IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M97 of 2016

BETWEEN:

**AARON JOE THOMAS GRAHAM**
Plaintiff

and

**MINISTER FOR IMMIGRATION AND BORDER PROTECTION**
Defendant

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P58 of 2016

BETWEEN:

**MEHAKA LEE TE PUIA**
Plaintiff

and

**MINISTER FOR IMMIGRATION AND BORDER PROTECTION**
Defendant

# ANNOTATED, AMENDED SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)


Intervener's submissions
Filed on behalf of the Attorney-General for the
State of Queensland (Intervening)
Form 27c

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Per Philippa Mott
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## PART I: Internet publication

1. This submission is in a form suitable for publication on the Internet.

## PART II: Basis of intervention

2. The Attorney-General for the State of Queensland intervenes in these proceedings pursuant to s 78A of the *Judiciary Act 1903* (Cth).

## PART III: Reasons why leave to intervene should be granted

3. Not applicable.

## PART IV: Statutory provisions

4. The relevant statutory provisions are set out in the annexures to the parties' written submissions. In addition, the Attorney-General refers to s 503D of the *Migration Act 1958* (Cth), which is set out in the Annexure to these submissions.

## PART V: Submissions

*Summary*

5. Properly construed in light of their practical operation and effect, s 501(3) and s 503A neither exclude the High Court's constitutionally entrenched jurisdiction to grant relief for jurisdictional error, nor compromise the institutional integrity of any federal court.

6. That conclusion follows from the following considerations:

   (a) while the statutory scheme impacts on the prospects of successful judicial review ~~difficult~~, on occasions significantly,[1] ~~indeed for reasons developed below, the likelihood of this is apt to be overstated in respect of someone who there would be no basis in fact for a reasonable suspicion,~~ it does not exclude the courts' jurisdiction to grant relief for jurisdictional error; and

   (b) it is for the Minister to prove, and the court to determine, whether the statutory preconditions necessary to engage s 503A have been met.

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[1] Indeed, for reasons developed below, the likelihood of this is apt to be overstated in respect of someone for whom there would be no basis in fact for a reasonable suspicion.

*Statement of argument*

**(a) Practical operation of the statutory scheme**

7. The plaintiff and the applicant (for convenience, 'the plaintiffs') are right to submit that the validity of a law must be assessed against the 'substance or practical effect' of the statutory scheme.[2] It is well settled that '[b]efore the constitutional validity of a statute is considered its meaning *and operation* must be ascertained'.[3] This is particularly the case where, as here, invalidity is said to arise from the operation of the statute resulting in 'practically unreviewable decisions'.[4] However, the plaintiffs assume rather than explain the practical operation of the impugned provisions.

8. The Attorney-General generally adopts the defendant's description of the statutory scheme,[5] and expands upon its practical operation as follows.

9. In practice, the Minister only considers whether to exercise his power to cancel a visa under s 501(3) upon receiving a submission from an authorised migration officer inviting him to do so, as occurred in the present cases.[6] The power in s 501(3) may only be exercised by the Minister personally (s 501(4)). The Minister's discretion in s 501(3) is only enlivened if he 'reasonably suspects' that the person does not pass the character test. The circumstances in which a person 'does not pass' the character test include where 'the Minister reasonably suspects' (s 501(6)(b)):

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

    - that the group, organisation or person has been or is involved in criminal conduct.

10. A '[s]uspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove."'[7] It is not a 'mere idle wondering' whether a thing exists or not, but 'is a positive feeling of actual apprehension or mistrust, amounting to a "slight opinion, but without sufficient evidence".'[8] However, as McHugh J said in

