IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S31 OF 2017**

BETWEEN: **JOHN FALZON**
Plaintiff

AND: **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**
Defendant

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

Filed on behalf of the Defendant and the Commonwealth Attorney-General (Intervening) by:

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PART I PUBLICATION

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

PART II ISSUES

2. These are the joint submissions of the Defendant (**Minister**) and the Attorney-General of the Commonwealth, who intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) (together, the **Commonwealth**).

3. Section 501(3A) of the *Migration Act 1958* (Cth) (**the Act**) requires the Minister to cancel a non-citizen's visa if the Minister is satisfied that the non-citizen has been convicted of certain offences and is serving a full-time custodial sentence. Does s 501(3A) purport to confer the judicial power of the Commonwealth on the Minister contrary to Ch III of the Constitution? The Commonwealth contends that the answer is "no".

PART III SECTION 78B NOTICE

4. The Plaintiff's notices under s 78B of the *Judiciary Act* are sufficient.

PART IV FACTS

5. The Plaintiff is a national of Malta who arrived in Australia on 29 February 1956 [**AB 23 [1]-[2]**]. Between 1 September 1984 and 10 March 2016, he held a Class BF Transitional (permanent) visa [**AB 192 [1]**].

6. On 26 June 2008, the Plaintiff was convicted on one count of trafficking a large commercial quantity of cannabis, comprising eight pounds of dried cannabis and 1,881 cannabis plants. He was sentenced to 11 years' imprisonment [**AB 31, 35, 39**].

7. It was not the Plaintiff's first trafficking offence. On 26 September 1995, the Plaintiff was convicted of four counts of drug trafficking [**AB 31**]. Apart from those trafficking offences, the Plaintiff's criminal record also includes convictions for assault

occasioning actual bodily harm, two counts of theft, handling/receiving/retaining stolen goods and cruelty to animals [**AB 31**].

8. On 10 March 2016, a delegate of the Minister cancelled the Plaintiff's visa under s 501(3A) of the Act [**AB 10**]. At that time, the Plaintiff was imprisoned, on a full-time basis, in Loddon Prison in Victoria [**AB 192 [4]**].

9. On 15 March 2016, the Plaintiff applied for revocation of the delegate's decision to cancel his visa under s 501CA(4) of the Act [**AB 17**]. On 10 January 2017, the Assistant Minister for Immigration and Border Protection decided not to revoke the delegate's decision [**AB 190**].

PART V APPLICABLE PROVISIONS

10. The Commonwealth accepts the accuracy of the Plaintiff's statement of applicable constitutional provisions, statutes and regulations.

PART VI ARGUMENT

A. SUMMARY

11. In its terms and practical operation, s 501(3A) of the Act requires the Minister to cancel a non-citizen's visa in certain circumstances. This power to determine whether a non-citizen can enter or remain in Australia is executive in character. Its exercise forms no part of the judicial power of the Commonwealth.

12. That s 501(3A) operates on a non-citizen having been convicted of certain offences does not convert the Minister's power to determine who may remain in Australia into an exercise of judicial power. The Parliament has a broad choice as to the factum upon which the power of cancellation will operate.

13. A non-citizen whose visa is cancelled under s 501(3A) is in no different position from other non-citizens who do not hold a visa in Australia. He or she must be detained pursuant to ss 189 and 196 of the Act pending removal, deportation or the grant of a visa. The validity of those sections is not challenged in this proceeding, despite the fact that it is those provisions that require the Plaintiff's detention.

14. The Plaintiff attacks s 501(3A) on the misconceived basis that it confers upon the Minister a power to detain non-citizens. What he contends for is, in substance, a limitation on the Parliament's and the Executive's power to determine which non-citizens may enter and remain in Australia. The existence of such a limitation must be rejected. That is particularly true where the proposed limitation would operate in favour of non-citizens who have been convicted of serious criminal offences.

15. Even if (which is denied) the validity of s 501(3A) is to be determined on the basis that it authorises or causes detention, s 501(3A) still does not confer the judicial power of the Commonwealth on the Minister. A non-citizen whose visa is cancelled pursuant to s 501(3A) is detained for the accepted non-punitive purpose of excluding him or her from the Australian community pending removal or deportation. Detention of that kind is not contrary to Ch III of the Constitution.

16. In elaborating these conclusions, it is useful to begin with the legislative scheme, before turning to the Ch III principles which the Plaintiff seeks to invoke.

B. THE LEGISLATIVE SCHEME

17. The object of the Act is "to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens" (s 4(1)). To advance this object, the Act "provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain" (s 4(2)). The Act also "provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by this Act" (s 4(4)).

18. A non-citizen is lawful or unlawful depending on whether he or she holds a visa (ss 13-14). Section 189(1) requires an officer, who knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, to detain the person. Section 196(1) relevantly provides that an unlawful non-citizen detained under s 189 must be kept in immigration detention until removed, deported, or granted a visa.

19. A lawful non-citizen will become unlawful if his or her visa is cancelled (s 15).

Cancellation powers under the Act include those contained in s 501. Sub-sections (1), (2) and (3) confer discretionary powers on the Minister to refuse or cancel a visa. Section 501(1) provides that the Minister *may* refuse to grant a visa to a person if the person does not satisfy the Minister that they pass the character test. Section 501(2) provides that the Minister *may* cancel a person's visa if the Minister reasonably suspects that the person does not pass the character test and the person does not satisfy the Minister that they do pass the test. Section 501(3) provides that the Minister *may* refuse or cancel a person's visa if the Minister reasonably suspects that the person does not pass the character test and the Minister is satisfied that refusal or cancellation is in the national interest.

