IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S114 OF 2013**

On appeal from
Supreme Court of New South Wales Court of Criminal Appeal

BETWEEN: **BONANG DARIUS MAGAMING**
Appellant

AND: **THE QUEEN**
Respondent

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

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PART I FORM OF SUBMISSIONS

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

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes under s 78A of the *Judiciary Act 1903* (Cth) in support of the Respondent.

PART IV LEGISLATIVE PROVISIONS

3. The Commonwealth adopts the Appellant's statement of applicable legislative provisions.

PART V ARGUMENT

A. INTRODUCTION

4. The Appellant makes two arguments against the validity of s 236B of the *Migration Act 1958* (Cth) (**Migration Act**), in its application to s 233C.

5. First, the Appellant contends that these provisions are contrary to the separation of the judicial and prosecutorial functions.[1]

   5.1. The Appellant notes that: (i) there is an overlap in the conduct prohibited by ss 233A and 233C of the Migration Act; (ii) the mandatory minimum sentence in s 236B applies only to the s 233C offence; (iii) the prosecutor determines whether a person is charged with an offence against s 233A or s 233C.

   5.2. The Appellant contends that, consequently, a person's imprisonment for a conviction of an offence against s 233C is arbitrary, and that a critical element of the punishment is determined otherwise than by the exercise of judicial power by a court.

6. In summary, the Commonwealth responds as follows. ***See Pt B below***

   6.1. The judicial function is to determine whether a person is guilty of the offence with which the person is charged and, if so, sentence the person for that offence. That judicial function co-exists with a broad prosecutorial discretion to determine the offence with which a person will be charged. Accordingly, the prosecutor, by choosing to charge a person with an

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[1] Appellant's submissions, para 4(a).

offence against s 233C rather than s 233A, does not exercise any "critical element" in the judicial function of sentencing an offender.

6.2. The fact that s 233A and s 233C attract different penalties does not make any punishment for a conviction against s 233C "arbitrary". Although not essential to validity, there is a material difference between the offences against s 233A and s 233C. Those provisions create separate offences with different elements – the offence against s 233A is made out where a single person is smuggled, whereas the aggravated offence against s 233C is only made out where a "group" comprising at least 5 persons is smuggled.

7. Second, the Appellant contends that the mandatory minimum sentence in s 236B requires courts to act contrary to accepted notions of judicial power.[2]

7.1. The Appellant contends that the mandatory minimum sentence will often be grossly disproportionate to the gravity of the offending, and that outcomes for co-offenders in like circumstances may be very different.

7.2. The Appellant also contends that an aspect of the sentencing decision is made without the offender being heard, and without reasons being given.

8. In summary, the Commonwealth responds as follows. ***See Pt C below***

8.1. It is no part of the judicial function in Australia to assess whether a penalty prescribed by Parliament (including a mandatory minimum penalty) is, in the court's view, reasonably necessary for the punishment of criminal guilt. The requirement of "proportionality" in sentencing is a common law principle, which takes account of any maximum or minimum penalty or penalties prescribed by Parliament.

8.2. The mandatory minimum sentence does not compel any disparity as between co-offenders. The courts will determine the appropriate sentence for conviction of an offence against s 233C, within the prescribed maximum and minimum penalties. The fact that sentences may be compressed at the lower end of liability does not suggest any constitutional difficulty. Moreover, there is no difficulty with the prosecutor choosing to prosecute one co-accused under s 233A, and another co-accused under s 233C, even though that may lead to a difference in sentencing outcome.

8.3. A court provides procedural fairness for the decisions it makes – that is, whether a person is guilty of the offence charged, and the appropriate sentence within the statutory range. A court also provides an offender with reasons for its decision on sentencing. The prosecution is not

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[2] Appellant's submissions, para 4(b).

required to give a person a hearing on, nor reasons for, the choice of offences with which the person will be charged.

9. Before responding to the Appellant's arguments in detail, it is convenient to state some of the main positive propositions for which the Commonwealth contends.

9.1. Parliament may determine what conduct is criminal, and what penalties are to be imposed on that conduct. Once a Commonwealth law has a sufficient connection with a head of power (a matter not put in issue here), the wisdom or expediency of that law is a matter for Parliament: paras 35-40 below.

9.2. A Commonwealth law may validly require a court to make a specified order if the court is satisfied that a specified event has occurred. A Commonwealth law may also validly confer on the executive government a choice as to whether to bring proceedings that result in that (non-discretionary) order, or proceedings that result in an alternative (discretionary) order: see para 45 below.

9.3. Prosecutors have a broad discretion as to the offence with which to charge a person, and this discretion is not in practice reviewable by a court. Courts sentence an offender for the offence or offences for which he or she has been convicted or which were proven against him or her, rather than an offence with which the offender could have been charged, but was not: see paras 13 and 15 below.

9.4. Common law sentencing principles apply subject to a contrary legislative intention. Parliament may alter the balance struck by the common law between competing public interests (here, between the different purposes of punishment): see paras 49-50 below.

B. THERE IS NO BREACH OF THE SEPARATION OF POWERS

10. Nothing in s 236B of the Migration Act (read with ss 233A and 233C) is contrary to the constitutionally required separation of federal judicial power.

10.1. The adjudication of criminal guilt and the imposition of punishment is an exclusively judicial function.[3] There is no issue in this case about the courts' role in adjudicating guilt; rather, the issue is the effect of the impugned provisions on the courts' role in imposing punishment for breach of the criminal law.

10.2. In short, the courts' exclusive power to *impose* punishment for breach of the criminal law does not preclude Parliament's power to *prescribe*

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3 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 (***Chu Kheng Lim***) at 27 (Brennan, Deane and Dawson JJ); *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 109 [40] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

punishment, nor the executive's discretion to determine the offence with which a person will be charged.[4]

11. The only issue for present purposes is whether the prosecutor has purported to exercise part of an exclusively judicial function. The Appellant had sought to argue that the executive is directing the court as to the exercise of judicial power; however, special leave was not granted on that point.[5]

B.1 Role of courts and prosecution: basic principles

12. The Appellant's argument runs counter to two basic principles.

13. First, the prosecution has a broad discretion to determine the offence with which a person will be charged. This prosecutorial discretion "is not any part" of the courts' function.[6]

13.1. For that reason, this discretion is not susceptible in practice to judicial review, in order to preserve the independence of the courts.[7] That is, the separation of judicial power requires that courts not become entangled in the prosecutor's discretion.[8]

13.2. A prosecutor is subject to duties of fairness that may be enforced by the trial judge.[9] Those duties can be enforced ultimately by the judge staying proceedings as an abuse of process, although it can be expected that this would occur only rarely.[10] However, the separation of functions does not permit the court to canvass the exercise of the prosecutor's discretion in cases where a court might consider that a less serious or more serious offence would be more appropriate.[11] As Dawson and McHugh JJ observed in *Maxwell*,[12] "the most important sanctions governing the proper performance of a prosecuting authority's functions are likely to be political rather than legal".

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4 The executive implements the order of imprisonment: see *New South Wales v Kable* (2013) 87 ALJR 737 at 747 [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), and may have a role in ameliorating the sentence; for example, by granting parole(see *Baker v The Queen* (2005) 223 CLR 513 at 533-534 [47]-[48] (McHugh, Gummow, Hayne and Heydon JJ)) or by the prerogative of mercy.