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[2] Graham submissions, 16 [35]; Te Puia submissions, 4 [14].
[3] *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 519 [46] (French CJ) (emphasis added). See also *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 581 [11] (French CJ, Kiefel and Bell JJ), 625 [149] (Keane J); *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28, 42 [23] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 352 [7] (Brennan CJ and McHugh J) ('*Hindmarsh Island Bridge Case*'); *Commonwealth v Tasmania* (1983) 158 CLR 1, 152 (Mason J) ('*Tasmanian Dam Case*'); *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 186 (Latham CJ) ('*Bank Nationalisation Case*').
[4] *Te Puia* submissions, 9 [25].
[5] Defendant submissions in Graham, 2-3 [9]-[12].
[6] Graham special case, 2 [8] (Graham SCB 16); Te Puia special case, 2 [5] (Te Puia SCB 13).
[7] *Hussein v Chong Fook Kam* [1970] AC 942, 948 (Lord Devlin), quoted with approval in *George v Rockett* (1990) 170 CLR 104, 115 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
[8] *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, 303 (Kitto J), quoted with approval in *George v Rockett* (1990) 170 CLR 104, 115 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

*Ruddock v Taylor*, 'it is immaterial to the state of mind of suspicion whether the state of affairs that is suspected is real or not.'[9] It follows that the power in s 501(3) may be properly exercised in circumstances where the affected person is not and never has been a member of, nor had an association with, a criminal organisation.

11. For a suspicion to be 'reasonable', there must be 'reason to suspect',[10] meaning that 'some factual basis for the suspicion must be shown.'[11] Adapting the words of Kitto J in *Queensland Bacon Pty Ltd v Rees*, there will be reason to suspect something if there is 'something which in all the circumstances would create in the mind of a reasonable person in the position of the [Minister] an actual apprehension or fear' of that state of affairs.[12] Further, whether there are reasonable grounds for suspecting something 'must be judged against what was known or reasonably capable of being known at the relevant time'[13] (that is, the time the decision was made). A suspicion may therefore be reasonable despite being founded on assumptions of fact and law that are later discovered to be mistaken.[14]

12. It is also a condition of the exercise of the power in s 501(3) that the Minister be 'satisfied' that cancellation is in the 'national interest'. Like a statute which vests a power in a Minister and provides the 'public interest' as the relevant criterion for decision,[15] s 501(3)(d) requires the Minister to make:[16]

> a discretionary value judgment ... by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view'.[17]

13. As this Court has recognised, what is in the 'national interest' is 'largely a political question'.[18] Further, in this case the Parliament has decided that the process of 'weighing

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[9] *Ruddock v Taylor* (2005) 222 CLR 612, 637 [92] (McHugh J). See also at 622 [27] (Gleeson CJ, Gummow, Hayne and Heydon JJ).
[10] *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, 303 (Kitto J).
[11] *George v Rockett* (1990) 170 CLR 104, 115 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
[12] *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, 303 (Kitto J).
[13] *Ruddock v Taylor* (2005) 222 CLR 612, 626 [40] (Gleeson CJ, Gummow, Hayne and Heydon JJ).
[14] *Ruddock v Taylor* (2005) 222 CLR 612, 627 [44] (Gleeson CJ, Gummow, Hayne and Heydon JJ).
[15] *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2015) 255 CLR 231, 241 [13] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ).
[16] *O'Sullivan v Farrer* (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson and Gaudron JJ).
[17] *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, 505 (Dixon J).
[18] *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28, 46 [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

... benefits and detriments',[19] called for by the reference to the 'national interest' in s 501(3), is to be undertaken by the Minister personally.[20]

14. Even if the Minister forms the requisite suspicion and satisfaction, he must then consider whether the visa should nonetheless not be cancelled on discretionary grounds. This involves an obligation on the part of the Minister to take account of the legal consequences of cancelling the visa under s 501(3).[21] This may include consideration of the human consequences of the decision[22] – so far as that information is known[23] – such as the impact on any children concerned, the person's links to the Australian community and the hardship they may face in returning to their home country. However, the Minister is not required to consider any specific factors in exercising his residual discretion.[24]

15. The 'rules of natural justice' do not apply to a decision made under s 501(3) (s 501(5)). That provision excludes the hearing rule, but not the bias rule.[25] Because natural justice is excluded, the Minister is also required to take into account that a consequence of selecting the procedure under s 501(3) rather than s 501(2) is that the person will be denied an opportunity to make submissions on why the visa should not be cancelled on discretionary grounds (given that s 501C only allows the person to make subsequent submissions regarding the character test, not the national interest or the Minister's residual discretion).[26]

16. In making his decision, the Minister is also entitled to rely upon information which is protected under s 503A. Section 503A(2)(c) relevantly has the effect that neither the Minister, nor an authorised migration officer, can be required to divulge to (*inter alia*) a

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[19] *Sincair v Mining Warden at Maryborough* (1975) 132 CLR 473, 485 (Stephen J); cf *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423, 443-444 [55] (Hayne J).

