000-2012* (Federation Press, 2012) at 42, citing George Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994) at 200-201.

124 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 689 (Toohey J).

Conclusion

95 Prior to the introduction of the minimum sentence, over 92% of offenders received a head sentence of less than five years.[125] It is plain from that statistic that the amendment operates to force courts to impose harsher penalties, not by requiring courts to give greater weight to the object of deterrence,[126] but by requiring the courts to imprison all offenders in all circumstances. The "sole purpose" of the minimum sentence "is to require sentencers to impose heavier sentences than would be proper according to the justice of the case".[127]

96 The pith and substance of the law is to conscript the courts to an adjudicative process that compromises cardinal precepts of the exclusively judicial sentencing function and essential attributes of judicial power. The law eliminates that "capacity in special circumstances to avoid the rigidity of inexorable law" essential to justice,[128] even where practical unfairness becomes manifest, and the law saps to an impermissible degree the appearance of the independence of the courts. Section 236B(3)(c) in its application to s 233C is repugnant to Ch III.

Fraser Henleins* and *Ex parte Coorey

97 The legislative structure considered in *Fraser Henleins Pty Ltd v Cody* (1945) 70 CLR 100 is relevantly identical to that in the present case: *Magaming* at [79]. Two points should be made.

98 First, the *Black Marketing Act 1942* (Cth) was enacted in a context of wartime when the defence power was near its zenith. Section 18 of the Act provided that it "shall continue in operation ... not longer than six months after His Majesty ceases to be engaged in war". The relationship between that context and Ch III attracts special considerations not arising on this appeal.[129]

99 Secondly, in holding the legislation valid, the court adopted the reasoning of the majority in *Ex parte Coorey* (1944) 45 SR (NSW) 287, who considered that interposing the contingency of a conviction saved the statutory scheme from invalidity (at 314-315, 318-320). On the other hand, in holding the law invalid, Jordan CJ said the following (at 300):

> It was pointed out in *Waterside Workers' Federation of Australia v J W Alexander Ltd* that "convictions for offences and the imposition of penalties are matters appertaining exclusively to" the judicial power. ... [The Act] purports to invest a person who is not a competent Court with part of the judicial power of the Commonwealth ... In my opinion, the fact that the penalty is dictated in advance of the trial does not make the encroachment on the judicial power of the Commonwealth any the less real.

100 That is precisely the reasoning that was adopted in *Deaton* and *Ali* and later decisions of the Privy Council. It is required by later decisions of this court including *Boilermakers* and *Lim* and is to be preferred to the reasoning of the majority. The considerations set out in *Wurridjal*[130] and *John v Federal Commissioner of Taxation*[131] do not compel a different a conclusion.

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125 Submission by the Attorney-General's Department to the Senate Standing Committee on Legal and Constitutional Affairs on its inquiry into the *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012* at 5.

126 *Wong v The Queen* (2001) 207 CLR 584 at [71] (Gaudron, Gummow and Hayne JJ), referring to s 6D of the *Sentencing Act 1991* (V), which provides that, in sentencing a "serious offender", the court "must regard the protection of the community from the offender as the principal purpose for which the sentence is imposed" and "may, in order to achieve that purpose, impose a sentence longer than that which is proportionate".

127 *Trenerry v Bradley* (1997) 115 NTR 1 at 11 (Mildren J). See also at 3 (Martin CJ), 9 (Angel J).

128 *Cobiac v Liddy* (1969) 119 CLR 257 at 269 (Windeyer J).

129 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 257-258 (Fullagar J).

130 *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [68] (French CJ).

131 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439.

Palling v Corfield

101 The appellant's arguments are not foreclosed by *Palling v Corfield* (1970) 123 CLR 52. The law was materially different and, in any event, the possibility of constitutional limits was left open.

102 First, s 49(1) of the *National Service Act 1951* (Cth) made it an offence to fail to attend a medical examination upon being served with a notice under that Act. Upon conviction, the prosecution could request that the court ask the offender to enter into a recognisance to the effect that the offender would attend and submit to a medical examination upon being served with any subsequent notice. If the offender refused, he or she was to be imprisoned on certain conditions for up to seven days.