5 See *Magaming v The Queen* [2013] HCA Trans 140 at p 15 (lines 599-607). The attempted argument is precluded in any event by *Elias v The Queen* (2013) 87 ALJR 895 (***Elias***).

6 *Elias* (2013) 87 ALJR 895 at 904 [34] (the Court), citing *Maxwell v The Queen* (1996) 184 CLR 501 (***Maxwell***) at 514 (Dawson and McHugh JJ).

7 *Likiardopoulos v The Queen* (2012) 86 ALJR 1168 (***Likiardopoulos***) at 1177 [37] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); see also 1171 [2] (French CJ).

8 *Likiardopoulos* (2012) 86 ALJR 1168 at 1171 [2] (French CJ), citing *Jago v District Court (NSW)* (1989) 168 CLR 23 at 39 (Brennan J); *Barton v The Queen* (1980) 147 CLR 75 at 94-95 (Gibbs ACJ and Mason J).

9 *Likiardopoulos* (2012) 86 ALJR 1168 at 1177 [37] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); see also 1171 [2] (French CJ); *Elias* (2013) 87 ALJR 895 at 904 [35] (the Court).

10 *Maxwell* (1996) 184 CLR 501 at 512, 514 (Dawson and McHugh JJ), 535 (Gaudron and Gummow JJ). This is all that is meant by the statement that the criminal process requires "fairness": see *X7 v Australian Crime Commission* (2013) 87 ALJR 858 (***X7***) at 871 [38] (French CJ and Crennan J), cited in Appellant's submissions, para 73.

11 *Elias* (2013) 87 ALJR 895 at 904 [34] (the Court).

12 (1996) 184 CLR 501 at 514.

14. The Appellant contends that the existence of this broad prosecutorial discretion does not answer whether there is an implied limit on legislative power.[13] However, the breadth of the prosecutorial discretion reflects that the prosecutor and the court perform different functions. This difference in functions means that a prosecutor does not, by charging a person with one offence rather than another, remove from the court any element of the sentencing function.

15. The second basic principle is that the judicial function is: (i) to determine whether an accused is guilty of the offence with which he or she was charged (when guilt is not admitted); and, if the offence is proven, (ii) to sentence the offender for that offence (or otherwise deal with the person[14]).

    15.1. In particular, an offender is sentenced for the offence proven against him or her, not for an offence with which he or she potentially could have been charged that has a lower maximum penalty.[15]

    15.2. In so far as there are co-offenders,[16] the findings of fact on which the conviction or sentencing of an offender are based are only conclusive as between that offender and the Crown, and do not operate against the world (including co-offenders tried separately).[17]

16. Accordingly, there is nothing unusual about the prosecutor's choice of charge affecting the punishment that may be imposed on an offender.[18] Nor is there anything uncommon with criminal laws laying down a "base level" offence (here, people smuggling) that is wholly included in other offences that contain aggravating factors.[19] As explained below, Parliament may prescribe a mandatory minimum penalty.[20] Accordingly, the fact that in this case one of those overlapping offences attracts a mandatory minimum sentence is merely a difference of degree, not of kind. Indeed, the logic of the Appellant's argument would seem to be that a prosecutor could not be given a discretion to choose between overlapping offences if there was a difference between the *maximum* penalties (not just the minimum penalties) for those offences. That would be a major intrusion into Parliament's undoubted power to prescribe penalties.

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13 Appellant's submissions, para 44.

14 Note *Crimes Act 1914* (Cth), s 19B (discharge of offenders on condition but without proceeding to conviction). Section 19B can only be applied to offenders against s 233C who are under 18 years old at the time of offending: Migration Act, s 236A.

15 *Elias* (2013) 87 ALJR 895 at 902 [26], 904 [34] (the Court).

16 Cf Appellant's submissions, para 81.

17 *Likiardopoulos* (2012) 86 ALJR 1168 at 1176-1177 [35] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

18 *Elias* (2013) 87 ALJR 895 at 904 [34] (the Court). The maximum penalty for an offence is a relevant factor in assessing the proportionate sentence: *Elias* at 902 [27]; see para 49.1 below.

19 *Elias* (2013) 87 ALJR 895 at 904-905 [36] (the Court): "it will often be possible to conceive of other charges upon which the prosecution might arguably have proceeded". See eg the offences listed in *R v Brown* (1989) 17 NSWLR 472 at 473 (the Court): robbing or assaulting with intent to rob another person (14 years); robbing another person armed with an offensive weapon (20 years); robbing another person while armed with an offensive weapon, and harming the person at the time of robbery (life).

20 See para 36 below.

17. These two basic principles are reflected in the decision of this Court in *Fraser Henleins Pty Ltd v Cody*.[21]

18. In that case, which involved a more complete form of overlapping offences than the present, the *Black Marketing Act 1942* (Cth) (**Black Marketing Act**) penalised "black marketing", defined as certain acts or omissions that were breaches of regulations made under the *National Security Act 1939* (Cth) (**National Security Regulations**). Offences against the Black Marketing Act attracted higher penalties, including mandatory minimum penalties.[22]

19. Relevantly, the Court rejected an argument that the prosecutor's choice of whether to prosecute under the Black Marketing Act or the National Security Regulations involved any exercise of judicial power. Latham CJ stated:[23]

> ... in all cases of public prosecutions, there must first be a decision by some public authority whether to prosecute or not to prosecute. The risk of infliction of a penalty depends upon the decision of a non-judicial authority or person as to whether any prosecution at all should be instituted. But such a decision is in no respect an exercise of judicial power.

20. The Appellant's attempts to distinguish *Fraser Henleins* should be rejected. First, reliance on the defence power formed no part of the Court's reasoning.[24] Second, it is irrelevant that the decision pre-dated the *Boilermakers* doctrine.[25] The issue in *Fraser Henleins* (and the issue here) is whether the prosecutor has purported to exercise any part of an exclusively judicial function. At the time of *Fraser Henleins*, it was well settled that only Ch III courts could exercise federal judicial power,[26] and that the adjudication and punishment of criminal guilt was an exclusively judicial function.[27]

B.2 Prosecution does not exercise any "critical part" of the sentencing function

21. For the reasons set out above, the prosecution does not exercise any "critical part" in the sentencing function in determining whether to charge a person with

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21 (1945) 70 CLR 100 (***Fraser Henleins***).

22 See *Fraser Henleins* (1945) 70 CLR 100 at 118-119 (Latham CJ). Black marketing was punishable by (a) if the offence was prosecuted summarily – imprisonment for not less than 3 months or, with a body corporate offender, a fine between £1,000 and £5,000, and (b) if the offence was prosecuted on indictment – imprisonment for not less than 5 months or, with a body corporate offender, a fine of not less than £10,000.

23 *Fraser Henleins* (1945) 70 CLR 100 at 119-120; see also 121 (Starke J), 139 (Williams J). See also *Ex parte Coorey* (1944) 45 SR (NSW) at 314-315 (Davidson J), whose reasoning (as well as the reasoning of Nicholas CJ in Eq) was adopted by Dixon J and McTiernan J in *Fraser Henleins* (1945) 70 CLR 100 at 125, 132.

