



## HIGH COURT OF AUSTRALIA

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**IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY**

BETWEEN:

**Margaret Archer**

Appellant

and

**Minister for Immigration and Citizenship**

Respondent

**APPELLANT’S SUBMISSIONS**

**PART I: CERTIFICATION**

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

**PART II: ISSUES**

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2. **Appeal ground 1** raises one issue: on the proper construction of s 501BA(2) of the *Migration Act 1958* (Cth), may the Minister set aside a s 501CA decision “without any limitation of the time that elapses, at any date, however distant”,<sup>1</sup> or must any decision to reverse the state of affairs obtaining in consequence of the s 501CA decision be made within a reasonable time? The appellant (**Mrs Archer**) contends that the answer to that question is the latter.

(1) The ordinary rule is that a power must be exercised within a reasonable time.<sup>2</sup>

(2) On the text, context and purpose of s 501BA(2), the ordinary rule applies. The power of “ministerial override”<sup>3</sup> in s 501BA(2) is only enlivened on the occurrence

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<sup>1</sup> *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 573 (Dixon J).

<sup>2</sup> *Koon Wing Lau* (1949) 80 CLR 533 at 573-574 (Dixon J) at 590 (Williams J); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at [451], [453] (Keane J) citing *Koon Wing Lau* (1949) 80 CLR 533 at 574-574, 590.

<sup>3</sup> *YTLT v Minister for Home Affairs* [2021] HCATrans 177 (Gageler J). See also the characterisation of the analogous provisions in s 501A as “override” powers in *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430 at [10], [33], [53] and [56] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

of an ‘original decision’ under s 501CA(4),<sup>4</sup> and is enlivened specifically to respond to (‘set aside’) that original decision.<sup>5</sup> The purpose of s 501BA(2) is to “quickly”<sup>6</sup> address the state of affairs produced by the s 501CA(4) decision:<sup>7</sup> the reinstatement of the person’s visa<sup>8</sup> (the right to remain in Australia)<sup>9</sup> and typically the person’s release into the Australian community.<sup>10</sup>

- (3) This construction gives s 501BA(2) “the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme” to which it belongs.<sup>11</sup> In contrast, construing s 501BA(2) as time-unlimited would elevate it to a “freestanding cancellation power”<sup>12</sup> which would duplicate s 501(3).<sup>13</sup>

3. **Appeal ground 2** raises whether the purported exercise of the s 501BA(2) power on 30 May 2024 was within a reasonable time of the s 501CA(4) decision on 22 February 2023. Mrs Archer contends the answer to that question is “no”.

- (1) The correct way to assess whether time taken is reasonable is to give primacy to the inherent nature of the statutory task. Resourcing and bureaucratic design choices should not be elevated over what the statute requires.

### **PART III: NOTICE OF CONSTITUTIONAL MATTER**

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4. No notice is considered necessary.

### **PART IV: REPORT OF JUDGMENTS BELOW**

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5. The judgment below is unreported and its medium neutral citation is *Archer v Minister for Immigration and Citizenship* [2026] FCAFC 20 (*Archer PJ*). The decision of the

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<sup>4</sup> Act, s 501BA(1).

<sup>5</sup> Act, s 501BA(2).

<sup>6</sup> Second reading speech introducing the *Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth)* (Commonwealth, Parliamentary Debates, House of Representatives, 24 September 2014, p 10326).

<sup>7</sup> *XMBQ v Minister for Immigration and Multicultural Affairs* [2025] FCA 553 (*XMBQ PJ*) at [130] (Horan J); *Minister for Immigration and Citizenship v XMBQ* (2026) 315 FCR 207 (*XMBQ Full Court*) at [73] (Kennett J) (Bromwich J agreeing at [1]) citing *CRRN v Minister for Immigration and Multicultural Affairs* [2025] FCA 192 at [33] (Owens J).

<sup>8</sup> Act, s 501CA(5).

<sup>9</sup> *XMBQ Full Court* at [45] (Kennett J) (Bromwich J agreeing at [1]).