103 Whether the offender was imprisoned at all, and the duration of imprisonment, depended wholly on the offender's unwillingness to comply with the statute after conviction for non-compliance:

(a) imprisonment depended on a refusal to enter into a recognisance to attend any further examination, or the recognisance not being to the court's satisfaction (s 49(2)(b)), or the offender entering into a recognisance and not complying with it (s 49(3)); and

(b) imprisonment would continue only while the offender declined to submit to a medical examination (s 49(4)) to a maximum of seven days (s 49(2)(b)).

104 These considerations reveal that the sentence imposed was not a mandatory sentence in the usual sense: it was a device to compel compliance with the statute, by imprisonment for up to a maximum of seven days. That law is very different to the statutory scheme in this appeal.

105 Secondly, the court expressly left open the possibility of constitutional limits in respect of other statutory schemes. Barwick CJ accepted that, generally, "Parliament can prescribe such penalty as it thinks fit for the offences which it creates", reasoning that it is possible to envisage "circumstances which may warrant the imposition on the court of a duty to impose specific punishment" (at 58). The absence of judicial discretion does not itself lead to invalidity, so that the court must obey the statute in that respect "assuming its validity in other respects" (at 58). But where the imposition of a sentence is conditioned on some contingency, "[t]here may be limits to the choice of the Parliament in respect of such contingencies" (at 59).

106 Upon proper analysis, *Palling* stands for no more than the proposition that, where satisfaction of a condition enlivening a court's duty depends upon a decision made by a member of the executive branch of government, it does not *necessarily* follow that the legislature has thereby authorised the executive to infringe impermissibly upon the judicial power.[132] More is required.

107 That analysis is also consistent with the other judgments. Walsh J saw the law as providing no more than that "there shall be a fixed sentence for a particular offence when some stated condition is satisfied" (at 68), accepting that "[i]f the prosecutor were given power to impose punishment for the offence, no doubt that would be a purported grant to the prosecutor of judicial power" (at 69). Menzies J was similarly circumspect in concluding that Parliament could "to some extent" validly control the exercise of judicial power (at 64). Windeyer and Gibbs JJ saw no need to add to the reasons of the other members of the court (at 65, 70).

108 Accordingly, the arguments advanced by the appellant are not foreclosed by that decision.

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132 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [49] (French CJ).

Severability and resentencing

109 No other valid construction of s 236B(3)(c) in its application to s 233C is reasonably open.[133] Section 15A of the *Acts Interpretation Act 1901* (Cth) may be applied to effect a partial validation of a provision where the operation of the remaining parts of the law remains unchanged. However, an invalid provision is not to be read down if it appears that the law is intended to operate according to its terms or not at all.[134] If s 236B(3)(c) is invalid in its application to s 233C, s 236B(4)(b) is invalid in the same way. The minimum non-parole period prescribed by that provision cannot survive the invalidity of the minimum head sentence.

110 A less severe sentence is warranted in law,[135] being a sentence of a severity appropriate in all the circumstances of the offence.[136] In the court below, the respondent conceded that, in this eventuality, the appellant should have received a less severe sentence.[137]

PART VII LEGISLATION

111 The annexure sets out the applicable statutes, regulations and instruments.

PART VIII ORDERS SOUGHT

112 The appellant seeks the following orders:

1. Appeal allowed.
2. Set aside paragraph 4 of the orders of the Court of Criminal Appeal of the Supreme Court of New South Wales made in respect of the appellant on 15 February 2013 and, in its place, order that the appellant's appeal to that court be allowed.
3. Remit the matter to the Court of Criminal Appeal of the Supreme Court of New South Wales for the appellant to be re-sentenced consistently with the reasons for judgment of this court.

PART IX ESTIMATE OF ORAL ARGUMENT

113 The appellant estimates that two and a half hours are required for his oral argument.

Dated: 12 July 2013

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133 Section 3A of the Migration Act provides that provisions of the Act must be given every valid application.

134 *Victoria v Commonwealth* (1996) 187 CLR 416 at 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

135 *Criminal Appeals Act 1912* (NSW) s 6(3).

136 *Crimes Act 1914* (Cth) s 16A(1).