24 Contra Appellant's submissions, para 98. For example, *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185 was another decision concerning the definition of judicial power decided during war time.

25 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. Contra Appellant's submissions, para 100.

26 *New South Wales v The Commonwealth (The Wheat Case)* (1915) 20 CLR 54; *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 (***J W Alexander***).

27 See eg *J W Alexander* (1918) 25 CLR 434 at 444 (Griffith CJ); *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 175 (Isaacs J).

an offence against s 233C or s 233A.[28] The decisions in *Deaton v Attorney-General*,[29] *Hinds v The Queen*,[30] *Liyanage v The Queen*[31] and *Ali v The Queen*[32] (relied on by the Appellant) do not alter the position.

22. *Deaton*[33] and *Hinds*[34] deal with a different point – whether an Act can give the executive the power to determine the punishment of an individual person who has been convicted. Section 236B does not do that – the sentence is determined by the court within the range prescribed by Parliament, without any interposition by the executive.

23. Both *Deaton* and *Hinds* accept that Parliament may prescribe maximum or minimum penalties.[35] In *Hinds*,[36] the Privy Council stated the relevant limit as follows:

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

24. Given that the Privy Council in *Hinds* accepted that Parliament may prescribe a minimum penalty, the reference to the executive "determining" the severity of punishment cannot include the situation where the prosecutor chooses to charge a person with an offence that attracts a mandatory minimum penalty.

25. A crucial difference between this case and *Liyanage*[37] was that the sentencing laws in *Liyanage* were altered retrospectively, so as to target and secure the punishment of particular individuals. Here, ss 233A, 233C and 236B contain prospective rules of general application. Those sections are not designed to secure the conviction and enhance the punishment of particular individuals.[38]

26. The decision in *Ali*[39] is also readily distinguishable.

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28 Contra Appellant's submissions, para 48.
29 [1963] IR 170 (***Deaton***). Appellant's submissions, paras 49-50.
30 [1977] AC 195 (***Hinds***). Appellant's submissions, para 52.
31 [1967] 1 AC 259 (***Liyanage***). Appellant's submissions, para 51.
32 [1992] 2 AC 93 (***Ali***). Appellant's submissions, para 53.
33 [1963] IR 170 at 183. In *Deaton*, the penalty under customs legislation was "treble the value of the goods, including the duty payable thereon, or one hundred pounds, *at the election of the Commissioners of Customs*" (emphasis added): at 181.
34 [1977] AC 195 at 225-226. In *Hinds*, a person convicted in the Gun Court could only be discharged by the Governor-General, acting on the advice of a "Review Board". A majority of the members of that Board were not judges. The Act purported to remove the power to determine the length of custodial sentence from the judiciary and vest it in an executive body: at 225.
35 *Deaton* [1963] IR 170 at 181; *Hinds* [1977] AC 195 at 226.
36 [1977] AC 195 at 226.
37 [1967] AC 259 at 290-291. The relevant alterations to sentencing law, the offence provisions, and the removal of procedural protections, are set out at 279-281.
38 Cf *Liyanage* [1967] AC 259 at 291. See *Ali* [1992] 2 AC 93 at 102 quoting *Deaton* [1963] IR 170 at 182-183: "There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case".
39 [1992] 2 AC 93.

26.1. In *Ali*, the critical features of the Act were: (i) if a charge for drug importation with an allegation of trafficking was heard by a judge of the Supreme Court alone, there was a mandatory penalty of death on conviction; (ii) if the *same* charge was heard by the Intermediate or the District Court, that Court could only impose a fine or imprisonment; and (iii) the Director could choose whether the case would be heard by a judge alone or by the Intermediate or the District Court.[40]

26.2. In that situation, the Privy Council held that the Director had been given a power, in substance, to select the penalty to be imposed in a particular case, which was invalid.[41]

27. *Ali* therefore turned on two factors: (i) there were divergent punishments for the same offence; and (ii) the prosecutor's unilateral choice of forum determined which of those punishments was available. Neither of those factors is present here.[42] Instead, the Migration Act contains two offences that have different elements, and the prosecution has its usual discretion as to the offence with which to charge a person.

28. Nothing in *Ali* suggests any constitutional difficulty with that position.[43] *Ali* accepted that, in general, a prosecutor could be given a discretion to charge a person with one offence rather than another.[44] *Ali* also accepted that Parliament could prescribe a mandatory fixed penalty (not just a mandatory minimum penalty) for an offence:[45]

> If in Mauritius importation of dangerous drugs by one found to be trafficking *carried in all cases the mandatory death penalty* and importation on its own a lesser penalty, the Director of Public Prosecution's discretion whether to charge importation with or without an allegation of trafficking would be entirely valid.

29. A further difference between *Ali* and the present case is that, in *Ali*, the Supreme Court was required to impose a single, fixed penalty: death.[46] Here, ss 233C and 236B confer a discretion on the sentencing court (albeit constrained) to determine the appropriate penalty between the maximum and minimum sentence.

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40 See, respectively, Dangerous Drugs Act 1986 (Mauritius), s 38(4), s 38(3) and s 28(8). The relevant provisions are set out in [1992] 2 AC 93 at 97-98.

41 *Ali* [1992] 2 AC 93 at 104.

42 Note that certain federal indictable offences can be tried summarily, but only with the consent of both the prosecutor and the defendant: see *Crimes Act 1914* (Cth), s 4J(1).

43 Contra Appellant's submissions, para 54.

44 [1992] 2 AC 93 at 104: "In general, there is no objection of a constitutional or other nature to a prosecuting authority having a discretion of that nature [ie whether to charge a person with one offence or another]".

45 *Ali* [1992] 2 AC 93 at 104 (emphasis added).

46 *Ali* [1992] 2 AC 93 at 103. The imposition of the death penalty may raise special issues: see, by analogy, *Lockett v Ohio* 438 US 586 (1978); *Harmelin v Michigan* 501 US 957 (1991). Generally, however, Parliament may enact a single, fixed penalty: see paras 36 and 45.1 below.

30. Accordingly, even if *Ali* could stand as good law in Australia in the light of *Fraser Henleins* (which need not be decided here), it is remote from the present case. It casts no doubt on the validity of s 236B (read with ss 233A and 233C).

B.3 Punishment for an offence against s 233C is not "arbitrary"

31. The punishment for an offence against s 233C of the Migration Act is not "arbitrary", simply because there is an overlap in the conduct that may be caught by the offences in ss 233A and 233C.

32. The Appellant's imprisonment results from being convicted of an offence against s 233C and sentenced by a judge. The prosecutor's discretion as to whether to charge the Appellant with an offence against s 233A or s 233C does not raise any constitutional difficulties: see B.1 above. Accordingly, the Appellant's imprisonment is not "arbitrary" in any meaningful sense.[47] Nor is there any legislative adjudication of guilt[48] – the Appellant was convicted under an offence provision of general application.

(a) No constitutional difficulty arises from overlap between ss 233A and 233C

33. One aspect of the Appellant's argument appears to be that Parliament has criminalised substantially the same conduct with significantly different penalties.[49] That result would not lead to invalidity – *Fraser Henleins* establishes that there is no difficulty in Parliament prescribing offences with identical elements, but different penalties.[50] In any event, the Appellant's argument proceeds from a false premise.

