IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No S114 of 2013

BETWEEN

BONANG DARIUS MAGAMING
Appellant

and

THE QUEEN
Respondent

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ANNOTATED WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I Form of Submissions

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

Part II Basis of Intervention

2. The Attorney General for the State of New South Wales ("NSW Attorney") intervenes under s 78A of the Judiciary Act 1903 (Cth) in support of the respondent.

Part IV Legislative Provisions

3. The NSW Attorney adopts the appellant's statement of applicable legislative
20 provisions.

Part V Issues presented by the matter and argument

Issues

4. In summary, the NSW Attorney submits as follows:

Date of document: 9 August 2013
Filed by: I V Knight, Crown Solicitor
Level 5, 60-70 Elizabeth Street
SYDNEY NSW 2000
DX 19 SYDNEY

Contact: Gemma Namey
Tel: (02) 9224 5252
Fax: (02) 9224 5255
Email:
Gemma_Namey@agd.nsw.gov.au
Ref: 201302127

(a) Sections 233A and 233C of the Migration Act 1958 (Cth) ("Migration Act") are different offences. Any similarity or overlap between the offences in those sections does not give rise to "arbitrary" sentences for persons convicted of the offence against s 233C by operation of s 236B(3)(c) and does not infringe the separation of powers;

(b) the Commonwealth Parliament's judgment as to the irreducible seriousness of the offence in s 233C, as reflected in the operation of s 236B(3)(c), does not require a court exercising judicial power to act inconsistently with its nature, or impermissibly interfere with the judicial process.

10 Section 236B(3)(c) does not infringe the separation of powers

5. In deciding whether a law offends Ch III of the Constitution, its operation and effect will define its constitutional character. The determination of a law's operation and effect "requires identification of the nature of the rights, duties, powers and privileges which the statute changes, regulates or abolishes": HA Bachrach Pty Limited v Queensland (1998) 195 CLR 547 at 561 [12].

6. As with other constitutional constraints upon legislative power, the relevant inquiry is systemic or "functionalist" in character: see eg Wainohu v New South Wales (2011) 243 CLR 181 at 212 [52] per French CJ and Kiefel J (their Honours were there discussing the doctrine in Kable v Director of Public Prosecutions (NSW) (1996) 189
20 CLR 51 ("Kable"), but the point is of more general application in the context of Ch III).

7. The appellant's submission that a person's sentence following conviction for the offence against s 233C will be "arbitrary", because a critical element will be determined other than by a Ch III court, relies upon the proposition that ss 233A and 233C are, in substance, the same offence. That proposition warrants close scrutiny. For the purposes of the constitutional argument, Allsop P was prepared to "assume a sufficiently significant overlap in the old provisions to the extent that either provision could be used to found an indictment for the involvement in the entry of five or more people into Australia": Karim v R; Magaming v R [2013] NSWCCA 23 ("Karim")
30 at [50], Appeal Book ("AB") at 52. In relation to the "old" provisions (applying before 1 June 2010), his Honour took the reference in s 233(1) to "a non-citizen" to

include more than one such person, applying s 23(b) of the Acts Interpretation Act 1901 (Cth): Karim at [9], AB at 35. The language of s 233A(1) differs from that of the prior s 233(1) offence, the former requiring the "second person" to have the characteristics specified in s 233A(1)(b) (as to which absolute liability applies) and (1)(c).

8. An indictment containing a single charge under s 233A particularising involvement in the entry into Australia of more than five persons would either charge an offence not created by the Migration Act (see Walsh v Tattersall (1996) 188 CLR 77 at 91 per Gaudron and Gummow JJ) or would be duplicitous: see Walsh v Tattersall at 112 per Kirby J. The statutory description of the offence in s 233A(1) indicates that the act or conduct prohibited – the gist of the charge – is the accused's involvement in the bringing or entry of the specific "second person" referred to. Involvement in the bringing or entry of multiple non-citizens is not properly characterised as a single act with multiple forbidden characteristics: see Romeyko v Samuels (1972) 2 SASR 529 at 552 per Bray CJ. If that is correct, it follows that ss 233A and 233C do not involve the same or substantially identical conduct. The intersection between them consists of the availability of:

   (a) a choice of charges when the relevant smuggling involved a group of five or more people: either five or more counts under s 233A or one count under s 233C; and

   (b) the alternative verdict in s 233C(3), pursuant to which a person may be found not guilty of the aggravated offence in s 233C(1) but guilty of the offence in s 233A(1).

9. There is no reason to assume that the choice between the alternatives set out at [8(a)] above will be made in an "arbitrary" manner, based only on "individual preference" (cf Appellant's Submissions ("AS") at [66]). The prosecutorial discretion will presumably be exercised following an assessment of the available evidence and in accordance with the applicable Commonwealth prosecution policies and any relevant directions or guidelines issued under s 8 of the Director of Public Prosecutions Act 1983 (Cth).