137 Respondent's supplementary submissions on resentencing dated 22 November 2012 at [15]-[16].

Migration Act 1958

Act No. 62 of 1958 as amended

This compilation was prepared on 7 June 2010
taking into account amendments up to Act No. 51 of 2010

Volume 1 includes: Table of Contents
Sections 1–261K

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on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

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Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

Division 12—Offences in relation to entry into, and remaining in, Australia

Subdivision A—People smuggling and related offences

228A Application of Subdivision

This Subdivision applies in and outside Australia.

229 Carriage of non-citizens to Australia without documentation

(1) The master, owner, agent, charterer and operator of a vessel on which a non-citizen is brought into Australia on or after 1 November 1979 are each guilty of an offence against this section if the non-citizen, when entering Australia:

(a) is not in possession of evidence of a visa that is in effect and that permits him or her to travel to and enter Australia; and

(b) does not hold a special purpose visa; and

(c) is not eligible for a special category visa; and

(d) does not hold an enforcement visa; and

(e) is a person to whom subsection 42(1) applies.

(1A) A person commits an offence if:

(a) the person is a master, owner, agent, charterer or operator of an aircraft; and

(b) the person brings a non-citizen into Australia by air on the aircraft; and

(c) the non-citizen is the holder of a maritime crew visa that is in effect.

(2) A person who is guilty of an offence against this section is liable, upon conviction, to a fine not exceeding $10,000.

(3) An offence against subsection (1) or (1A) is an offence of absolute liability.

Note: For ***absolute liability***, see section 6.2 of the *Criminal Code*.

(4) For the purposes of subsection (1), the defendant bears an evidential burden in relation to establishing that subsection 42(1)

does not apply to a person because of subsection 42(2) or (2A) or regulations made under subsection 42(3).

Note: For ***evidential burden***, see section 13.3 of the *Criminal Code*.

(5) It is a defence to a prosecution for an offence against subsection (1) in relation to the bringing of a non-citizen into Australia on a vessel if it is established:

(a) that the non-citizen was, when he or she boarded or last boarded the vessel for travel to Australia, in possession of evidence of a visa that was in effect and that permitted him or her to travel to and enter Australia, being a visa that:

(i) did not appear to have been cancelled; and

(ii) was expressed to continue in effect until, or at least until, the date of the non-citizen's expected entry into Australia;

(b) that the master of the vessel had reasonable grounds for believing that, when the non-citizen boarded or last boarded the vessel for travelling to and entering Australia, the non-citizen:

(i) was eligible for a special category visa; or

(ii) was the holder of a special purpose visa; or

(iii) would, when entering Australia, be the holder of a special purpose visa; or

(iv) was the holder of an enforcement visa; or

(v) would, when entering Australia, be the holder of an enforcement visa; or

(c) that the vessel entered Australia from overseas only because of:

(i) the illness of a person on board the vessel;

(ii) stress of weather; or

(iii) other circumstances beyond the control of the master.

(5A) It is a defence to a prosecution for an offence against subsection (1A) in relation to the bringing of a non-citizen into Australia on an aircraft if it is established that:

(a) the non-citizen was, when he or she boarded or last boarded the aircraft for travel to Australia, in possession of evidence of another class of visa that was in effect and that permitted him or her to travel to and enter Australia, being a visa that:

(i) did not appear to have been cancelled; and

(ii) was expressed to continue in effect until, or at least until, the date of the non-citizen's expected entry into Australia; or

(b) the aircraft entered Australia from overseas only because of:

(i) the illness of a person on board the aircraft; or

(ii) stress of weather; or

(iii) other circumstances beyond the control of the master.

(6) A defendant bears a legal burden in relation to the matters in subsection (5) or (5A).

230 Carriage of concealed persons to Australia

(1) The master, owner, agent and charterer of a vessel are each guilty of an offence against this section if an unlawful non-citizen is concealed on the vessel when it arrives in the migration zone.

(1A) The master, owner, agent and charterer of a vessel are each guilty of an offence against this section if:

(a) a person is concealed on the vessel when it arrives in Australia; and

(b) the person would, if in the migration zone, be an unlawful non-citizen.