[20] *Madafferi v Minister for Immigration and Multicultural Affairs* (2002) 118 FCR 326, 353 [89] (French, O'Loughlin and Whitlam JJ). See also *Re Patterson; Ex parte Taylor* (201) 207 CLR 391, 499-500 [323], [325] (Kirby J).

[21] *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1, 6 [17] (Allsop CJ and Katzmann J), 39 [177]-[179] (Buchanan J); *Taulahi v Minister for Immigration and Border Protection* [2016] FCAFC 177 (14 December 2016) [52] (Kenny, Flick and Griffiths JJ).

[22] *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1, 5 [9] (Allsop CJ and Katzmann J) (the requirement to consider legal consequences is 'reinforced if the legal consequences of the decision are important in human terms').

[23] The absence of procedural fairness under s 501(3) means that 'the Minister may lawfully make a decision under s 501(3) without the benefit of any information the visa holder might contribute': *Taulahi v Minister for Immigration and Border Protection* [2016] FCAFC 177 (14 December 2016) [84] (Kenny, Flick and Griffiths JJ).

[24] *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566, 606 [126]-[128] (Heydon and Crennan JJ). For eg, the Minister is not necessarily required to consider the best interests of a child of the person: *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, 29 [85]-[86] (Wigney J).

[25] *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 73 [43] (Gleeson CJ and Hayne J), 95 [131] (McHugh J), 112 [180] (Kirby J).

[26] *Taulahi v Minister for Immigration and Border Protection* [2016] FCAFC 177 (14 December 2016) [94], [102] (Kenny, Flick and Griffiths JJ). See also *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 455 [194]-[196] (Gummow and Hayne JJ, Gleeson CJ and Gaudron JJ agreeing).

court or a person, information which has been communicated to an authorised migration officer by a gazetted agency on condition that it be treated as confidential, and is relevant to the exercise of power under s 501 or s 501C ('protected information'). An authorised migration officer is also prohibited from divulging or communicating the information to any other person, other than the Minister or another authorised migration officer for the purposes of an exercise of power under s 501 or 501C (s 503A(1)). An authorised migration officer (but not the Minister) is also prohibited from giving the information in evidence (s 503A(2)(d)). The Minister may, by writing, declare that s 503A(1) or (2) does not prevent the disclosure of 'specified information' in 'specified circumstances'. Details of the gazetted agency (including its name and the conditions on which the communication of information by the agency occurred) are protected in the same was as 'protected information' (s 503D).

17. If the Minister decides to cancel the visa, he is not under a general obligation to provide reasons,[27] but may do so voluntarily.[28] However, the Minister is required to give reasons in a specific sense. Section 501C(3)(a) provides that 'as soon as practicable' after making a decision under s 501(3), the Minister must provide the person with 'a written notice that sets out the decision' as well as 'particulars of the relevant information'. 'Relevant information' means 'the reason, or part of the reason, for making the original decision' which is particular to the person, other than non-disclosable information (s 501C(2)). Where the Minister's decision is based on the person's membership or association with a criminal organisation, disclosure of that basis for the decision will always be a relevant particular. Indeed, in cases such as present, the Minister should disclose that he reasonably suspects that the person has been and/or still is a member of a *specified* motorcycle gang, and that the gang was and/or still is involved in criminal conduct.[29] Accordingly, much like the situation considered in *Assistant Commissioner Condon v Pompano Pty Ltd*, it is submitted that, at least for the s 501C process, the person will know in a general sense *what* is the allegation made against them, though not *how* the Minister has formed a suspicion of that allegation.[30]

18. The person may seek judicial review for jurisdictional error of the Minister's decision under s 501(3), either in the High Court pursuant to s 75(v) of the *Constitution* or in the Federal Court pursuant to s 476A(1)(c) and (2) of the *Migration Act*. The judicial review application may be made on a range of grounds. The reasons or relevant particulars given by the Minister might disclose, for example, that he took into account an irrelevant