20. The character test is set out in s 501(6). It specifies a number of grounds on which a person may not pass the character test, which relevantly include that the person has a "substantial criminal record" as defined in s 501(7) (s 501(6)(a)), and that an Australian or foreign court has convicted the person, found them guilty, or found a charge proved against them of a sexually based offence involving a child (s 501(6)(e)). A person has a "substantial criminal record" if, among other matters, they have been sentenced to a term of imprisonment of 12 months or more (s 501(7)(c)).

21. By contrast with s 501(1), (2) and (3), s 501(3A) *requires* the Minister to cancel a person's visa if:

(a) the Minister is satisfied that the person does not pass the character test because of the operation of:

(i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or

(ii) paragraph (6)(e) (sexually based offences involving a child); and

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

22. Contrary to the Plaintiff's submissions [**PS at [39(c)]**], the Minister does not have a discretion to choose between exercising power under s 501(2) or exercising power under s 501(3A). Nor does the Minister have a discretion to decide not to consider

exercising the power under s 501(3A) [**cf PS at [36(e)**]. By the use of the term "must" in s 501(3A), the sub-section imposes a mandatory obligation to cancel whenever its terms are met.[1]

23. Mandatory cancellation of a non-citizen's visa pursuant to s 501(3A) is subject to a regime by which, on application, that cancellation may be revoked. As soon as practicable after a cancellation decision is made, s 501CA(3) requires the Minister to give the non-citizen notice of the original decision and the particulars of information on which the decision was based, and invite the person to make representations to the Minister about revocation of the original decision. If the non-citizen makes representations in accordance with the invitation, and the Minister is satisfied either that the person passes the character test or that there is another reason why the original decision should be revoked, the Minister may revoke the original decision (s 501CA(4)).

C. CHAPTER III AND EXECUTIVE DETENTION

24. The Plaintiff's challenge to s 501(3A) depends on propositions which are said to have been established by this Court, in particular in *Chu Kheng Lim v Minister for Immigration* (***Lim***).[2] In truth, however, the propositions that the Plaintiff advances involve severing various statements made by the Court from their constitutional foundations. In this respect, the Plaintiff's case bears out the wisdom in Judge Henry Friendly's caution against "the domino method of constitutional adjudication ... wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation".[3]

25. Nowhere is this tendency more apparent than in the Plaintiff's characterisation of Ch III as a protection of personal liberty or a freedom from executive detention [**PS at [24], [30], [34], [42(j)]**]. While it may be accepted that one of the "constitutional objectives"

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1 See *Acts Interpretation Act 1901* (Cth) ss 33(1), (2A).

2 (1992) 176 CLR 1.

3 Friendly, 'The Bill of Rights as a Code of Criminal Procedure' (1965) 53 *California Law Review* 929 at 950, quoted in *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 94 [137] (Hayne, Crennan, Kiefel and Bell JJ).

which the separation of powers advances is "the guarantee of liberty",[4] analysis and application of the principles in *Lim* and later cases cannot safely proceed from a constitutional objective framed at such a high level of generality. In particular, the "guarantee of liberty" does not have "an immediate normative operation in applying the Constitution".[5] What is in issue is whether the law infringes the structural separation of powers by conferring judicial power on the Executive, rather than the operation of a guarantee of individual rights.[6] To hold otherwise would be to transform a common law freedom into a binding constitutional limitation. While it is true that Brennan, Deane and Dawson JJ referred in *Lim* to "a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth",[7] that "immunity" was expressly confined to "citizens". Further, that formulation, has been criticised,[8] and has not been accepted by a majority of the Court in subsequent cases.

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26. The principle in *Lim* has its constitutional roots in the identification of the judicial power of the Commonwealth and the exhaustive vesting of that power in accordance with Ch III of the Constitution.[9] Justices Brennan, Deane and Dawson (with whom Mason CJ relevantly agreed) recognised those foundations in stating that the provisions of Ch III constitute "an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested"[10] and that, accordingly, the grants of

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4 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ). See also *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 86 [97] (Bell J).

5 Cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at 23 [72] (McHugh and Gummow JJ).

6 *Kruger v Commonwealth* (1997) 190 CLR 1 at 61, 68 (Dawson J, with McHugh J agreeing at 141-142); *Thomas v Mowbray* (2007) 233 CLR 307 at 355 [111] (Gummow and Crennan JJ).

7 (1992) 176 CLR 1 at 28-29.

8 See *Kruger v Commonwealth* (1997) 190 CLR 1 at 110 (Gaudron J); *Al-Kateb* (2004) 219 CLR 562 at 648-649 [258] (Hayne J, with Heydon J agreeing at 662-663 [303]); *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 24-27 [57]-[62] (McHugh J); *Thomas v Mowbray* (2007) 233 CLR 307 at 330 [18] (Gleeson CJ); *South Australia v Totani* (2010) 242 CLR 1 at 146-147 [382]-[383] (Heydon J); *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 135-136 [345] (Heydon J).

9 See, eg, *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 21-22 [48]-[51] (McHugh J), 76 [224] (Hayne J); *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 at 498 [20] (Gleeson CJ); *Al-Kateb v Godwin* (2004) 219 CLR 562 at 647 [254] (Hayne J).