10. The overlap between ss 233A and 233C is less than that between the offences at issue in Fraser Henleins Pty Ltd v Cody (1945) 70 CLR 100 ("Fraser Henleins"), where the

offences were "each defined identically by reference to breaches of the regulations": see Karim at [65], AB at 58 (cf Allsop P's later description of Fraser Henleins as involving "a relevantly identical legislative structure": at [79], AB at 64; 70 CLR at 110 per Latham CJ). The constitutional submission on behalf of the appellant in Fraser Henleins, that "the committee [advising the Attorney General in relation to prosecutions under s 4(4) of the Black Marketing Act] exercises judicial powers because it performs a function which determines the penalty to be imposed upon a person prosecuted under the [Black Marketing] Act" (at 118 per Latham CJ) raises the same complaint as to a prosecutor's exercise of an exclusively judicial power as does the appellant in the present case and was rejected by all members of the Court: at 120 per Latham CJ, 121-122 per Stark J, 124-125 per Dixon J, 132 per McTiernan J, 139-140 per Williams J.

11. This Court has repeatedly confirmed the separation of judicial and prosecutorial functions, including on the basis that "the independence and impartiality of the judicial process would be compromised if courts were perceived to be in any way concerned with who is prosecuted and for what": see eg Likiardopoulos v The Queen (2012) 86 ALJR 1168 at 1177 [37] per Gummow, Hayne, Crennan, Kiefel and Bell JJ, see also at 1171 [2] per French CJ; Elias v The Queen (2013) 87 ALJR 895 at 904 [34] per French CJ, Hayne, Kiefel, Bell and Keane JJ; Maxwell v The Queen (1996) 184 CLR 501 at 514 per Dawson and McHugh JJ, 534 per Gaudron and Gummow JJ. Courts "are thus left free to hear and determine charges of criminal offences impartially", not having become concerned with prosecutorial decisions which "courts are ill-equipped to make": Jago v District Court (NSW) (1989) 168 CLR 23 at 39 per Brennan J. It is also accepted that "the prosecutor's selection of the charge is capable of having a bearing on the sentence": Elias at 904 [34]. The imposition of a constitutional limitation of the type advocated by the appellant would appear to require an acceptance that the prosecutorial choice of charge determines a person's sentence in any case where an offence with a mandatory minimum sentence is selected. That is not consistent either with the established understanding of the prosecutorial function or with the analysis of intermediate appellate courts in Australia which have considered the function performed by a judge when sentencing pursuant to s 236B, discussed further below.

12. The appellant's attempt to develop a novel implication from Ch III premised on the protection of individual liberty and requiring some form of proportionality between "the deprivation of liberty" and "the adjudication and punishment of criminal guilt" (AS at [56]-[63]) cannot be sustained by reference to the reasoning in cases such as Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1, Kable and Fardon v Attorney-General (Qld) (2004) 223 CLR 575 concerning detention that did not follow from the adjudication of criminal guilt. By contrast to the possibilities concerning other forms of detention, the deprivation of liberty effected by a sentence imposed by a Ch III court, in accordance with the prescribed penalty for the relevant offence(s) and following a conviction will be supported by a sufficient constitutional factum, specific to the person who is to be detained: cf South Australia v Totani (2010) 242 CLR 1 ("Totani") at 83 [211] per Hayne J. The claimed additional constitutional requirement of proportionality between the level of punishment prescribed by the legislature and the seriousness of the relevant crime as an aspect of the judicial process will be considered below, in relation to the alleged interference with that process.

Section 236B(3)(c) does not interfere with the judicial process

13. Accepting that the legislative powers of the Commonwealth do not extend to such interference with the judicial process as would authorise or require a court exercising federal judicial power to do so in a manner which is inconsistent with its nature (see eg Nicholas v The Queen (1998) 193 CLR 173 per Gummow J at 233 [148]; International Finance Trust Co Ltd v New South Wales Crime Commission (2009) 240 CLR 319 ("IFTC") at 352-353 [50] per French CJ) the NSW Attorney submits that the judicial process is not interfered with by the operation of s 236B(3)(c) of the Migration Act. It is relevant to consider the historic functions and processes of courts of law when determining this issue: see eg Thomas v Mowbray (2007) 233 CLR 307 at 355 [111] per Gummow and Crennan JJ; IFTC at 353 [52] per French CJ; Totani at 63 [134] per Gummow J.