34. Sections 233A and 233C of the Migration Act create different offences with different elements. Section 233A proscribes the smuggling of "another person" who is a non-citizen.[51] Section 233C proscribes the smuggling of a "group of at least 5 persons", at least 5 of whom are non-citizens.[52] The statement by Allsop P[53] that the "same conduct (if five or more people are involved) is viewed divergently by Parliament" does not, with respect, fully grapple with this difference, nor with the manner in which offenders would be sentenced for contraventions of s 233A or s 233C as a result of that difference.

34.1. The reference to a "group" in s 233C is a circumstance of aggravation which, in effect, creates the different and more serious offence under s 233C, rather than a circumstance of aggravation that renders an

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47 Cf Appellant's submissions, para 56. *The Commonwealth v Fernando* (2012) 200 FCR 1 at 21 [99] (the Court) (cited in Appellant's submissions, note 48) was considering a false imprisonment claim, and used "arbitrary" to mean without lawful authority.

48 Contra Appellant's submissions, para 57.

49 Appellant's submissions, para 33, quoting Reasons below, [56] (at **Appeal Book** (AB) p 54).

50 The Black Marketing Act penalised "black marketing", defined as certain acts or omissions that were breaches of the National Security Regulations. Offences against the Black Marketing Act attracted higher penalties, including mandatory minimum penalties: see para 18 above.

51 Migration Act, s 233A(1)(a) and (b).

52 Migration Act, s 233C(1)(a) and (b).

53 Reasons below, [57] (at AB pp 54-55).

offender liable to a greater penalty for the same offence that is set out in s 233A.[54] The better view is that a single charge under s 233A that particularised the smuggling of more than one person would be bad either because no such offence exists or for duplicity.[55] In other words, s 233A only applies to smuggling a single person. There is no scope for reading the reference in s 233A to "another person" and "the second person" as including the plural.[56]

34.2. Parliament has in s 233C treated the existence of a group as a factor justifying the enactment of a more serious offence with higher penalties. Although the Appellant disputes whether the aggravating factor of smuggling a group of 5 or more people justifies the difference in penalty,[57] that is simply an attack on the merits of the legislative judgment made by Parliament.

34.3. It is true that if a person engaged in people smuggling of a group of 5 or more people, the prosecutor could choose whether to charge the accused with breaching s 233C, or with 1 or more charges of breaching s 233A, with each charge identifying a separate person smuggled.[58] In the latter case, at the stage of sentencing, the court would impose separate sentences for each offence then fix a total effective sentence and a single non-parole period, after taking into account considerations of accumulation and concurrence, proportionality and totality.[59] If an accused person is found guilty of smuggling another person contrary to s 233A, the fact that the person smuggled 5 or more people cannot be taken into account in sentencing, because it is not permissible to have regard to facts disclosing a circumstance of aggravation that could have been, but was not, charged.[60] At the time of the Appellant's offending, the Prosecution Policy of the Commonwealth (issued by the Commonwealth Director in March 2009) provided that in the ordinary course the charge or charges laid or proceeded with would be the most serious disclosed by the evidence.[61]

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54 See *R v Meaton* (1986) 160 CLR 359 at 367 (Brennan and Deane JJ); *Keung v The Queen* (2008) 191 A Crim R 317 at 324 (Giles JA with Johnson and Hall JJ agreeing).

55 See *Walsh v Tattersall* (1996) 188 CLR 77 at 91 (Gaudron and Gummow JJ), 112 (Kirby J).

56 *Walsh v Tattersall* ibid; contra Reasons below, [9] (at AB p 35). The presumption in s 23(b) of the *Acts Interpretation Act 1901* (Cth) applies subject to contrary intention: s 2(2). See *R v Giam* (1999) 104 A Crim R 416 at 420 [24] (Spigelman CJ with Abadee and Adams JJ agreeing), *Johnson v Miller* (1937) 59 CLR 467 at 489 (Dixon J), cf *R v B* (2008) 76 NSWLR 533.

57 Cf Appellant's submissions, paras 34-35.

58 Cf Appellant's submissions, para 34.

59 *Johnson v The Queen* (2004) 78 ALJR 616 at 624-625 [26]-[27]; *Cargnello v DPP (Cth)* [2012] NSWCCA 162 at [92]-[93] (Basten JA); *Crimes Act 1914* (Cth), ss 19, 19AB(1).

60 *R v De Simoni* (1981) 147 CLR 383 at 389 (Gibbs CJ); *Elias* [2013] HCA 31 at [26] (note 46) (the Court).

61 *Prosecution Policy of the Commonwealth* (March 2009) at [2.20]. On 27 August 2012, the Attorney-General issued a direction under s 8(1) of the *Director of Public Prosecutions Act 1983* (Cth) which provides that the Director must not institute, carry on or continue to carry on a prosecution for an offence under s 233C of the Migration Act against a person who was a crew member in a people smuggling venture, unless the Director is satisfied that certain circumstances exist.

(b) Parliament can determine appropriate penalty

35. Second, contrary to the Appellant's submissions,[62] there is no constitutional requirement that a punishment prescribed by Parliament must be reasonably capable of being seen as necessary for the adjudication and punishment of criminal guilt.

36. Parliament has broad power to determine the appropriate penalties for offences that it creates. As Barwick CJ held in *Palling v Corfield*:[63]

36.1. It is "beyond question" that Parliament can prescribe such penalty as it thinks fit for the offences it creates.

36.2. Parliament may validly prescribe a single fixed penalty – it is the court's duty to impose the penalty, and the court has no power not to impose it.

36.3. Although it may be thought undesirable for a court not to have any discretion as to the penalty imposed, it is a decision for Parliament whether or not to give such a discretion to the courts.[64]

This analysis of the respective roles of Parliament and the courts is quite contrary to the Appellant's argument.[65]

37. The same result follows from general principles of characterisation. The Commonwealth Parliament enacts offences and prescribes penalties under its incidental power (either express or implied).[66] The scope of the incidental power is explained by Dixon CJ as follows in *Burton v Honan*:[67]

> These matters of incidental powers are largely questions of degree, but in considering them we must not lose sight of the fact that once the subject matter is fairly within the province of the Federal legislature the justice and wisdom of the provisions it makes are matters entirely for the Legislature and not for the Judiciary.
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> In the administration of the judicial power in relation to the Constitution there are points at which matters of degree seem sometimes to bring forth arguments in relation to justice, fairness, morality and propriety, but those are not matters for the judiciary to decide upon.

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62 Appellant's submissions, para 63.

63 (1970) 123 CLR 52 at 58; see also 65 (Menzies J), 68 (Walsh J). Windeyer and Gibbs JJ agreed with the other judgments: at 65, 70.

64 In the United States, it has been accepted that sentencing discretion is subject to federal law: see eg *Mistretta v United States* 488 US 361 (1989) at 364-365; *Chapman v United States* 500 US 453 (1991) at 467.