10 (1992) 176 CLR 1 at 26 quoting *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

legislative power "do not permit the conferral upon any organ of the Executive Government of any part of the judicial power of the Commonwealth".[11]

27. One function which pertains exclusively to judicial power is the "adjudgment and punishment of criminal guilt".[12] Plainly one such form of punishment is the imposition of a sentence of imprisonment for wrongdoing. But not all detention involves punishment. Whether detention is of a kind that can lawfully be imposed only in the exercise of the judicial power of the Commonwealth depends on whether or not that detention is imposed for a punitive or a non-punitive purpose.[13] Purpose is to be determined through the application of the ordinary rules of statutory construction,[14] having regard to "all the circumstances of the case".[15]

28. In applying the above principles, the Plaintiff's status as an alien is critical. The Plaintiff seeks to downplay the significance of that status [**PS at [31]-[32]**]. He goes so far as to assert that the *Lim* principle "protects aliens as much as citizens" (**PS at [31]**). But that is true in only a limited sense. It is true, of course, that an alien is not an "outlaw". But in *Lim* itself, Brennan, Deane and Dawson JJ (with whom Mason CJ agreed) expressly stated that the effect of being an alien is "significantly to diminish the protection which Ch III of the Constitution provides, in the case of a citizen, against imprisonment otherwise than pursuant to judicial process".[16] It does so because the detention of aliens is readily characterised as having a non-punitive purpose. As Kiefel and Keane JJ observed in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*, "the character of a law which affects the right of a citizen under the common law to be at liberty is radically different from that of a law which affects

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11 *Lim* (1992) 176 CLR 1 at 27.

12 *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ); *Duncan v New South Wales* (2015) 255 CLR 388 at 407 [41] (the Court) (***Duncan***); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 69-70 [40] (French CJ, Kiefel and Nettle JJ).

13 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 584 [45] (McHugh J), 650-651 [267] (Hayne J), 660 [294] (Callinan J); *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 25-26 [60] (McHugh J), 61 [167] (Gummow J), 85 [261]-[263] (Callinan J); *Duncan* (2015) 255 CLR 388 at 409-410 [47]-[49] (the Court).

14 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 557 [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

15 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 24 [58] (McHugh J).

16 *Lim* (1992) 176 CLR 1 at 29.

an alien who seeks to enter the Australian community without its permission".[17]

29. In *Lim* itself, the Court held that the conferral on the Executive of authority to detain an alien is valid if it occurs for the purpose of considering and granting permission to remain in Australia, or deportation or removal if permission is not granted, because detention for those purposes is "neither punitive in nature nor part of the judicial power of the Commonwealth".[18]

D. CHAPTER III IS NOT ENGAGED

Section 501(3A) does not authorise detention

30. The Plaintiff's Ch III attack on s 501(3A) implicitly depends on the proposition that that provision confers power to detain non-citizens.

31. In fact, s 501(3A) makes no provision for the detention of non-citizens. All that it does, in both its legal and practical operation, is require the Minister to cancel the visas of certain non-citizens. It is true that, following visa cancellation under that subsection, a non-citizen will be exposed to the same scheme of mandatory detention and removal for which the Act provides with respect to all unlawful non-citizens. So much is confirmed by s 15 of the Act. However, the Plaintiff does not challenge that scheme of detention. His challenge is confined to s 501(3A). This case can therefore be disposed of in the same way that the Court disposed of the challenge, on Ch III grounds, to ss 198AB and 198AD of the Act in *Plaintiff S156/2013 v Minister for Immigration and Border Protection*.[19] In that case, the Court concluded that the challenge was "untenable, because neither s 198AB nor s 198AD makes any provision for imprisonment".[20] The same is true of s 501(3A).

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17 (2013) 251 CLR 322 at 385 [206], and at 385 [207]-[208]. See also *Al-Kateb v Godwin* (2004) 219 CLR 562 at 637 [219] (Hayne J); *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 12-13 [16]-[18], 14 [24] (Gleeson CJ); *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 at 499 [21] (Gleeson CJ).

18 (1992) 176 CLR 1 at 32. See also, eg, *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 69-70 [40] (French CJ, Kiefel and Nettle JJ), 86 [98] (Bell J), 160 [381] (Gordon J).

19 (2014) 254 CLR 28.

20 (2014) 254 CLR 28 at 46 [37] (the Court).

32. The fact that the Plaintiff will be exposed to detention after his visa is cancelled does not entail the conclusion that s 501(3A) itself authorises, requires or causes the detention of the Plaintiff. While constitutional analysis proceeds from an appreciation of the legal and practical operation of a challenged law, s 501(3A) cannot sensibly be said to authorise detention in its legal and practical operation [**cf PS [27], [38], [42 (j)]**]. Detention arises from the legal and practical operation of ss 189 and 196, not s 501(3A). Indeed, ss 196(4) and (5)(b) expressly deal with the detention of non-citizens whose visas are cancelled pursuant to s 501 of the Act.[21]

33. By contrast, 501(3A) relates solely to whether a visa must be cancelled, which in turn has consequences for the status of a person as a lawful or an unlawful non-citizen (ss 13 and 14). Section 501(3A) says nothing about the consequences of having a particular status. It would have been open to the Parliament not to have provided for the detention of unlawful non-citizens had it so chosen, and that would not have required any change to the terms of s 501(3A). That the Parliament may be taken to have been aware of, or even to have intended, particular consequences to follow cancellation does not alter the legal or practical effect of the impugned section. It simply demonstrates Parliament's appreciation of how s 501(3A) would operate together with other parts of the statutory scheme. That appreciation provides no warrant to attribute to s 501(3A) an operation that its terms cannot bear [**cf PS at [36(i)], [38]**].[22]

Visa cancellation is not an exclusively judicial function

34. Section 501(3A) is one of a number of powers conferred on the Executive by the Act that give practical expression to Australia's sovereign right to decide which aliens shall be permitted to enter or remain in its territory.[23] That right is given effect, at least in

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21 The Plaintiff makes various criticisms of ss 196(4A) and (5)(b), but makes no attack on their validity: **PS [16], [37(b)]**. Those criticisms are irrelevant to any issue in this proceeding. The same is true of the Plaintiff's references to the possibility that the Minister, in making a revocation decision, may rely on information that is protected under s 503A: **PS [21], [37(c)]**.