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[27] Section 501G is the statutory source of the requirement to give reasons in relation to most decisions under s 501, but excludes decisions under s 501(3).
[28] See, for eg, *Taulahi v Minister for Immigration and Border Protection* [2016] FCAFC 177 (14 December 2016) [71]-[72] (Kenny, Flick and Griffiths JJ).
[29] *Taulahi v Minister for Immigration and Border Protection* [2016] FCAFC 177 (14 December 2016) [148] (Kenny, Flick and Griffiths JJ).
[30] *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 101 [163] (Hayne, Crennan, Kiefel and Bell JJ).

consideration, failed to take into account a relevant consideration, misconstrued the Act, or reached his conclusions in an unreasonable way.[31]

19. Indeed, Mr Graham succeeded in demonstrating that a previous decision of the Minister under s 501(3) was affected by jurisdictional error, notwithstanding that the Minister relied upon protected information.[32] The applicants in the present proceedings also make submissions of that kind.[33]

10 20. In fact, a person who has no membership of, or association with, a criminal organisation can ~~to~~ avail him- or herself of the opportunity to make representations to the Minister before resolving to seek judicial review. Whilst membership or association is not the relevant criterion, rather reasonable suspicion of such, non-membership or association is practically an important factual basis to demonstrate that no reasonable suspicion could be held. As soon as practicable after making the original decision, the Minister must invite the person to make representations about revoking it (s 501C(3)(b)). If in making representations, the person satisfies the Minister that they meet the character test, the Minister must revoke the original decision to cancel the visa (s 501C(4)).[34] The Minister
20 is required to afford natural justice when making a decision under s 501C(4), although the scope of natural justice is narrowed by s 503A.[35]

21. Because, in a case such as the present, a relevant particular will be that the Minister based his decision on s 501(6)(b), the person will be able to focus their representations on demonstrating that they do not and have not associated with a group, organisation or person involved in criminal conduct and nor is anything done in his or her everyday life which could reasonably give rise to a suspicion to that effect. If the person falls outside of s 501(6)(b), they will be able to make a general denial of association or membership of the kind alleged, reinforced by evidence as to their background, associations, occupation,
30 character and (if available) lack of any criminal record. If the person is unable to make a general denial of that kind, they will necessarily fall within s 501(6)(b).

22. If the Minister decides not to revoke his original decision, the person may commence judicial review proceedings for jurisdictional error in the High Court or Federal Court in respect of such decision.[36] On a judicial review of that kind, the person would file affidavit evidence of the Minister's original s 501(3) decision, and the material they

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40 [31] As, for eg, in *Taulahi v Minister for Immigration and Border Protection* [2016] FCAFC 177 (14 December 2016) [140], [150]-[152] (Kenny, Flick and Griffiths JJ)]; *Roach v Minister for Immigration and Border Protection* [2016] FCA 750 (24 June 2016) [88] (Perry J); *Tanielu v Minister for Immigration and Border Protection* (2014) 226 FCR 154, 161 [24] (Jessup J).

[32] *Graham v Minister for Immigration and Border Protection* [2016] FCA 682 (9 June 2016) [76] (Tracey J).

[33] Graham submissions, 19-20 [44]-[46]; Te Puia submissions, 10-12 [26]-[32].

[34] The word 'may' in s 501C(4) is properly construed to mean 'must': *Taulahi v Minister for Immigration and Border Protection* [2016] FCAFC 177 (14 December 2016) [148] (Kenny, Flick and Griffiths JJ).

[35] *Vella v Minister for Immigration and Border Protection* (2015) 230 FCR 61, 75 [54], 76 [61] (Buchanan, Flick and Wigney JJ).