14. Accepted notions of judicial power do not require the preservation of an irreducibly wide sentencing discretion for offences such as s 233C which prohibit a range of conduct, some of which could potentially be the subject of less serious charges: cf AS at [93]. Justices Gaudron, Gummow and Hayne in Wong v The Queen (2001) 207

CLR 584 at 599 [36] described the historical development of the sentencing task in terms that acknowledge the variable extent of judicial sentencing discretion and the ongoing existence of mandatory minimum sentences:

> Passing sentence on a convicted person was once a ritual which neither required nor permitted the exercise of any judgment by the judge. Now, apart from some very rare cases, a judge who is required to pass sentence on an offender must choose which of several forms of disposition should be made and must decide how great the punishment will be. The legislature prescribes the maximum punishment that may be imposed. In some (relatively few) cases it will prescribe a minimum. The judge must decide, having regard to what the offender has done and whatever may be urged in aggravation or mitigation, what sentence should be passed. If the judge imposes a penalty that is plainly too heavy, it is said that the sentence is manifestly excessive; if it is plainly too light, it is manifestly inadequate.

Minimum sentences have been prescribed by the NSW Parliament: see eg Crimes (Sentencing Procedure) Act 1999 (NSW) s 61(2) (serious heroin or cocaine trafficking offences where court satisfied of certain matters); Crimes Act 1900 (NSW) s 19B (murder of a police officer while on-duty).

15. Citing Wong, inter alia, the unanimous judgment in Elias (which did not involve a constitutional challenge) explained that "[t]he administration of the criminal law involves individualised justice, the attainment of which is acknowledged to involve the exercise of a wide sentencing discretion": at 903 [27]. The "court is sentencing *the* offender for *the* offence", not for the offending conduct which might have resulted in conviction for a less serious offence: Elias at 902 [26], emphasis in original. The Court has also accepted that by setting a maximum penalty, the legislature indicates its assessment of the relative seriousness of the offence and thus provides a sentencing yardstick: see eg Markarian v The Queen (2005) 228 CLR 357 at 372 [31]; Muldrock v The Queen (2011) 244 CLR 120 at 133 [31]; Elias at 903 [27]. The plurality in Markarian observed that "Judges need sentencing yardsticks": at 372 [30] per Gleeson CJ, Gummow, Hayne and Callinan JJ. It is "beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences which it creates": Palling v Corfield (1970) 123 CLR 52 at 58 per Barwick CJ. Where the penalty

prescribed is a maximum penalty, that yardstick will constrain a court's sentencing discretion by imposing an upper limit on the available sentencing range.

16. Similarly, a statutory minimum penalty reflects "a legislative direction as to the seriousness of the offence": Bahar v The Queen (2011) 214 A Crim R 417 at 428 [46], [48] per McLure P (Martin CJ and Mazza J agreeing). The statutory minimum and maximum penalties "are the floor and ceiling respectively within which the sentencing judge has a sentencing discretion to which the general sentencing principles are applied": Bahar at 429 [54]. President Allsop explained that "approaching the matter as in Bahar permits all usual sentencing considerations ... to be accommodated, though in a more compressed range, and with the consequence of a general increase in the level of sentences": Karim at [45], AB at 50, although Fraser JA (Holmes JA and Ann Lyons J agreeing) doubted whether the mandatory minimum now found in s 236B is apt to produce "compression" in R v Nitu [2013] 1 Qd R 459; (2012) 269 FLR 216 at 229-230 [38], 231-232 [42]. If – as is accepted – the legislature can indicate its assessment of the gravity of an offence by the penalties it enacts, and if a sentencing court's discretion is thus constrained, it cannot tenably be argued that compression of the range of sentencing discretion by imposition of a mandatory minimum sentence requires the court to act contrary to accepted notions of judicial power, simply because an offence potentially covers a wide range of offending conduct.

17. This Court has accepted, in Palling v Corfield, that "it is within the competence of the Parliament to determine and provide in the statute a contingency on the occurrence of which the court shall come under a duty to impose a particular penalty or punishment", judicial power not being "invalidly invaded" if the fulfilment of the contingency denies the court any discretion as to punishment: at 58, 59 per Barwick CJ, see also at 62-63 per McTiernan J, 64 per Menzies J, 67 per Owen J and 68 per Walsh J. The proposition that a law requiring a court exercising federal jurisdiction to make a specified order upon satisfaction of a condition does not impermissibly interfere with judicial power was reiterated in IFTC at 352 [49] per French CJ (citing Palling v Corfield), 360 [77] per Gummow J and 373 [120]-[121] per Hayne, Crennan and Kiefel JJ (dissenting) and Totani at 48 [71] per French CJ, 63 [133] per Gummow J. Applying Fraser Henleins, four members of the Court in Palling v Corfield specifically recognised prosecutorial choice as a constitutionally acceptable contingency: at 61 per

Barwick CJ, 64 per Menzies J, 67 per Owen J, 70 per Walsh J: cf AS at [106]. Against that background, it could not be said that s 236B(3)(c) requires significant departure from the methods and standards that have characterised judicial activities in the past: see Thomas v Mowbray at 355 [111].