(1B) An offence against subsection (1) or (1A) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(2) Subsection (1) does not apply if the master of the vessel:

(a) as soon as it arrives in the migration zone, gives notice to an officer that the non-citizen is on board; and

(b) prevents the non-citizen from landing without an officer having had an opportunity to question the non-citizen.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

(2A) Subsection (1A) does not apply if the master of the vessel:

(a) as soon as it arrives in Australia, gives notice to an officer that the person is on board; and

(b) prevents the person from leaving the vessel without an officer having had an opportunity to question the person.

Penalty: $10,000.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2A) (see subsection 13.3(3) of the *Criminal Code*).

231 Master of vessel to comply with certain requests

(1) The master of a vessel arriving in Australia must comply with any request by an authorised officer to:

(a) give the authorised officer a list of all persons on the vessel and prescribed particulars of each of them; or

(b) gather together those persons or such of them as are specified by the officer; or

(c) make sure of the disembarkation from the vessel of those persons or such of them as are specified by the officer.

(2) If:

(a) a person is on a vessel that has arrived in Australia; and

(b) that person's name is not on a list of persons on the vessel given under subsection (1);

the person is taken, for the purposes of section 230, to have been concealed on the vessel when it arrived.

232 Penalty on master, owner, agent and charterer of vessel

(1) Where:

(a) a non-citizen:

(i) enters Australia on a vessel; and

(ii) because he or she is not the holder of a visa that is in effect, or because of section 173, becomes upon entry an unlawful non-citizen; and

(iii) is a person to whom subsection 42(1) applies; or

(b) a removee or deportee who has been placed on board a vessel for removal or deportation leaves the vessel in Australia otherwise than in immigration detention under this Act;

the master, owner, agent and charterer of the vessel shall each be deemed to be guilty of an offence against this Act punishable by a fine not exceeding 100 penalty units.

(1A) An offence against subsection (1) is an offence of absolute liability.

Note: For ***absolute liability***, see section 6.2 of the *Criminal Code*.

(1B) For the purposes of paragraph (1)(a), the defendant bears an evidential burden in relation to establishing that subsection 42(1) does not apply to a person because of subsection 42(2) or (2A) or regulations made under subsection 42(3).

Note: For ***evidential burden***, see section 13.3 of the *Criminal Code*.

(2) It is a defence to a prosecution for an offence against subsection (1) in relation to the entry of a non-citizen to Australia on a vessel if it is established:

(a) that the non-citizen was, when he or she boarded or last boarded the vessel for travel to Australia, in possession of evidence of a visa that was in effect and that permitted him or her to travel to and enter Australia, being a visa that:

(i) did not appear to have been cancelled; and

(ii) was expressed to continue in effect until, or at least until, the date of the non-citizen's expected entry into Australia; or

(b) that the master of the vessel had reasonable grounds for believing that, when the non-citizen boarded or last boarded the vessel for travelling to and entering Australia, the non-citizen:

(i) was eligible for a special category visa; or

(ii) was the holder of a special purpose visa; or

(iii) would, when entering Australia, be the holder of a special purpose visa; or

(iv) was the holder of an enforcement visa; or

(v) would, when entering Australia, be the holder of an enforcement visa; or

(c) that the vessel entered Australia from overseas only because of:

(i) the illness of a person on board the vessel; or

(ii) stress of weather; or

(iii) other circumstances beyond the control of the master.

(3) A defendant bears a legal burden in relation to the matters in subsection (2).

233A Offence of people smuggling

(1) A person (the ***first person***) commits an offence if:

(a) the first person organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of another person (the ***second person***); and

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

(c) the second person had, or has, no lawful right to come to Australia.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

(2) Absolute liability applies to paragraph (1)(b).

Note: For absolute liability, see section 6.2 of the *Criminal Code*.

(3) For the purposes of this Act, an offence against subsection (1) is to be known as the offence of people smuggling.

233B Aggravated offence of people smuggling (exploitation, or danger of death or serious harm etc.)

(1) A person (the ***first person***) commits an offence against this section if the first person commits the offence of people smuggling (the ***underlying offence***) in relation to another person (the ***victim***) and any of the following applies:

(a) the first person commits the underlying offence intending that the victim will be exploited after entry into Australia (whether by the first person or another);

(b) in committing the underlying offence, the first person subjects the victim to cruel, inhuman or degrading treatment (within the ordinary meaning of that expression);

(c) in committing the underlying offence:

(i) the first person's conduct gives rise to a danger of death or serious harm to the victim; and

(ii) the first person is reckless as to the danger of death or serious harm to the victim that arises from the conduct.

Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.

Note: Sections 236A and 236B limit conviction and sentencing options for offences against this section.

(2) There is no fault element for the physical element of conduct described in subsection (1), that the first person commits the underlying offence, other than the fault elements (however described), if any, for the underlying offence.

(3) To avoid doubt, the first person may be convicted of an offence against this section even if the first person has not been convicted of the underlying offence.

(4) In this section:

exploit has the same meaning as in the *Criminal Code*.

forced labour has the same meaning as in section 73.2 of the *Criminal Code*.

serious harm has the same meaning as in the *Criminal Code*.

sexual servitude has the meaning given by section 270.4 of the *Criminal Code*.

slavery has the meaning given by section 270.1 of the *Criminal Code*.

233C Aggravated offence of people smuggling (at least 5 people)

(1) A person (the ***first person***) commits an offence if:

(a) the first person organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of at least 5 persons (the ***other persons***); and

(b) at least 5 of the other persons are non-citizens; and

(c) the persons referred to in paragraph (b) who are non-citizens had, or have, no lawful right to come to Australia.

Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.

Note: Sections 236A and 236B limit conviction and sentencing options for offences against this section.

(2) Absolute liability applies to paragraph (1)(b).

Note: For absolute liability, see section 6.2 of the *Criminal Code*.

(3) If, on a trial for an offence against subsection (1), the trier of fact:

(a) is not satisfied that the defendant is guilty of that offence; and

(b) is satisfied beyond reasonable doubt that the defendant is guilty of the offence of people smuggling;

the trier of fact may find the defendant not guilty of an offence against subsection (1) but guilty of the offence of people smuggling, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

233D Supporting the offence of people smuggling

(1) A person (the ***first person***) commits an offence if:

(a) the first person provides material support or resources to another person or an organisation (the ***receiver***); and

(b) the support or resources aids the receiver, or a person or organisation other than the receiver, to engage in conduct constituting the offence of people smuggling.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

(2) Subsection (1) does not apply if the conduct constituting the offence of people smuggling relates, or would relate, to:

(a) the first person; or

(b) a group of persons that includes the first person.

(3) To avoid doubt, the first person commits an offence against subsection (1) even if the offence of people smuggling is not committed.

233E Concealing and harbouring non-citizens etc.

(1) A person (the ***first person***) commits an offence if:

(a) the first person conceals another person (the ***second person***); and

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

(c) the first person engages in the conduct with the intention that the second person will enter Australia in contravention of this Act.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

(2) A person (the ***first person***) commits an offence if:

(a) the first person conceals another person (the ***second person***); and

(b) the second person is an unlawful non-citizen or a deportee; and

(c) the first person engages in the conduct with the intention of preventing discovery by an officer of the second person.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

(3) A person (the ***first person***) commits an offence if:

(a) the first person harbours another person (the ***second person***); and

(b) the second person is an unlawful non-citizen, a removee or a deportee.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

234 False documents and false or misleading information etc. relating to non-citizens

(1) A person shall not, in connexion with the entry, proposed entry or immigration clearance, of a non-citizen (including that person himself or herself) into Australia or with an application for a visa or a further visa permitting a non-citizen (including that person himself or herself) to remain in Australia:

(a) present, or cause to be presented, to an officer or a person exercising powers or performing functions under this Act a document which is forged or false;

(b) make, or cause to be made, to an officer or a person exercising powers or performing functions under this Act a statement that, to the person's knowledge, is false or misleading in a material particular; or

(c) deliver, or cause to be delivered, to an officer or a person exercising powers or performing functions under this Act, or otherwise furnish, or cause to be furnished for official purposes of the Commonwealth, a document containing a statement or information that is false or misleading in a material particular.