[36] Section 75(v) of the *Constitution*; s 476A(1)(c), (2) of the *Migration Act*.

presented to the Minister for his consideration in making the s 501C decision. The person would be available for cross-examination. In a case where the material given to the Minister was convincing evidence that the person was outside the scope of s 501(6)(b), and the Minister did no more than rely upon protected information, it would be open to the Court to draw an inference that, whatever the protected information was, it could not have been of a kind that would support the necessary suspicion or the Minister could not have been acting reasonably in forming such a suspicion. It would be unnecessary for the court to decide which.[37] An inference of that kind could lead to a conclusion that the Minister's suspicion was unreasonable in that it 'lack[ed] an evident and intelligent justification.'[38] This is not least because, in a case where the protected information was of a kind which could found a *reasonable* suspicion, the Minister would almost invariably be possessed of disclosable information supporting his suspicion, evidence of which could be given to a court on a judicial review in respect of each decision.

23. Against that background, the plaintiffs' assertion that the 'statutory scheme exists to facilitate Executive decision-making in secret' must be rejected.[39] Section 503A does not have that purpose: it exists to ensure that gazetted agencies may give information to the Minister and his department with confidence that it will not be disclosed.[40] Nor, as the above discussion shows, does it have that effect.

**(b) Institutional integrity**

24. The protections afforded by s 503A are only engaged if the preconditions set by Parliament are established. Those preconditions are that the information was communicated by a gazetted agency, to an authorised migration officer, on the basis that it be treated as confidential, and the information was relevant to an exercise of power under s 501, 501A, 501B or 501C.

25. Importantly, where the Minister seeks to invoke the protection against production arising from s 503A(2)(c), the onus is on him to prove, by admissible evidence,[41] that the

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[37] Cf *Stevens v Minister for Immigration and Border Protection* [2016] FCA 1280 (2 November 2016) ~~at~~ [103]-[112]. To the extent Charlesworth J was stating a principle of general application, respectfully it should not be accepted.

[38] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 367 [76] (Hayne, Kiefel and Bell JJ). See further 349-352 [24]-[30], esp 350 [27] (French CJ), 362 [63], 363 [65], 364 [68] and 365-366 [72], esp 365-366 [72] (Hayne, Kiefel and Bell JJ), 370-371 [90]-[91] and 375 [105] (Gageler J); *Avon Downs Pty Ltd v FCT* (1949) 78 CLR 353, 360 (Dixon J).

[39] Graham submissions, 17 [37].

[40] Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 1998, 1231 (Mr Ruddock, Minister for Immigration and Multicultural Affairs); Commonwealth, *Parliamentary Debates*, Senate, 11 November 1998, 60 (Senator Kemp). See also *Vella v Minister for Immigration and Border Protection* (2015) 230 FCR 61, 70 [34], 78-79 [71] (Buchanan, Flick and Wigney JJ); *Evans v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 135 FCR 306, 320 [47] (Kenny J).

[41] *Eshchenko v Minister for Immigration and Multicultural and Indigenous Affairs [No 2]* (2005) 147 FCR 545, 550 [19]-[20] (Graham J).

statutory preconditions are met.[42] In order to demonstrate that the preconditions are met, the Minister may choose to disclose to the Court information otherwise protected by s 503A (such as the identity of the gazetted agency and the conditions on which it was communicated to an authorised migration officer[43]). The Minister might also choose to make a declaration under s 503A(3) to allow others to disclose the information to a court.[44]

26. As the defendant submits, it is for the Court to determine whether the preconditions are, in fact, met. This is an ordinary judicial function involving the 'application of the law as determined to the facts as determined'.[45] Section 503A therefore does not impermissibly direct the courts as to the manner and outcome of their exercise of jurisdiction, nor deprive any court of an 'essential characteristic'.[46]

27. Further, the plaintiffs' submission[47] that s 503A impermissibly impedes judicial fact-finding should be rejected. It is a commonplace for legislatures to enact laws regulating procedure and evidence,[48] including provisions which prevent disclosure both to a party and the court. Provisions in terms similar to s 503A are not unusual.[49] Some such provisions have been held to restate common law principles.[50] The reality is that rules of

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[42] *Vella v Minister for Immigration and Border Protection* [2014] FCA 1177 (6 November 2014) [34] (Wigney J).

[43] Section 503D provides that these matters fall within the protection of s 503A.