22 See generally *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 264-265 [31] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Re Bolton Ex parte Beane* (1987) 162 CLR 514 at 518 (Mason CJ, Wilson and Dawson JJ); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 649-650 [229] (Nettle and Gordon JJ); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 111 [184] (Gageler J).

23 See *Attorney-General (Canada) v Cain* [1906] AC 542 at 546, cited in *Lim* (1992) 176 CLR 1 at 29-30 (Brennan, Deane and Dawson JJ); *Robtelmes v Brenan* (1906) 4 CLR 395 at 400 (Griffith CJ).

part,[24] through laws passed by the Parliament pursuant to s 51(xix) of the Constitution, which empowers the Parliament to make laws with respect to "naturalisation and aliens", and in doing so to prescribe "whatever reasons it thinks fit"[25] for allowing aliens to enter or remain, or excluding aliens from the country.[26]

35. In practice, that sovereign right to exclude or admit aliens has historically been exercised by the Executive.[27] The cancellation of an alien's visa is one way in which this sovereign right to decide whether to permit an alien to remain in Australia's territorial limits is expressed and exercised. As an incident of those powers, the Executive has also historically had power to detain an alien pending deportation or resolution of their immigration status.[28]

36. It has never been suggested that the judiciary is the *appropriate* – let alone the *only* – branch of government with the power to determine whether non-citizens who commit criminal offences in Australia should be allowed to remain. Such determinations are, as a matter of history, for the political branches of government. The grant or withdrawal of permission to remain is not withdrawn from the Executive, and vested exclusively in the judiciary, simply because a matter that is relevant to the decision is that the non-citizen has committed a criminal offence. The long history of deportation of non-citizens who commit offences bears that out (as discussed in paragraph 42 below).

37. Section 501(3A) therefore does not involve any purported vesting of judicial power in the Executive to determine which non-citizens may remain in Australia. There is no

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24 The Commonwealth also possesses non-statutory executive power to exclude aliens from Australia (see *Ruddock v Vadarlis* (2001) 110 FCR 491 at 541-543 [186]-[193] (French J, with Beaumont J agreeing at 514 [95]; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 647-652 [476]-[495] (Keane J) (***CPCF***)), although the precise ambit of that power has not been finally resolved: cf *CPCF* (2015) 255 CLR 514 at 564-568 [137]-[151] (Hayne and Bell JJ), 595-602 [258]-[285] (Kiefel J).

25 *Pochi v Macphee* (1982) 151 CLR 101 at 106 (Gibbs CJ, with Mason and Wilson JJ agreeing at 112 and 116 respectively).

26 See also *Lim* (1992) 176 CLR 1 at 26 (Brennan, Deane and Dawson JJ), 45 (Toohey J); *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 558-559 (Latham CJ, with McTiernan and Webb JJ agreeing at 583 and 593 respectively); *Ex parte Walsh; In re Yates* (1925) 37 CLR 36 at 132-133 (Starke J).

27 See *Aliens Act 1793*, 33 Geo 3, c 4, ss VII, XV; *Aliens Act 1848*, 11 & 12 Vic, c 20, s I; *Musgrove v Chun Teeong Toy* [1891] AC 272; *Immigration Restriction Act 1898* (NSW) s 11; *Immigration Restriction Act 1897* (WA) s 14; *Chinese Immigration Restriction Act 1888* (Vic) s 9; *Immigration Restriction Act 1901* (Cth) s 8; *Immigration Act 1920* (Cth) s 7 (inserting s 8A); *Migration Act 1958* (Cth) as enacted, ss 12-13; *Migration Amendment Act 1983* (Cth) ss 10-11 (substituting a new s 12 and amending s 14).

28 *Lim* (1992) 176 CLR 1 at 32 (Brennan, Deane and Dawson JJ).

occasion to test the validity of that provision against Ch III, for the function it confers is classically executive, and therefore not an exclusively judicial function.

Choosing conviction as a factum does not involve any determination or punishment of criminal guilt

38. In its terms, s 501(3A) imposes a duty that arises where certain preconditions are established, one of which is the fact of conviction of a non-citizen for certain kinds of offences. In selecting that precondition, Parliament did not seek to impose additional punishment on non-citizens with respect to their previous offending, or to alter the punishment imposed for that offending. Rather, as Gummow J explained in the context of an analogous precondition in *Fardon v Attorney-General (Qld)*, s 501(3A) operates by reference to the Plaintiff's status deriving from that conviction, but sets up "its own normative structure".[29] Far from revealing a disguised exercise of judicial power, Gummow J considered this choice of factum to have counted in favour of validity in that case.[30] Whether or not that is true with respect to s 501(3A), as a matter of law "in general, a legislature can select whatever factum it wishes as the 'trigger' of a particular legislative consequence".[31]

39. The Plaintiff submits that "[t]he constitutional prohibition on extra-judicial adjudgment and punishment is disjunctive not conjunctive" [**PS at [25]**]. From this it is said to follow that the imposition of "punishment" is impermissible, even if entirely divorced from the adjudgment of criminal guilt. However, not every hardship or detriment that is imposed by the Executive on a person who has been convicted of an offence constitutes a "punishment" of a kind that can be imposed only in the exercise of the judicial power of the Commonwealth.[32] At a minimum, in substance or in form, the "punishment" must be *for* wrongdoing.[33] Executive action that has as a pre-requisite a

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29 (2004) 223 CLR 575 at 610 [74].