65 Cf the attempts to distinguish *Palling v Corfield* in Appellant's submissions, paras 102-104.

66 *R v Kidman* (1915) 20 CLR 425 at 434 (Griffith CJ), 441 (Isaacs J), 450 (Higgins J), 459-460 (Powers J); *R v Sharkey* (1949) 79 CLR 121 at 136 (Latham CJ), 157 (McTiernan J), 163 (Webb J); cf 148-149 (Dixon J) (relying on an implied power and s 51(xxix)), 160 (Williams J) (relying on defence power).

67 (1952) 86 CLR 169 at 179. Thus there is no requirement of "reasonable proportionality" in forfeiture laws: *Theophanous v The Commonwealth* (2005) 225 CLR 101 at 128 [70] (Gummow, Kirby, Hayne, Heydon and Crennan JJ).

38. These statements do not address merely Parliament's positive power to enact criminal laws, but describe the constitutional relationship between Parliament and the courts. Any constitutional implication – including an implication sought to be drawn from Ch III of the Constitution – must be securely based in the text and structure of the Constitution.[68] It would require clear constitutional authority for the courts to rule on whether the punishment laid down by an Act is inappropriate or excessive for a particular offence.[69] No clear authority can be found in Ch III of the Constitution.

39. In the absence of an express constitutional right or prohibition, there is no principled basis on which a court could assess for itself the "irreducible seriousness" of an offence, to which Parliament must tailor its legislative judgment.[70] As Lord Atkin stated in *Proprietary Articles Trade Association v Attorney-General (Canada)*:[71]

> The criminal quality of an act cannot be determined by intuition; nor can it be discovered by any standard but one: Is the act prohibited with penal consequences?

40. The Appellant has not provided any workable criteria by which a court could assess whether a prescribed punishment was "grossly disproportionate".[72] The Commonwealth contends that the Court should not undertake this assessment, because it is legally irrelevant. Furthermore, the necessary material from which the Court could make appropriate findings of constitutional fact was not placed before the courts below, and nor has the Appellant placed that material before this Court. However, were the Court minded to embark on such an exercise, the material should include authoritative sources evidencing the continuing harms caused by people smuggling, and the national interest in protecting the integrity of the borders.[73] For convenience, the material listed in footnote 73 below is collected in the affidavit of Andrew Buckland affirmed on 1 August 2013 and filed with these submissions.

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68 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 409 [240], [242] (Gummow J), 453-454 [389], [393] (Hayne J), 484-486 [469]-[473] (Callinan J); see also 352 [33] (Gleeson CJ and Heydon J).

69 See by analogy *Runyowa v The Queen* [1967] AC 26 (PC) at 49. *Runyowa* held that an express constitutional prohibition on "inhuman or degrading punishment or other treatment" did not provide the courts with authority to determine whether a penalty prescribed by Parliament was excessive. That conclusion about the meaning of an express constitutional prohibition has been overtaken by later cases: *Reyes v The Queen* [2002] 2 AC 235 (PC) at 256 [43], 257 [45].

70 Cf Appellant's submissions, paras 30 and 34. In the United States, the confined requirement of proportionality in punishment derives from the 8th Amendment (which prohibits cruel and unusual punishments): see eg *Solem v Helm* 463 US 277 (1983) at 285; *Ewing v California* 538 US 11 (2003) at 20.

71 [1931] AC 310 (PC) at 324.

72 Cf Appellant's submissions, para 93.

73 See for example Australian Government, *Report of the Expert Panel on Asylum* Seekers (August 2012) at 19 [1.4] (protecting integrity of borders), 75 (deaths at sea from people smuggling October 2001-June 2012); Australian Crime Commission, *Organised Crime in Australia 2013* (July 2013), 62-65. See also the Second Reading Speech to the Anti-People Smuggling and Other Measures Bill 2010 (Cth), House of Representatives Debates, 24 February 2010, 1645 at 1645-1646 (which was referred to in the court below and is referred to in footnote 17 of the Appellant's submissions).

(c) Response to Appellant's other arguments

41. The other cases relied on by the Appellant do not contradict these well-settled principles.

41.1. *Fardon v Attorney-General (Qld)*[74] considered the validity of preventative detention legislation, where a person was detained by an order of the Supreme Court because of the risk of future offending. There is no comparison with this case, where the Appellant is detained by reason of his conviction for an offence against s 233C of the Migration Act.

41.2. *Chu Kheng Lim*[75] considered the validity of immigration detention, where non-citizens were detained without any order of the court. Again, there is no comparison with this case.[76]

42. Moreover, the Appellant derives no assistance from the principle that a tax cannot be "arbitrary", and therefore must be imposed by ascertainable criteria of sufficiently general application.[77] The offences in ss 233A and 233C are contained in public Acts of Parliament. The Appellant's liability to punishment derives from his being convicted of the offence and sentenced by an exercise of judicial power by a court.[78]

C. THERE IS NO INTERFERENCE WITH THE JUDICIAL PROCESS

43. The mandatory minimum sentence in s 236B of the Migration Act (read with ss 233A and 233B) does not interfere with the judicial process, nor does it require courts to act contrary to accepted notions of judicial power.

C.1 Sentencing for a criminal offence: general principles

44. A Commonwealth law cannot require a court to exercise judicial power in a manner that is inconsistent with the essential character of a court or of judicial power.[79] However, nothing in s 236B (read with ss 233A and 233C) does so. The Appellant's arguments are answered by three principles.

45. First, *Palling v Corfield*[80] establishes that there is no constitutional difficulty with a law merely because it requires a court to make a certain order once the court

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74 (2004) 223 CLR 575; Appellant's submissions, paras 58-61. The passage from Gummow J in *Fardon* at [80] (quoted in Appellant's submissions, para 58) is not a majority view: see note 76 below.

75 (1992) 176 CLR 1; Appellant's submissions, paras 62-63.

76 Even in that context, the statements in *Chu Kheng Lim* must be read in the light of subsequent limiting discussion: see *Al-Kateb v Godwin* (2004) 219 CLR 562 at 583 [40]-[42] (McHugh J), 648 [255]-[256] (Hayne J, with Heydon J agreeing on this point); see also 659 [291] (Callinan J). See also *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 26-27 [62], 32 [77] (McHugh J), 75 [222], 77 [227] (Hayne J, with Heydon J agreeing), 85 [262] (Callinan J); see also 14 [26] (Gleeson CJ).

77 Contra Appellant's submissions, paras 64-66.

78 Contra Appellant's submissions, paras 68-70.

79 *Chu Kheng Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ).