(2) A person shall not transfer or part with possession of a document:

(a) with intent that the document be used to help a person, being a person not entitled to use it, to gain entry, or to remain in, Australia or to be immigration cleared; or

(b) where the person has reason to suspect that the document may be so used.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

234A Aggravated offence of false documents and false or misleading information etc. relating to non-citizens (at least 5 people)

(1) A person must not, in connection with:

(a) the entry or proposed entry into Australia, or the immigration clearance, of a group of 5 or more non-citizens (which may include that person), or of any member of such a group; or

(b) an application for a visa or a further visa permitting a group of 5 or more non-citizens (which may include that person), or any member of such a group, to remain in Australia;

do any of the following:

(c) present, or cause to be presented, to an officer or a person exercising powers or performing functions under this Act a document that the person knows is forged or false;

(d) make, or cause to be made, to an officer or a person exercising powers or performing functions under this Act a statement that the person knows is false or misleading in a material particular;

(e) deliver, or cause to be delivered, to an officer or a person exercising powers or performing functions under this Act, or otherwise give, or cause to be given, for official purposes of the Commonwealth, a document containing a statement or information that the person knows is false or misleading in a material particular.

Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.

Note: Sections 236A and 236B limit conviction and sentencing options for offences against this section.

(2) A person must not transfer or part with possession of a document or documents:

(a) with the intention that the document or documents be used to help a group of 5 or more people, none of whom are entitled to use the document or documents, or any member of such a group, to gain entry into or remain in Australia, or to be immigration cleared; or

(b) if the person has reason to suspect that the document or documents may be so used.

Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.

Note: Sections 236A and 236B limit conviction and sentencing options for offences against this section.

235 Offences in relation to work

(1) If:

(a) the temporary visa held by a non-citizen is subject to a prescribed condition restricting the work that the non-citizen may do in Australia; and

(b) the non-citizen contravenes that condition;

the non-citizen commits an offence against this section.

Note: Subdivision C of this Division also contains offences relating to work by a non-citizen in breach of a visa condition.

(2) For the purposes of subsection (1), a condition restricts the work that a non-citizen may do if, but not only if, it prohibits the non-citizen doing:

(a) any work; or

(b) work other than specified work; or

(c) specified work.

(3) An unlawful non-citizen who performs work in Australia whether for reward or otherwise commits an offence against this subsection.

Note: Subdivision C of this Division also contains offences relating to work by an unlawful non-citizen.

(4) If:

(a) there is a criminal justice certificate or a criminal justice stay warrant about a non-citizen; and

(b) the person does any work within the meaning of subsection 160(2), in Australia, whether for reward or otherwise;

then without limiting the operation of any other provision of this Act, the person commits an offence against this subsection.

(4A) Subsection (4) does not apply to a non-citizen who holds a criminal justice stay visa, but this subsection does not affect the operation of subsection (1).

Note: A defendant bears an evidential burden in relation to the matters in subsection (4A) (see subsection 13.3(3) of the *Criminal Code*).

(4B) An offence against subsection (1), (3) or (4) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(5) The penalty for an offence against subsection (1), (3) or (4) is a fine not exceeding $10,000.

(6) For the purposes of this section, a reference in a visa, and the reference in subsection (3), to the performance of any work in Australia by a person, shall each be read as not including a reference to the performance by the person of any work of a prescribed kind or of work in prescribed circumstances.

(7) To avoid doubt, for the purposes of this section, a reference in a visa, and the reference in subsection (3), to the performance of any work in Australia by a person, does not refer to engaging in:

(a) an activity in which a person who is a detainee in immigration detention voluntarily engages where the activity is of a kind approved in writing by the Secretary for the purposes of this paragraph; or

(b) an activity in which a person who is a prisoner in a prison or remand centre of the Commonwealth, a State or a Territory engages as a prisoner; or

(c) an activity in which a person engages in compliance with:

(i) a sentence passed, or an order made, under subsection 20AB(1) of the *Crimes Act 1914* (community service orders etc.); or

(ii) a community service order, a work order, a sentence of periodic detention, an attendance centre order, a sentence of weekend detention, an attendance order, or a

similar sentence or order, passed or made under the law of a State or Territory.

236 Offences relating to visas

(1) A person is guilty of an offence if:

(a) the person uses a visa with the intention of:

(i) travelling to Australia; or

(ii) remaining in Australia; or

(iii) identifying himself or herself; and

(b) the visa is a visa that was granted to another person.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

(2) A person is guilty of an offence if:

(a) the person has a visa in his or her possession or under his or her control; and

(b) the visa is a visa that was not granted to the person.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

(3) Subsection (2) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

(4) The fault element for paragraph (2)(a) is intention.