30 (2004) 223 CLR 575 at 619 [108]. See also *South Australia v Totani* (2010) 242 CLR 1 at 64 [137] (Gummow J).

31 *Baker v The Queen* (2004) 223 CLR 513 at 532 [43] (McHugh, Gummow, Hayne and Heydon JJ); *South Australia v Totani* (2010) 242 CLR 1 at 49 [71] (French CJ), 141 [369] (Heydon J).

32 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 12 [17] (Gleeson CJ); *Duncan* (2015) 255 CLR 388 at 409 [46] (the Court).

33 See *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580 (Deane J); *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 at 359-340 [21], 363 [35] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ); *Duncan* (2015) 255 CLR 388 at

judicial determination of guilt does not involve an exercise of power that is exclusively judicial, simply because it has adverse consequences for a person [**PS at [36], [46]**].

40. Nothing in the Act, or in the extrinsic materials associated with the enactment of s 501(3A), reveals any purpose to punish or otherwise increase the penalty for the offending that enlivens s 501(3A). Rather, the statutory text reveals a legislative determination that persons who have been convicted of certain kinds of serious offending should prima facie be excluded from the Australian community, at least pending reconsideration of their permission to remain (which can occur through a revocation application). The references in the Explanatory Memorandum and the second reading speech to ensuring that the unlawful non-citizen is detained pending final determination of their visa status point in no different direction [**cf PS at [36(i)]**]. It is not "indicative of an additional purpose of retribution" for the past offending.[34]

41. Laws empowering the Executive to attach administrative consequences to a prior criminal conviction are not novel, and have not hitherto been treated as transgressing on an area of exclusive judicial power. For example, legislation disqualifying or disciplining liquidators, directors, medical practitioners or public servants after they have been convicted of an offence or other contravention is commonplace.[35] The widespread operation of laws of that kind tells against the proposition that the selection of a conviction as a factum for the operation of a law trespasses upon an area of exclusive judicial power, by purporting to add to the "punishment" imposed by the court following that conviction.

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408 [43], 409 [46] (the Court); *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at 386 [79] (Gageler J).

34 *Duncan* (2015) 255 CLR 388 at 409 [47] (the Court).

35 See, eg, *Aboriginal and Torres Strait Islanders Act 2005* (Cth) ss 143S, 144ZN; *Building Energy Efficiency Disclosure Act 2010* (Cth) s 30(1); *Corporations Act 2001* (Cth) s 206B; *Hearing Services Administration Act 1997* (Cth) s 19(4); *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) sch 1 items 119(4)(b), 127(1)(a); *Antarctic Marine Living Resources Conservation Act 1981* (Cth) s 12; *Australian Citizenship Act 2007* (Cth) s 34; *Banking Act 1959* (Cth) ss 17(2), 20, 22(a); *Chemical Weapons (Prohibition) Act 1994* (Cth) s 25; *Insurance Act 1973* (Cth) ss 25, 27; *Life Insurance Act 1995* (Cth) ss 125A, 245; *National Consumer Credit Protection Act 2009* (Cth) s 80(1)(c), (f), (2)(c); *Private Health Insurance (Prudential Supervision) Act 2015* (Cth) ss 115(2)(b), 119; *Renewable Energy (Electricity) Act 2000* (Cth) s 30; *Superannuation Industry (Supervision) Act 1993* (Cth) ss 29G(2)(b), 120, 133(1)(a)(ii); *Therapeutic Goods Act 1989* (Cth) s 41; *Biosecurity Act 2015* (Cth) s 530; *Radiocommunications Act 1992* (Cth) ss 124, 171; *Health Insurance Act 1973* (Cth) ss 124D, 124F. See also *Medical Board of Queensland v Byrne* (1958) 100 CLR 582 at 594 (Fullagar and Taylor JJ). Note that legislation can also validly authorise an executive body to take action against a person who the body is satisfied has committed an offence: see, eg, *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at 379 [59] (French CJ, Hayne, Kiefel, Bell and Keane JJ), 386 [79] (Gageler J).

42. The history of Commonwealth migration law is also telling. Since 1901, aliens have been liable to removal or deportation after being found guilty of an offence.[36] It has long been recognised that excluding or expelling an alien on that basis does *not* constitute punishment for an offence, and therefore does not involve an exercise of judicial power.[37] In *Ex parte Walsh; In re Yates*, Isaacs J distinguished between deportation as "punishment for a crime" (which can only be ordered by a court), and deportation as a "political precaution" (which must be carried out by the Executive).[38] In *O'Keefe v Calwell,* Latham CJ rejected the argument that deportation amounted to the imposition of a penalty without judicial proceeding.[39] In a frequently cited passage, his Honour stated that "[t]he deportation of an unwanted immigrant (who could have been excluded altogether without any infringement of right) ... is a measure of protection of the community from undesired infiltration and is not punishment for any offence".[40]

43. Indeed, since the late 1990s, s 501 of the Act has provided for the cancellation of visas where non-citizens fail to satisfy the Minister that they pass the character test, which necessarily occurred where the person had been sentenced to imprisonment for 12 months or more. If the commission of a past offence (or the requirement for the Minister to "form a positive satisfaction" in that regard) is a constitutionally impermissible criterion [**PS at [36(a), (d)]**], that criticism applies not just to s 501(3A), but to the other cancellation powers in s 501. Yet the validity of those other powers is well settled, and apparently accepted by the Plaintiff [**PS at [40]**].