80 (1970) 123 CLR 52 at 59 (Barwick CJ), 64 (Menzies J), 68 (Walsh J). Windeyer and Gibbs JJ agreed with the other judgments: at 65, 70.

is satisfied that certain conditions exist. This principle is confirmed by later cases.[81]

45.1. Accordingly, it would be possible for a Commonwealth law to contain a single, fixed penalty for an offence.[82] It must follow that it is also permissible to confer a sentencing discretion that is constrained at the lower end by a mandatory minimum sentence.[83]

45.2. It is true that Barwick CJ stated that there may be limits on the contingencies chosen by Parliament that engage the exercise of judicial power.[84] However, the choice by a prosecutor to charge a person with an offence containing a mandatory minimum penalty cannot be an impermissible contingency, given the principles set out in B.1 above.[85]

46. Second, there is a long history of mandatory sentences in England and Australia, which undermines any argument that the application of a minimum sentence is contrary to the judicial process.[86]

47. For a long time fixed penalties were prescribed by the common law and statute, with death being the mandatory punishment for most felonies.[87] (In practice, there were ways of alleviating that punishment, principally through the device of the "benefit of the clergy".[88]) Thus wide judicial discretion was not a long-standing feature of English (or Australian) sentencing law at the time of federation.[89]

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81 See eg *International Finance Trust Company Ltd v NSW Crime Commission* (2009) 240 CLR 319 at 352 [49] (French CJ), 360 [77] (Gummow and Bell JJ), 372-373 [120]-[121] (Hayne, Crennan and Kiefel JJ, dissenting in the result); *South Australia v Totani* (2010) 242 CLR 1 at 48 [71] (French CJ), 63 [133] (Gummow J); see also *Wynbyne v Marshall* (1997) 117 NTR 11 (special leave refused: *Wynbyne v Marshall* [1998] HCA Trans 191).

82 See also *Deaton* [1963] IR 170 at 182-183; *Ali* [1992] 2 AC 93 at 102.

83 See also *Bahar v The Queen* (2011) 214 A Crim R 417 (***Bahar***) at 428 [46]-[49] (McClure P, with Martin CJ and Mazza J agreeing): if Parliament can prescribe a *maximum* penalty, then it can prescribe a *minimum* penalty.

84 (1970) 123 CLR 52 at 59 (Barwick CJ), cited in Appellant's submissions, para 62.

85 *Palling v Corfield* (1970) 123 CLR 52 at 59-61 (Barwick CJ), 64 (Menzies J), 67 (Owen J), 70 (Walsh J), with Windeyer and Gibbs JJ agreeing with the other judgments: at 65, 70; *Fraser Henleins* (1945) 70 CLR 100 at 119-120 (Latham CJ), 121 (Starke J), 139 (Williams J).

86 Historical practice is relevant in determining the essential attributes of the judicial process: see *Thomas v Mowbray* (2007) 233 CLR 307 at 355 [111] (Gummow and Crennan JJ). On historical practice and "judicial" functions, see eg *R v Davison* (1954) 90 CLR 353 at 369 (Dixon CJ and McTiernan J), 382 (Kitto J); *Saraceni v Jones* (2012) 246 CLR 251 at 256 [2] (the Court). Admittedly, some essential features of criminal justice are of relatively recent origin: *X7* (2013) 87 ALJR 858 at 882-883 [100] (Hayne and Bell JJ).

87 Richard G Fox and Bernard M O'Brien, "Fact-finding for Sentencers" (1976) 10 *Melbourne University Law Review* 163 at 164.
The common law rule was that felonies were punishable by death: see Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (1883) (**Stephen (1883)**), Vol II, at 88 (until the reign of George III). When Parliament created capital offences, practically none provided any alternative to the death penalty: Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (1948) Vol 1 at 14.

88 See eg Stephen (1883), Vol 1 at 459-472.

89 See Andrew Ashworth, *Sentencing and Criminal Justice* (5th ed, 2010) at 52.

48. Mandatory sentences have continued since 1901, although they are less common than previously. When capital punishment was abolished in the 20th century, murder was made punishable by a mandatory sentence of life imprisonment, both in England[90] and Australia.[91] In Australia, treason attracted mandatory capital punishment until 1973.[92] There continue to be mandatory minimum sentences required under State and Territory law for a range of different offences.[93] The continued existence of mandatory sentences (including mandatory minimum sentences) strongly indicates that s 236B is not contrary to any "essential" features of the judicial process.

10 49. Third, the common law principles of sentencing (even if "fundamental"[94]) apply within the framework set by the legislation creating the offences and prescribing punishment, and are subject to contrary legislative intention.[95]

49.1. One such principle is that the sentence fixed by a court should be proportionate to the gravity of the crime.[96] However, the objective assessment of the gravity of the offence takes account of the penalties

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90 As enacted, *Murder (Abolition of Death Penalty) Act 1965* (c 71), s 1(1) provided for mandatory life imprisonment for murder (except for murder by children).

91 For example, *Baker v The Queen* (2005) 223 CLR 513 at 527 [27], 528 [29] (McHugh, Gummow, Hayne and Heydon JJ): under the previous s 19 of the *Crimes Act 1900* (NSW) and associated provisions, the only sentence that could be passed on conviction was penal servitude for life. See also *R v Schultz* [1976] VR 325, holding that s 3 of the *Crimes Act 1958* (Vic) (as amended in 1975) required that a person convicted of murder be sentenced to life imprisonment.

92 As enacted, s 24(1) of the *Crimes Act 1914* (Cth) provided that any person who engaged in the prohibited activities (broadly, treason) "shall be liable to the punishment of death." This meant the penalty was mandatory: see *Sillery v The Queen* (1981) 180 CLR 353 at 365-366 (Wilson J, dissenting in the result), considering a later version of s 24(1). The death penalty was removed in 1973, and substituted with life imprisonment: *Death Penalty Abolition Act 1973* (Cth), ss 4 and 5.

93 **NSW:** *Crimes Act 1900* (NSW), s 19B (life sentence for murder of on-duty police officer); *Crimes (Sentencing Procedure) Act 1999* (NSW), s 61(2) (mandatory life sentence for serious heroin or cocaine trafficking if specified conditions are met).
NT: Criminal Code (NT), s 157 (life sentence for murder), with a standard non-parole period of either 20 or 25 years: Sentencing Act (NT), s 53A; Sentencing Act (NT), s 78B (mandatory custodial sentences for aggravated property offences) and ss 78D-78DF (a range of mandatory minimum sentences prescribed, for example 3 months actual imprisonment for "level 5 offence – first offence": s 78D).
Qld: *Criminal Code Act 1899* (Qld), s 305 (life imprisonment or an indefinite sentence for murder); *Weapons Act 1990* (Qld), s 50 (minimum prison sentence for unlawful possession of weapons), s 50B (minimum prison sentence for unlawful supply of a weapon), s 65 (minimum prison sentence for unlawful trafficking in weapons and explosives); *Transport Operation (Road Use Management) Act 1995* (Qld), s 79(1C) (mandatory imprisonment if person convicted of driving under the influence twice within 5 years).
SA: *Criminal Law Consolidation Act 1935* (SA), s 11 (life imprisonment for murder, with mandatory non-parole period of 20 years: *Criminal Law (Sentencing) Act 1988* (SA), s 32(5)(ab)).
Vic: *Country Fire Authority Act 1958* (Vic), s 39A (minimum prison sentence for causing fire in country area in extreme weather conditions), s 39C (minimum prison sentence for causing fire in country area with intent to cause damage).
WA: *Criminal Code 1913* (WA), s 279(4) (murder), s 284(4) (mandatory disqualification for 2 years if convicted of culpable driving), s 297 (grievous bodily harm), s 318 (serious assault), s 401 (repeat burglary offence); *Misuse of Drugs Act 1991* (WA), s 34 (drug offences).

94 Cf *Chester v The Queen* (1988) 165 CLR 611 at 618 (the Court), referring to the "fundamental principle" of proportionality.

95 See *Elias* (2013) 87 ALJR 895 at 901-902 [25] (the Court): "*subject to any contrary statutory intention*, common law principles such as proportionality, totality and parity apply in the sentencing of offenders under Victorian law" (emphasis added, citations omitted).