[44] As was done in *Vella v Minister for Immigration and Border Protection* [2014] FCA 1177 (6 November 2014) [35]. In the present matters, that the information was relevant to the exercise of power, and was communicated to an authorised migration officer by a gazetted agency on condition that it be treated as confidential, are agreed facts: See Graham special case, 2 [9] (Graham SCB 16); Te Puia special case, 2 [6] (Te Puia SCB 13).

[45] *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J). See also *Kuczborski v Queensland* (2014) 254 CLR 51, 114 [209] (Crennan, Kiefel, Gageler and Keane JJ), 139 [303] (Bell J).

[46] Compare *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* (2008) 234 CLR 532, 551 [7] (Gleeson CJ), 558-559 [33]-[34] (Gummow, Hayne, Heydon and Kiefel JJ), 539-594 [173]-[174] (Crennan J); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 531 [93]-[94] (French CJ), 540 [136], 542 [143]-[144] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), 576 [257] (Kirby J).

[47] Graham submissions, 6 [15.2], 14 [31.1].

[48] See *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* (2008) 234 CLR 532, 560 [39] (Gummow, Hayne, Heydon and Kiefel JJ), 596-597 [186]-[189] (Crennan J); *Elbe Shipping SA v Giant Marine Shipping SA* (2007) 159 FCR 518, 529 [27] (Dowsett J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 601 [41] (McHugh J); *R v MSK* (2004) 61 NSWLR 204, 212 [35] (Mason P, Wood CJ at CL, Barr J agreeing); *Nicholas v The Queen* (1998) 193 CLR 173, 188 [20] (Brennan CJ).

[49] See, for eg, *Community Justice Centre Act 2005* (NT) s 34; *Epidemiological Studies (Confidentiality) Act 1992* (ACT) s 8; *Fair Trading (Australian Consumer Law) Act 1992* (ACT) s 54(5); *Financial Transaction Reports Act 1993* (Tas) s 10(3); *Gaming Control Act* (NT) s 71(3); *Gaming Control Act 1993* (Tas) s 157(2)(b); *Gaming Machine Act* (NT) s 22(3); *Health Care Act 2008* (SA) ss 66(3), 73(3); *Hospital and Health Boards Act 2001* (Qld) s 138; *Mineral Royalty Act* (NT) s 50(4A); *Transport Safety Investigation Act 2003* (Cth) s 60(3)(b) (upheld in *Elbe Shipping SA v Giant Marine Shipping SA* (2007) 159 FCR 518, 529 [27]); *Victims of Crime Act 1994* (ACT) s 29(4); *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 89(4); *Witness Protection (Northern Territory) Act* (NT) s 39(2); *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 270; *Wrongs Act 1958* (Vic) s 28LZF. For historical examples, see also: *Evidence Act* (NT) s 42D between 1982 and 2012, and *Evidence Act 1898* (NSW) pt VI between 1979 and 1988.

[50] For eg, s 16(3) of the *Parliamentary Privileges Act 1987* (Cth), which was held to 'declare' the existing state of the law: *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, 333 (Lord Browne-Wilkinson). Similarly,

evidence, whether of the common law or statute, and various common law privileges,[51] seek to balance the public interest in the court's correct ascertainment of facts, against competing public interests (here, for example, national security). No invalidity arises merely because the legislature enacts a rule of evidence and decides that the latter public interest outweighs the former.[52]

**(c) The availability of judicial review**

10 28. Section 75(v) of the *Constitution* prevents the Commonwealth Parliament from enacting legislation which would exclude the High Court's jurisdiction to grant relief where the decision of a Commonwealth officer is affected by jurisdictional error.[53] The principle arising from *Kirk v Industrial Court (NSW)* similarly limits the power of State Parliaments to exclude the jurisdiction of a State Supreme Court to grant relief for jurisdictional error.[54]

29. However, nothing in s 75(v), nor this Court's jurisprudence, prevents the legislature of the Commonwealth or a State from conferring on Ministers powers properly exercisable
20 on the basis of a suspicion,[55] or by reference to evaluative, polycentric and political criteria,[56] and without first hearing from those who will be affected by the decision.[57] Such a power may leave 'little room for challenging the decision in a court of law',[58] but it does this by conferring a wide jurisdiction and thereby minimising the circumstances in which the Minister will fall into jurisdictional error.[59] It does not exclude the possibility

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the High Court found that s 76 of the *Corruption and Crime Commission Act 2003* (WA) was 'comparable' to the common law with respect to public interest immunity in *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* (2008) 234 CLR 532, 559 [36] (Gummow, Hayne, Heydon and Kiefel JJ).