44. The proposition that cancelling an offender's visa (and subsequent detention and removal) does not amount to punishment for his or her previous offending is consistent

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36 See *Immigration Restriction Act 1901* (Cth) s 8; *Immigration Act 1920* (Cth) s 7 (inserting s 8A); *Migration Act 1958* (Cth) as enacted, ss 12-13; *Migration Amendment Act 1983* (Cth) ss 10-11 (substituting a new s 12 and amending s 14).

37 *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41 at 43 (Smithers J), 62 (Deane J, with Evatt J agreeing at 57); *NBNB v Minister for Immigration and Border Protection* (2014) 220 FCR 44 at 75 [102] (Buchanan J); *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292 at 309 [66] (Tamberlin, Sackville and Stone JJ).

38 (1925) 37 CLR 36 at 95-96; see also at 60-61 (Knox CJ), 132-133 (Starke J).

39 (1949) 77 CLR 261.

40 (1949) 77 CLR 261 at 278. See also *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 555 (Latham CJ). See, eg, *Al-Kateb v Godwin* (2004) 219 CLR 562 at 584 [45] (McHugh J).

with the position in Canada[41] and New Zealand, [42] and also in the United States where the courts have held that deportation contingent on criminal offending is not a criminal punishment and does not amount to double jeopardy.[43]

45. The above submissions demonstrate that the Plaintiff's contention that the cancellation of a visa based on past criminal offending involves additional punishment for the offence, and therefore power of an exclusively judicial kind, must be rejected.

46. Further, because the Plaintiff's visa was not cancelled as punishment for his previous criminal offending, there is no question of s 501(3A) imposing "double punishment" [**cf PS at [36(f)], [46]**]. Even when a non-citizen is detained following the end of a term of imprisonment, by reason of the combined operation of ss 501(3A), 189 and 196, that is not because the Minister has determined that the non-citizen should serve a longer sentence of imprisonment for his or her offending [**cf PS at [36(f)]**]. Instead, the commencement of immigration detention serves the new and independent purpose of separating a non-citizen from the community until either a decision is made to permit that non-citizen to re-enter the Australian community or the non-citizen is removed.[44]

E. IN ANY EVENT, SECTION 501(3A) IS NOT CONTRARY TO CHAPTER III

47. Even if, contrary to the submissions above, it is relevant or necessary in determining the validity of s 501(3A) to have regard to the fact that ss 189 and 196 require an unlawful non-citizen whose visa is cancelled to be detained pending removal, deportation or the grant of a visa, s 501(3A) is nevertheless valid.

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41 *Hurd v Canada (Minister of Employment and Immigration)* [1989] 2 FC 594 at 606-607 (MacGuigan J, with Urie and Stone JJ agreeing at 607). See also *Canada (Minister of Employment and Immigration) v Chiarelli* [1992] 1 SCR 711 at 735-736 (Sopinka J); *Medovarski v Canada (Minister of Citizenship and Immigration)* [2005] 2 SCR 539 at 556 [47] (McLachlin CJ).

42 See *Guo v Minister of Immigration* [2014] NZCA 513 at [15] (O'Regan P) (overturned on appeal in *Guo v Minister of Immigration* [2016] 1 NZLR 248 on other grounds).

43 See, eg, *Immigration and Naturalization Service v Lopez-Mendoza*, 468 US 1032 at 1038-1039 (O'Connor J) (1984); *Harisiades v Shaugnessy* 342 US 580 (1952); *United States v Yacoubian*, 24 F.3d 1 at 10 (9th Cir, 1994); *Zuniga v Greene*, 53 F Supp 2d 1100 (D Colo, 1999); *United States v Garay-Burgos*, 961 F Supp 1231 (D Ariz, 1997); *Chukwurah v United States*, 813 F Supp 161 (EDNY, 1993); *Padilla v Kentucky*, 559 US 356 at 365-366 (Stevens J) (2010); *Figuereo-Sanchez v United States Attorney General*, 382 F Appx 211 at 213 (the Court) (3rd Cir, 2010); *United States v Danson*, 115 F Appx 486 at 488 (the Court) (2nd Cir, 2004); *Oliver v US Department of Justice, Immigration and Naturalization Service*, 517 F.2d 426 at 428 (the Court) (2nd Cir, 1975).

44 *Plaintiff M96A/2016 v Commonwealth* [2017] HCA 16 at [28] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

Section 501(3A) serves a non-punitive purpose

48. As explained by the joint judgment in *Plaintiff M96A/2016 v Commonwealth*, the first step in addressing a Ch III challenge of this kind is to identify the purpose of detention.[45] That is necessary because whether detention can be imposed otherwise than in the exercise of the judicial power of the Commonwealth depends on whether the detention is imposed for a punitive or a non-punitive purpose.[46]

49. The purpose and effect of s 501(3A) is to require the cancellation of a visa in order to exclude from the Australian community a category of aliens whom the Parliament has determined should not be part of the community due to their record of criminal offending. That purpose is non-punitive.[47] Provisions pursuing that same purpose have a long history in Australia (see paragraph 42 above).