96 See eg *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 472 (Mason CJ, Brennan, Dawson and Toohey JJ); *Markarian v The Queen* (2005) 228 CLR 357 (***Markarian***) at 390 [83] (McHugh J).

prescribed by Parliament – just as a *maximum* penalty represents Parliament's assessment of the seriousness of the offence,[97] so does a *minimum* penalty.[98]

49.2. Similarly, the principle of equal justice (which requires like cases to be treated alike, and different cases differently) applies only "so far as the law permits".[99] This principle requires equality *before* the law (that is, equality in the enforcement of legal rules) not equality *in* law (that is, equality in the content of legal rules).[100] Therefore, who is "equal" for these purposes is determined by the rule's criteria of classification.[101]

49.3. It should also be noted that the requirement for parity is subject to any overriding legislative requirements. For example, a different sentencing outcome may be justified if a co-offender has been found guilty of an offence that has a different maximum penalty.[102] Moreover, the prohibition on disparity between co-offenders does not permit one offender's sentence to be reduced below that which is adequate if the relevant sentencing legislation, on its proper construction, does not permit an inadequate sentence to be imposed.[103]

50. Accordingly, there is no suggestion that these common law principles cannot be altered by Parliament. To the contrary, the usual position is that Parliament can alter the balance that is struck by the common law between competing public interests.[104] Here, sentencing pursues a number of different objectives: protection of society, deterrence of the offender and others who might be tempted to offend, retribution and reform.[105] There is no reason why Parliament cannot, in the case of a minimum sentence, require that more weight be given to, say, general deterrence than other objectives.[106] The most basic quality of

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97 *Elias* (2013) 87 ALJR 895 at 902-903 [27] (the Court); *Markarian* (2005) 228 CLR 357 at 372 [31] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

98 *Bahar* (2011) 214 A Crim R at 429 [54] (McClure P, with Martin CJ and Mazza J agreeing). The extrinsic materials establish that mandatory minimum sentences were enacted to "reflec[t] the seriousness of the activity being prosecuted": Second Reading Speech to the Anti-People Smuggling and Other Measures Bill 2010 (Cth), House of Representatives Debates, 24 February 2010, 1645 at 1646. Therefore it is not correct to say that the mandatory sentence in s 236B is intended to impose a longer than usual sentence to protect the community: contra Appellant's submissions, para 90.

99 *Green v The Queen* (2011) 244 CLR 462 (***Green***) at 473 [28] (French CJ, Crennan and Kiefel JJ).

100 Wojciech Sadurski, "Equality Before the Law: A Conceptual Analysis" (1986) 60 *Australian Law Journal* 131 (**Sadurski**) at 131, cited with approval in *Green* (2011) 244 CLR 462 at 472 (n 72) (French CJ, Crennan and Kiefel JJ).

101 Sadurski, 60 *Australian Law Journal* 131 at 132.

102 *Green* (2011) 244 CLR 462 at 487 [71] (French CJ, Crennan and Kiefel JJ).

103 *Green* (2011) 244 CLR 462 at 476 [33] (French CJ, Crennan and Kiefel JJ).

104 For example, Parliament can alter how the balance is struck between competing public interests in the admission or exclusion of evidence: *Nicholas v The Queen* (1998) 193 CLR 173 at 197 [37] (Brennan CJ), 203 [55] (Toohey J), 239 [164], [167] (Gummow J), 275-276 [241]-[242] (Hayne J); see also 211 [82] (Gaudron J); *Lodhi v The Queen* (2007) 179 A Crim R 470 at 486-488 [57]-[73] (Spigelman CJ), 500 [121] (Barr J), 528 [215] (Price J) (special leave refused: *Lodhi v The Queen* [2008] HCA Trans 225).

105 See eg *Veen (No 2)* (1988) 164 CLR 465 at 476 (Mason CJ, Brennan, Dawson and Toohey JJ); Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (April 2006) at 134-140 [4.3]-[4.23].

106 On the importance of general deterrence in people smuggling offences, see eg *Jopar v The Queen* [2013] VSCA 83 at [2]-[6] (Weinberg JA); see also [90] (Priest JA).

courts is that they administer justice according to law, which includes faithful adherence of the courts to the laws enacted by Parliament, even if individual judges consider those laws to be undesirable.[107]

51. The Appellant's specific arguments are now dealt with in turn.

C.2 No breach of proportionality in sentencing

52. First, there is no breach of any requirement of proportionality in sentencing. There is a common law principle that courts should fix a sentence that reflects the gravity of the crime ("proportionality"). However, the assessment of gravity occurs within the legislative context, and takes account of the penalties set by Parliament, both maximum and minimum penalties: see para 49.1 above.

53. Here, a sentencing judge still determines the appropriate penalty within the range prescribed by Parliament.[108] In this way, the court still achieves individualised justice.

54. As noted, in the absence of an express constitutional right or prohibition, there is no basis for implying a constitutional requirement that the validity of a punishment prescribed by Parliament turns on the courts' assessment of whether that punishment is "unjust", "arbitrary", or "grossly disproportionate": see paras 35-40 above.[109] The length of any minimum sentence is a matter for Parliament. The criticism by some individual judges of the appropriateness of the mandatory minimum sentence[110] does not in any way undermine the validity of s 236B. The Appellant's claim that s 236B is "inconsistent with civilised standards of humanity and justice"[111] expresses a moral judgment that is Parliament's to make.

C.3 No breach of equality before the law

55. Second, there is no breach of equality before the law. As noted, "equal justice" requires only equality in the enforcement of legal rules (equality before the law), not substantive equality. Thus, determining who is "equal" for these purposes is determined by the law's criteria of classification: see para 49.2 above. Equally,

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107 *Baker v The Queen* (2005) 223 CLR 513 at 519-520 [6] (Gleeson CJ), quoting from *Nicholas* (1998) 193 CLR 173 at 197 [37] (Brennan CJ), with Hayne J agreeing at 275-276 [242].

108 *Bahar* (2011) 214 A Crim R 417 at 429 [54] (McClure P, with Martin CJ and Mazza J agreeing); *R v Karabi* (2012) 220 A Crim R 338 at 345 [34] (Muir JA, with Fraser and Chesterman JJA agreeing). Cf Appellant's submissions, para 89.

109 Contra Appellant's submissions, para 93. *Pearce v The Queen* (1998) 194 CLR 610 at 623 [40] (McHugh, Hayne and Callinan JJ) was addressing the different point of avoiding double punishment if a person has been charged with two or more overlapping offences in order to reflect the extent of his or her criminal conduct: at 622 [37]. Cf Appellant's submissions, para 89.