[51] For eg, parliamentary privilege has the result that certain evidence is not admissible; self-incrimination
30 privilege and legal professional privilege enable a party unilaterally to withhold relevant evidence.

[52] *Nicholas v The Queen* (1998) 193 CLR 173, 197-198 [28] (Brennan CJ), 203 [55] (Toohey J), 238 [160], 239 [164] (Gummow J), 274 [238] (Hayne J); *Lodhi v The Queen* (2007) 179 A Crim R 470, 487 [66] (Spigelman CJ, Barr and Price JJ agreeing). See also *South Australia v Totani* (2010) 242 CLR 1, 106 [269] (Heydon J).

[53] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 505-506 [75]-[76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

[54] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 581 [99]-[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[55] For eg, in *Ruddock v Taylor* (2005) 222 CLR 612, 624 [35], Gleeson CJ, Gummow, Hayne and Heydon JJ noted that the respondent's arguments about 'reasonable suspicion' went to statutory construction rather than the question of validity.

[56] See *P1 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1029 (26 September
40 2003) [49] (French J); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 180 [58]-[59] (French CJ) ('*Malaysian Declaration Case*'); *Plaintiff S297 v Minister for Immigration* (2015) 255 CLR 231, 242 [18] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ).

[57] As, for eg, in *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 668 [100] (Gummow, Hayne, Crennan and Bell JJ). See also *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 622 [367] (Gageler J).

[58] *Harburg Investments Pty Ltd v Mackenroth* [2005] 2 Qd R 433, 436 [3] (McPherson JA, Jerrard JA and White J agreeing).

[59] *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 205 (Deane and Gaudron JJ).

of the Court granting relief where he does so.[60] A power of that kind is wide but does not approach the kind of unbounded power the validity of which was questioned in *Plaintiff S157/2002*.[61]

30. In any event, decisions of the Minister under s 501(3) are, in practical terms, reviewable on a range of grounds, as explained above.[62] It is true that for an applicant to have the Minister's decision under s 501(3) set aside on the ground of unreasonableness is a result not lightly or easily achieved. But that is primarily a consequence of the low bar[63] presented by the conditions on which the Minister's power is exercisable, and the fact that, at the time of exercise, the Minister may, properly, have no information from the visa holder.

31. The validity of that may be tested in this way: even if the information protected by s 503A was disclosed to the applicant for the purposes of the judicial review, it would be challenging for the applicant to show that the Minister's decision was unreasonable in the relevant sense. Indeed, unless the information was so poor as to reveal that the Minister could not have acted reasonably in forming a suspicion on it, its disclosure is highly unlikely to assist a person seeking review of a s 501(3) decision. In the case of Ministerial bad faith, it is unlikely that the Minister could successfully resist a subpoena for production of the material, given the necessity of him establishing the statutory preconditions for the engagement of s 503A.

32. Further, to consider s 501(3) in isolation from the process required by s 501C is to misconstrue the operation of the statute.[64] The statute mandates a process akin to immediate administrative review, which enables affected persons effectively to put their case (at least in respect of the character test). In a case, unlike the present,[65] where the person has attempted to show that they have no association with, or membership of, a criminal organisation, s 501C will be critical. A decision under that section, like the s 501(3) decision, is amenable to judicial review, on a range of bases, including, for example, for unreasonableness.[66] As discussed above, in a case where the material presented to the Minister (and admitted in evidence on the judicial review) was convincing, if the Minister could do no more than point to the existence of protected

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[60] As, for eg, in *Plaintiff S297 v Minister for Immigration* (2015) 255 CLR 231, 243-244 [21], 250 [47] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ).

[61] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 512-513 [101]-[102] (Gaudron, McHguh, Gummow, Kirby and Hayne JJ).

[62] See above, 6 [18].

[63] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 375 [105] (Gageler J).