18. It is clear that proportionality is a common law sentencing principle of long standing, requiring, subject to any contrary legislative intention "that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances": Hoare v The Queen (1989) 167 CLR 348 at 354; Veen v The Queen (No. 2) (1988) 164 CLR 465 at 472, 485-486, 490-491, 496. The judicial process of assessment of the gravity of the crime for the purposes of the proportionality principle is not at large, however. The judge takes account of the legislative assessment of seriousness: see above at [15]. The process of judicial review of sentences for manifest excess does not differ in this respect.

19. The appellant's suggestion that proportionality in sentencing is abrogated by s 236B(3)(c) to an extent that it is "inconsistent with civilised standards of humanity and justice" (AS at [94]) should not be accepted. It would involve the court forming its own view as to the gravity of crimes, in the face of Parliament's clear intention to deprive a court sentencing under s 236(3)(c) of the power to impose a non-custodial sentence or a sentence of less than five years (see Bahar at 429 [53]); and in the absence of any constitutional prohibition providing a standard for assessment, such as is supplied by the Eighth Amendment in the United States Constitution. The Eighth Amendment itself only contains "a narrow proportionality principle" which recognises, inter alia, "the primacy of the legislature" and "the variety of legitimate penological schemes": Ewing v California 538 US 11 (2003), 20, 23.

20. The fact that s 236B(3)(c) may involve Parliament striking a different balance between competing public policy interests in sentencing to that drawn by the common law does not require a conclusion that there has been an impermissible intrusion on the judicial power: see eg Nicholas at 197 [37]-[38] per Brennan CJ, 239 [164] per Gummow J and 272 [234], 274 [238], 276 [244] per Hayne J. As Hayne J remarked in Nicholas (at 272 [234]), "[t]here are many rules which have been developed by the common law

which have been changed or even abolished by legislation and yet it is not suggested that such legislation intrudes upon the separation of judicial and legislative powers".

21. Finally, s 236B(3)(c) does not violate the norm of equal justice. For the reasons set out above (at [8]), ss 233A and 233C do not involve the same or substantially identical conduct, with the result that co-offenders who are convicted under the two different sections are not identically situated before the law: cf AS at [80]. Equal justice under the law only requires "identity of outcome in cases that are *relevantly* identical": Wong at 608 [65] per Gaudron, Gummow and Hayne JJ, quoted in Green v The Queen (2011) 244 CLR 462 at 473 [28] per French CJ, Crennan and Kiefel JJ (emphasis in original). As Mason CJ, Dawson and McHugh JJ remarked in Leeth v The Commonwealth (1992) 175 CLR 455 at 470 "[i]t is obviously desirable that, in the sentencing of offenders, like offenders should be treated in a like manner. But such a principle cannot be expressed in absolute terms." No requirement of substantive legal equality of the type identified by Deane and Toohey JJ's dissenting judgment in Leeth has been adopted by this Court.

22. In Leeth, Gaudron J (dissenting on the basis of an implied constitutional requirement of equal justice) acknowledged that "the law may treat things which are relevantly different as though they are not, or even treat things that are not different as though they are". If that is done "a legal distinction is created or denied and the law stated by reference to the existence or absence of that distinction": at 502. Her Honour distinguished this from "a directive to exercise a general power in different ways according to a factual matter": at 502. Section 236B(3)(c) states the law by reference to the existence of a conviction under s 233C. It should not be characterised as a law of the second type identified by Gaudron J in Leeth.

23. Accepting that formal identity of charges against offenders whose sentence is compared is not a necessary condition for application of the common law parity principle (Green at 474 [30] per French CJ, Crennan and Kiefel JJ), the potentially different sentencing outcomes for two offenders charged under ss 233A and 233C respectively are nevertheless justifiable by reference to the distinct conduct involved in the two offences and Parliament's judgment as to the irreducible seriousness of the offence in s 233C.

24. The NSW Attorney adopts the submissions of the Commonwealth Attorney-General concerning natural justice and reasons (section C.4 of the Annotated Submissions of the Attorney-General of the Commonwealth (Intervening)).

Part VI Estimate of time for oral argument

25. It is estimated that 10 minutes will be required for oral argument.

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MG Sexton SC SG
Ph: 02 9231 9440
Fax: 02 9231 9444
Email: Michael_Sexton@agd.nsw.gov.au

Joanna Davidson
Ph: 02 9231 9445
Fax: 02 9231 9444
Email: Joanna_Davidson@agd.nsw.gov.au