110 Cf Appellant's submissions, para 92.

111 Cf Appellant's submissions, para 94. The article by Professor Winterton referred to suggests that there may be an implied prohibition on imposing "barbarous sentences": George Winterton, "The Separation of Judicial Power as an Implied Bill of Rights" in Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 185 at 207. However, that is far removed from this case.

assessing whether there is a "relevant" difference between offenders will be determined by the law's criteria of classification.[112]

56. Contrary to the Appellant's submissions,[113] nothing in s 236B (or s 233A or s 233C) "mandates" the different treatment of co-offenders. Even with a minimum sentence, it is possible to give effect to a discount for a plea of guilty, albeit that there will be a compression of sentence at the lower end of the range.[114] In *Atherden v Western Australia*,[115] Wheeler JA stated that this compression of sentences did not involve any unreasonable departure from general principles governing discounts for pleas of guilty. Although those remarks were considering common law sentencing principles, they strongly indicate that the Appellant's complaints in this regard relate only to the particular exercise of discretion, and do not raise any constitutional difficulty.

57. There may be a difference in result if one co-accused is charged with one offence, and another co-accused with a different, more serious offence. However, there is no constitutional or other difficulty in that occurring.[116] Moreover, it is not accurate to say that the offences in ss 233A and 233C are "in substance the same offence"[117] – those provisions create different offences with different elements: see para 34 above.

58. The passage from *Green*[118] relied on by the Appellant does no more than provide a non-exhaustive list of some factors that would justify a difference in outcome when applying common law sentencing principles. Again, the "equality before the law" discussed in *Green* uses the law's criteria of classification to determine whether a difference in treatment is justifiable: see para 49.2 above. Here, Parliament has distinguished between people smuggling of another person in s 233A, and a group of 5 or more persons in s 233C. Any consequent difference in sentencing that results from this legislative distinction is "justifiable" for these purposes.

59. Contrary to the Appellant's submissions,[119] the divergent approaches in *Leeth v The Commonwealth*[120] cannot be reduced to a single proposition that discrimination between different classes of offenders may lead to invalidity.

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112 See *Wong v The Queen* (2001) 207 CLR 584 at 614 [82] (Gaudron, Gummow and Hayne JJ): it is no part of the judicial function to create subsets of an offence defined by legislation.

113 Appellant's submissions, para 80.

114 *Atherden v Western Australia* [2010] WASCA 33 at [42]-[44] (Wheeler JA, with McClure P and Owen JA agreeing); *R v Nitu* [2013] 1 Qd R 459 (***Nitu***) at 473 [36]-[37] (Fraser JA, with Holmes JA and Ann Lyons J agreeing); *DPP v Haidari* [2013] VSCA 149 at [42] (Harper JA, with Weinberg and Priest JJA agreeing).

115 [2010] WASCA 33 at [44]. See also *Nitu* [2013] 1 Qd R 459 at 472-475 [35]-[42] (Fraser JA, with Holmes JA and Ann Lyons J agreeing).

116 In *Likiardopoulos* (2012) 86 ALJR 1168, the appellant was charged with murder, and his co-offenders had pleaded to lesser offences: see 1172 [7], 1176 [32]. See also *Green* (2011) 244 CLR 462 at 487 [71] (French CJ, Crennan and Kiefel JJ).

117 Contra Appellant's submissions, para 80.

118 (2011) 244 CLR 462 at 474-475 [31], cited in Appellant's submissions, para 82.

119 Appellant's submissions, para 83.

120 (1992) 174 CLR 455 (***Leeth***).

Leeth concerned the possible lack of uniformity in the *geographical operation* of Commonwealth laws, which is not an issue here.

59.1. Mason CJ, Dawson and McHugh JJ rejected any argument that Commonwealth laws must have a uniform geographical operation,[121] and to this extent rejected any attempt to imply a substantive equality requirement into the Constitution.

59.2. Gaudron J held that there was an implied constitutional requirement of "equal justice",[122] which should be understood as referring to "equality before the law" as discussed in *Green*. The discussion of maximum penalties by Brennan J[123] should be understood in the same way.

59.3. Deane and Toohey JJ (in dissent) did imply a substantive doctrine of legal equality.[124] However, that approach has not been accepted in later cases.[125]

60. For these reasons, *Leeth* does not prevent Parliament from prescribing aggravating factors that attract more stringent penalties.

C.4 Court provides natural justice and reasons for its decisions

61. Finally, there is no failure to provide procedural fairness or reasons. Courts must provide procedural fairness, although the precise content of that obligation may vary.[126] Here, the Appellant did not stand trial because he pleaded guilty. However, a court would provide procedural fairness in determining whether a person was guilty of an offence against s 233C – the accused would be made aware of the case against him or her, and given an opportunity to answer it. The Appellant was provided with procedural fairness at the sentencing stage – he was given the opportunity to put submissions (through his legal representatives) on the appropriate sentence, within the range prescribed by Parliament.

62. Accordingly, the Appellant's objection appears to be that he was not given an opportunity to be heard on whether he should be charged with an offence against s 233C (which attracts a mandatory minimum sentence) or s 233A (which does not).[127] However, the prosecutor, prior to laying charges, owes no duty to inform a person of the charges that may be laid against that person.

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121 *Leeth* (1992) 174 CLR 455 at 467, 469.
122 *Leeth* (1992) 174 CLR 455 at 502.
123 *Leeth* (1992) 174 CLR 455 at 475-476, requiring uniformity in maximum penalties available in different parts of Australia for federal offences, although this need not lead to uniformity in sentences. Otherwise the courts apply laws that have differential operation: at 480.
124 *Leeth* (1992) 174 CLR 455 at 485, 488.
125 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 44-45 (Brennan CJ), 63-64, 67-68 (Dawson J, with McHugh J agreeing on this point: at 142), 112, 113 (Gaudron J), 153, 155 (Gummow J); *Putland v The Queen* (2004) 218 CLR 174 at 185 [25] (Gleeson CJ), 195 [59] (Gummow and Heydon JJ, with Callinan J agreeing).
126 *Assistant Commissioner Condon v Pompano* (2013) 87 ALJR 458 at 494 [156] (Hayne, Crennan, Kiefel and Bell JJ); cf 498-501 [188]-[198] (Gageler J).
127 See Appellant's submissions, para 77.

Such a duty would be wholly contrary to the prosecutor's broad discretion as to what offence to charge, which (as noted) is in practice not susceptible to judicial review. Nor can such a requirement be derived from the prosecutor's general duty of fairness, which operates within an adversarial system of justice.[128] Accordingly, there is no practical unfairness to the Appellant, and no possible grounds for a stay of proceedings.[129]

63. Providing reasons is an ordinary incident of the judicial process.[130] However, reasons only have to be sufficient to explain the order made. Here, the judge would give reasons to explain why the Appellant was to be given the minimum sentence available. No further reasons need be given for the level of that minimum sentence other than a reference to the relevant statute.[131]

PART VI ESTIMATE OF TIME FOR ORAL ARGUMENT

64. It is estimated that between 2 and 2.5 hours will be required for the presentation of the Commonwealth's oral argument depending on whether the Australian Human Rights Commission is granted leave to appear.

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128 Contra Appellant's submissions, para 73. The statement in *X7* (2013) 87 ALJR 858 at 871 [38] (French CJ and Crennan J, dissenting in the result) simply confirms the courts' power to control an abuse of process. A free-standing standard of "fairness" does not assist: at 881 [88] (Hayne and Bell JJ).

129 Contra Appellant's submissions, para 78.

130 *Wainohu v New South Wales* (2011) 243 CLR 181 at 213-215 [54]-[58] (French CJ and Kiefel J).

131 Contra Appellant's submissions, para 86.