[64] Cf *Taulahi v Minister for Immigration and Border Protection* [2016] FCAFC 177 (14 December 2016) [147] (Kenny, Flick and Griffiths JJ).

[65] Neither special case discloses any attempt by either plaintiff to persuade the Minister to revoke his decision. At least in the case of Mr Graham, he would fail the character test in s 501(6)(a) in any event, and the publicly available material appears sufficient for the formation of a reasonable suspicion for the purposes of s 501(6)(b): see Graham SCB 101-122.

[66] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 364 [67], 367 [76] (Hayne, Kiefel and Bell JJ).

information, a Court may be able to infer that, whatever the protected information was, it could not have been the basis for a 'reasonable suspicion'.

33. Further, in large part, the forensic difficulties faced by an applicant for judicial review of a s 501C decision are again the result of the low bar presented by the conditions on which the Minister's power is exercisable. If, for example, instead of conditioning the power on a 'reasonable suspicion', Parliament had chosen the criterion of 'knowledge or reasonable belief', the forensic task of an applicant would have been significantly easier, even if protected information continued to be withheld. Yet the plaintiffs, rightly, do not suggest that Parliament's selection of a low bar presents any constitutional difficulty.

34. Moreover, the fact that forensic obstacles exist which make it difficult for an applicant to demonstrate that a decision is affected by jurisdictional error of one particular kind (here, unreasonableness), does not mean that the jurisdiction conferred on the High Court by s 75(v) of the *Constitution* has been excluded. So much is clear from the reasons of Hayne J[67] and Heydon J[68] in *South Australia v Totani*. Their Honours pointed out that a decision-maker may not be required to provide reasons, legislation may restrict access to criminal intelligence and public interest immunity may in any event be claimed. As Heydon J said, '[i]t may be that strait is the gate, and narrow is the way, and few there be that find it', but that does not mean that judicial review for jurisdictional error is unavailable.[69]

35. As the New South Wales Court of Appeal said in *Commissioner of Police v Sleiman*, relying upon Hayne and Heydon JJ in *Totani*, 'The principles in *Kirk* do not ... lead to the conclusion that State legislation which creates practical difficulties for an applicant seeking judicial review for jurisdictional error will necessarily fall foul of Ch III of the *Commonwealth Constitution*.' The same reasoning applies equally with respect to the High Court's entrenched supervisory jurisdiction in s 75(v) of the *Constitution*. Any departure from the settled view that Parliament may permissibly erect forensic obstacles to judicial review would be inconsistent with the history of legislative restriction of judicial review,[70] and with the position at common law that reasons are not required to be given.[71]

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[67] *South Australia v Totani* (2010) 242 CLR 1, 79 [195] (Hayne J). French CJ agreed with Hayne J specifically on this point at 27 [27], and Crennan and Bell JJ agreed generally on the question of reviewability at 153 [415].
[68] *South Australia v Totani* (2010) 242 CLR 1, 105 [269] (Heydon J).
[69] *South Australia v Totani* (2010) 242 CLR 1, 106 [271] (Heydon J).
[70] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 568 [59], where the plurality note that the effect of the *Summary Jurisdiction Act 1848* (UK) 11 & 12 Vict c 43 was that the 'face of the record "spoke" no longer: it was the inscrutable face of a sphinx'.
[71] *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656, 662-663 (Gibbs CJ, Wilson, Brennan and Dawson JJ agreeing).

## PART VI: Estimate of time required for oral argument

36. The Attorney-General estimates that no more than 20 minutes will be required for the presentation of oral argument.

Dated ~~13~~ 28 February 2017.

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503D Details of gazetted agency to be treated as protected information

(1) If section 503A or 503B applies to information communicated by a gazetted agency to an authorised migration officer so that the information cannot be divulged or communicated except as provided for in sections 503A, 503B and 503C, then sections 503A, 503B and 503C apply to similarly protect the agency's details from being divulged or communicated as if the details were the information communicated by the agency.

(2) A reference in subsection (1) to ***agency's details*** is a reference to any information in relation to the gazetted agency including the agency's name and the conditions on which the communication of information by the agency occurred.

(3) In this section:

***gazetted agency*** has the same meaning as in section 503A.