50. The Plaintiff's submission to the contrary should be rejected for the following reasons.

51. *First*, the Plaintiff's observation that a non-citizen may be held in the same prison in which he or she was serving out a term of imprisonment is irrelevant to the characterisation of s 501(3A) [**cf PS at [36(g)]**]. The place where a non-citizen is detained, which is determined separately from any decision regarding the cancellation of a visa, does not shed any light on the purpose of the cancellation of a visa or of the detention that follows.[48]

52. *Second*, that visa cancellation will expose the non-citizen to immigration detention at the same time that he or she is completing a term of imprisonment for criminal offending is similarly irrelevant [**cf PS at [36(h)]**]. It is incorrect (whether "loosely speaking" or otherwise: **cf PS at [36(h]**) to assert that cancellation under s 501(3A) has the effect of "converting" criminal detention into immigration detention, such that a "criminal sentence will be served under the Act as immigration detention": a person

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45 [2017] HCA 16 at [21] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

46 See, eg, *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 592–593 [36]–[38] (French CJ, Kiefel and Bell JJ), 611-612 [98], [103] (Gageler J), 625-626 [149] (Keane J), 651 [235] (Nettle and Gordon JJ); *Al-Kateb v Godwin* (2004) 219 CLR 562, 584 [45] (McHugh J), 650-651 [267] (Hayne J, with whom Heydon J agreed at 662-663 [303]), 660 [294] (Callinan J); *Duncan* (2015) 255 CLR 388 at 409-410 [47]-[49] (the Court).

47 See *Lim* (1992) 176 CLR 1 at 32 (Brennan, Deane and Dawson JJ).

48 See *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486.

who is imprisoned pursuant to an order of a court plainly is not being held "by or on behalf of an officer" under the Act.

53. *Third*, the extrinsic materials reveal no punitive purpose [**cf PS at [36(i)]**]. That the Parliament had it in mind to keep aliens with a substantial criminal record in detention pending removal or reconsideration of their remaining in Australia[49] does not bespeak punishment or retribution for past offending. To the contrary, the second reading speech made clear that the Bill generally, and the power in s 501(3A) in particular, were directed "to ensuring that noncitizens do not pose a risk to the Australian community".[50] The Minister also stated that this accorded with community expectations that non-citizens who do not abide by Australian laws should have their visas cancelled.[51] Those purposes are consistent with those that underlie the other visa cancellation powers in s 501,[52] which the Plaintiff concedes are protective [**PS at [40]**]. If cancellation of a visa based on a serious criminal record involves punishment for an offence contrary to Ch III, then that is a point that has been overlooked in several decisions of this Court.[53]

54. *Fourth*, that s 501(3A) imposes a duty to cancel rather than a discretion whether to cancel does not mark it with a punitive purpose [**cf PS at [39(a)]**]. It is open to the Parliament to legislate by reference to a class of individuals in s 501(3A) instead of on a case-by-case basis as occurred in ss 501(1), (2) and (3). There is no reason in principle why a discretionary determination by the Executive to cancel a visa pursuant to ss 501(1), (2) or (3) involves no exercise of judicial power, whereas a legislative determination that certain offending should always result in prima facie cancellation pursuant to s 501(3A) does.

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49 See Commonwealth, *Parliamentary Debates*, House of Representatives, 24 September 2014 at 10328; Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) at [34].

50 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 September 2014 at 10328.

51 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 September 2014 at 10326.

52 See, eg, *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292.

53 See, eg, *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391; *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212; *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Akpata* (2002) 191 ALR 283; *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203; *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28.

55. *Fifth*, it was clearly open to the Parliament to form the view that non-citizens serving a full-time custodial sentence who also have a substantial criminal record shall be taken, absent revocation (which calls for assessment on a case by case basis), to be a group that should not be allowed to form part of the Australian community. Section 501(3A) applies if the non-citizen has been convicted of a sexually based offence involving a child, or has been sentenced to death, imprisonment for life or imprisonment for a term of 12 months or more (ss 501(6)(a), (e), (7)(a), (b) and (c)). To relate the constitutional argument to the circumstances of the Plaintiff, he was, most recently, sentenced to 11 years' imprisonment for trafficking a large commercial quantity of cannabis. It is hardly "capricious" [**PS at [42(e)]**] for the Parliament to form the prima facie view that such an offender should not be permitted to continue to live in Australia.

56. *Sixth*, the suggestion that the purpose of s 501(3A) is merely "to ensure detention in Australia" mischaracterises the statutory text and extrinsic materials [**PS at [44]**]. Detention will occur only pending determination of a revocation application, and pending removal (which s 198 of the Act requires to occur as soon as reasonably practicable). The purpose of cancellation and detention is to exclude persons with a particular criminal record from the Australian community, with the exclusion effected by the person's detention until such time as consideration is given to revoking the cancellation or he or she is removed or deported. The second reading speech expressly explained that "noncitizens who pose a risk to the community will remain in either criminal or immigration detention until they are removed or their immigration status is otherwise resolved".[54] This is a standard, non-punitive purpose for detaining aliens.

57. *Seventh*, s 501(3A) does not become punitive merely because it operates without any requirement that the Minister consider whether a non-citizen poses a risk of harm to the public [**PS at [42(e), (f), (g), (h)]**], or of the effect of cancellation on the non-citizen [**PS at [42(i)]**]. It is open to the Parliament, in the exercise of its undoubted legislative power under s 51(xix), to identify a class of non-citizens who are to be excluded from the community by reference to whatever criteria it wishes to select, whether or not that imposes hardship on the non-citizen in question. That is all the more so when those very matters could be considered on a revocation application.