Note: Section 5.2 of the *Criminal Code* defines ***intention***.

236A No discharge of offenders without proceeding to conviction for certain offences

The court may make an order under section 19B of the *Crimes Act 1914* in respect of a charge for an offence against section 233B, 233C or 234A only if it is established on the balance of probabilities that the person charged was aged under 18 years when the offence was alleged to have been committed.

236B Mandatory minimum penalties for certain offences

(1) This section applies if a person is convicted of an offence against section 233B, 233C or 234A.

(2) This section does not apply if it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed.

(3) The court must impose a sentence of imprisonment of at least:
  (a) if the conviction is for an offence against section 233B—8 years; or
  (b) if the conviction is for a repeat offence—8 years; or
  (c) in any other case—5 years.

(4) The court must also set a non-parole period of at least:
  (a) if the conviction is for an offence to which paragraph (3)(a) or (b) applies—5 years; or
  (b) in any other case—3 years.

(5) A person's conviction for an offence is for a ***repeat offence*** if:
  (a) in proceedings after the commencement of this section (whether in the same proceedings as the proceedings relating to the offence, or in previous proceedings), a court:
    (i) has convicted the person of another offence, being an offence against section 233B, 233C or 234A of this Act; or
    (ii) has found, without recording a conviction, that the person has committed another such offence; or
  (b) in proceedings after the commencement of the *Border Protection (Validation and Enforcement Powers) Act 2001* (whether in the same proceedings as the proceedings relating to the offence, or in previous proceedings), a court:
    (i) has convicted the person of another offence, being an offence against section 232A or 233A of this Act as in force before the commencement of this section; or
    (ii) has found, without recording a conviction, that the person has committed another such offence.

(6) In this section:

non-parole period has the same meaning as it has in Part IB of the *Crimes Act 1914*.

Government Departments

Attorney-General

Director of Public Prosecutions— Attorney-General's Direction 2012

Director of Public Prosecutions Act 1983

I, Nicola Louise Roxon, Attorney-General, having consulted the Director of Public Prosecutions (the ***Director***), give the following direction under subsection 8(1) of the *Director of Public Prosecutions Act 1983*.

1. The Director must not institute, carry on or continue to carry on a ***prosecution*** for an offence under section 233C of the *Migration Act 1958* against a person who was a ***member of the crew*** on a vessel involved in the bringing or coming, or entry or proposed entry, of unlawful non-citizens to Australia unless the Director is satisfied that:
   (a) the person has committed a ***repeat offence*** or may be convicted of a repeat offence in the same proceedings; or
   (b) the person's role in the people smuggling venture extended beyond that of a crew member; or
   (c) a death occurred in relation to the people smuggling venture.
2. This direction does not apply to any proceedings, including appeals, in relation to an offence a person has been sentenced for prior to the date of this direction.
3. To avoid doubt this direction applies to proceedings where a person has been convicted of an offence but not sentenced prior to the date of this direction, or where a person has pleaded guilty but not been sentenced prior to the date of this direction.
4. This direction also applies to prosecutions against section 232A or section 233A of the *Migration Act 1958* (repealed) as in force before the commencement of section 236B of the *Migration Act 1958*.
5. In those prosecutions to which paragraph 1 applies, the Director must consider instituting, carrying on or continuing to carry on a prosecution against the person pursuant to section 233A of the *Migration Act 1958* in accordance with the *Prosecution Policy of the Commonwealth*.

6. This general policy should be pursued, and the steps set out above should be taken, in a manner consistent with the *Prosecution Policy of the Commonwealth.*

7. In this direction:

member of the crew includes the captain or master of a vessel.

repeat offence is an offence a person has committed if:

(a) whether in the same proceedings as the proceedings relating to the offence, or in previous proceedings, a court:

(i) has convicted the person of another offence, being an offence against section 233A of the *Migration Act 1958*; or

(ii) has found, without recording a conviction, that the person has committed such an offence; or

(b) the person has been convicted of an offence with the same meaning of 'repeat offence' in subsection 236B(5) of the *Migration Act 1958*.

Dated 27 August 2012

ATTORNEY-GENERAL