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[54] Commonwealth, *Parliamentary Debates*, House of Representatives, 24 September 2014 at 10328.

Proportionality

58. The Plaintiff mounts a wide-ranging challenge to s 501(3A) on the basis that his criticisms of the choices made by Parliament in the legislative design of the subsection (and the scheme in which it appears) [**PS at [37], [42]**] are relevant to its proportionality and, therefore, to its validity [**PS at [30], [33]-[34], [41]-[45]**].

59. Contrary to the Plaintiff's submissions, proportionality analysis, of the kind articulated by the plurality in *McCloy v New South Wales*,[55] forms no part of determining whether a law contravenes Ch III of the Constitution. The Plaintiff seeks to support his grafting of that analysis onto Ch III discourse on a number of bases, none of which supports the radical doctrinal step which he invites this Court to take. In particular, his proposition that "where a law imposes a restriction on an important freedom" then the restriction must be "justified" by reference to an analysis of the kind deployed in *McCloy* would, if accepted, convert the principle of legality (a principle of construction) into a general mandate to review the validity of any law by examining its "proportionality" in restricting an "important" common law freedom [**cf PS [30]**].

60. The Plaintiff invokes proportionality analysis on the basis that Ch III enshrines a "freedom from executive detention", any limitation of which must be justified by the Commonwealth [**PS at [30], [34]**]. This argument proceeds from a false premise. Chapter III does not confer "freedom" upon either citizens or aliens. In testing a law against Ch III, the relevant question is whether the Parliament has purported to confer the judicial power of the Commonwealth otherwise than upon a Ch III court. Either a law does so, in which case it is invalid, or it does not. A law that diverts exclusively judicial functions away from Ch III courts cannot be "justified", and therefore "saved" from invalidity, on account of its pursuit of some legitimate countervailing objective by means that impose no undue burden on the separation of powers mandated by Ch III.[56] In that respect, limitations derived from Ch III differ fundamentally from the implied freedom of political communication. If "[t]he rationale for proportionality analysis is that no freedom, even a constitutionally guaranteed freedom, can be regarded as

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55 (2015) 257 CLR 178.

56 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 34 [80] (McHugh J); *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 137 [349] (Heydon J).

absolute",[57] that rationale does not offer any encouragement to the introduction of proportionality analysis into Ch III jurisprudence, which does not involve a constitutionally guaranteed freedom, and where the limit (where it applies) *is* absolute.

61. The statements of members of the Court on which the Plaintiff relies [**PS at [33]**] do not justify the introduction of proportionality analysis into Ch III of the Constitution. The requirement articulated in *Lim*, that a law authorising detention be "reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered",[58] as consistently applied by this Court, [59] does not involve any such analysis. Indeed, this Court has directly rejected the extension of proportionality reasoning to Ch III.[60]

62. At most, disproportionality to an identified end may, in an appropriate case, be an indication that might cause the Court to conclude that the purpose of the law is not, in fact, to achieve the identified non-punitive end. But disproportionality in this limited sense does not invite or involve any assessment of (i) the merits of the non-punitive purpose; (ii) the extent to which that non-punitive purpose might be achieved by other means; or (iii) the extent of the impact of the detention on the alien who is detained [**cf PS at [41]-[45]**].

63. In any event, there is no disproportion between the operation of s 501(3A), in requiring the cancellation of a visa of a non-citizen who fails the character test in such a way as to warrant a custodial sentence, and the protection of the Australian community. The cancellation of such a non-citizen's visa, and their subsequent removal from Australia, is directly referrable to the identified purpose. The matters upon which the Plaintiff relies do not break that connection. Finally, even if (which is denied) proportionality required the Minister to assess in an individualised way the risk of harm to the Australian community that is presented by a non-citizen and the impact of cancellation

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57 *Maloney v The Queen* (2013) 252 CLR 168 at 232 [166] (Kiefel J). See also *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 136 [444] (Kiefel J).

58 (1992) 176 CLR 1 at 33 (Brennan, Deane and Dawson JJ).

59 See, eg, *Plaintiff M96A/2016 v Commonwealth* [2017] HCA 16 at [21] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ); *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 369-370 [139] (Crennan, Bell and Gageler JJ), 385 [206]-[208] (Kiefel and Keane JJ).

60 *Magaming v The Queen* (2013) 252 CLR 381 at 397-398 [52] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

upon that non-citizen, these are matters that may be taken into account in deciding whether to revoke cancellation under s 501CA.[61] It follows that the Plaintiff's complaints about the "proportionality" of s 501(3A) leave out of account parts of the legislative scheme that are directly relevant to the provision's proportionality.

64. Accordingly, even if it is relevant to test the validity of s 501(3A) against the requirements established in *Lim*, and even if proportionality is relevant to the application of those limits (which it is not), s 501(3A) satisfies those requirements.

PART VII ESTIMATE OF TIME

65. The Commonwealth estimates that it will require 1.5 hours for the presentation of oral argument.

Dated: 7 June 2017

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[61] See, eg, *BMX15 v Minister for Immigration and Border Protection* (2016) 244 FCR 153 at 156-157 [8], 176 [85] (Bromberg J); *Tusitala v Assistant Minister for Immigration and Border Protection* [2016] FCA 845 at [29]-[31] (Markovic J); *BSJ16 v Minister for Immigration and Border Protection* [2016] FCA 1181 at [64] (Moshinsky J).