<sup>10</sup> *XMBQ PJ* at [130] (Horan J); *Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth)* at p 15 [84].

<sup>11</sup> *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [70] (McHugh, Gummow, Kirby and Hayne JJ).

<sup>12</sup> *XMBQ PJ* at [70] (Horan J).

<sup>13</sup> Compare *Makasa* (2021) 270 CLR 430 at [54]-[55] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

primary judge is also unreported. Its medium neutral citation is *Archer v Minister for Immigration and Citizenship* [2025] FCA 471 (***Archer Full Court***).

6. The judgment in *Minister for Immigration and Citizenship v XMBQ*, heard below together with Mrs Archer's appeal, is reported at (2026) 315 FCR 207 (***XMBQ Full Court***). The decision of the primary judge is unreported and its medium neutral citation is *XMBQ v Minister for Immigration and Citizenship* [2025] FCA 553 (***XMBQ PJ***).

## **PART V: FACTS**

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7. Mrs Archer was born in the United Kingdom in 1960 and arrived in Australia in 1965: *Archer PJ* [1]; T<sup>14</sup> [1]. She has not left Australia since she arrived: T [211]. She has a husband, 4 sons, 4 stepdaughters, 26 grandchildren and 21 nieces and nephews, almost all of whom live in Australia: T [173].
8. On 22 May 2018, Mrs Archer's Class BF Transitional (Permanent) visa was cancelled by a delegate of the Minister under s 501(3A) of the Act: *Archer PJ* [3]. Mrs Archer was notified of the decision and invited to make representations: *Archer PJ* [3]. On 24 May 2018, Mrs Archer made representations to the Department requesting revocation of the cancellation of her visa: *Archer PJ* [4].
9. On 30 November 2022, another delegate of the Minister refused to revoke the cancellation under s 501CA(4): *Archer PJ* [4]. On 6 December 2022, Mrs Archer applied to the Administrative Appeals Tribunal for review under s 500(1)(ba) of the Act: *Archer PJ* [5].
10. The Tribunal found that Mrs Archer did not pass the character test by reason of having a substantial criminal record, but was satisfied there was another reason to revoke the cancellation: *Archer PJ* [5]. On 22 February 2023, the Tribunal set aside the delegate's decision and substituted it for a decision that the cancellation of the visa be revoked under s 501CA(4) of the Act: *Archer PJ* [5]. The Minister became aware of the Tribunal's decision that day: *Archer PJ* [36].
11. From the date of the Tribunal's decision, Mrs Archer was at liberty in the Australian community, where she remained for over 15 months until the s 501BA(2) decision: *Archer PJ* [9].
12. On 24 February 2023, a case officer of the Department assessed Mrs Archer's case as warranting referral to the Minister: *Archer PJ* [36]. On 8 and 9 March 2023, a case officer

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<sup>14</sup> *Archer and Minister for Immigration, Citizenship and Multicultural Affairs* [2023] AATA 250 (T).

prepared a brief in relation to Mrs Archer: *Archer PJ* [37]. On 21 March 2023, a representative for the Minister advised that the Minister wished to proceed with a s 501BA Ministerial Submission in relation to Mrs Archer: *Archer PJ* [37].

13. From 21 March 2023 until 2 November 2023, no action was taken in relation to Mrs Archer's case.<sup>15</sup>
14. On 2 November 2023, the task of preparing the s 501BA Ministerial Submission in relation to Mrs Archer was allocated to Ms D'Amico of the Department: *Archer PJ* [38].  
<sup>16</sup> On 29 May 2024, the Submission was cleared to be provided to the Minister: *Archer PJ* [42]. On 30 May 2024, over fifteen months after the Tribunal's "original decision", the Minister purported to exercise the power in s 501BA(2): *Archer PJ* [42].

#### *Archer PJ*

15. The primary judge determined not to resolve whether the power in s 501BA(2) was conditioned by an implied limitation it be exercised within a reasonable time but assumed it was: *Archer PJ* [35]. Instead, his Honour simply assumed that there was a limitation, and moved immediately to consider whether that limitation had been breached, without any identification and consideration of the basis for that limitation.
16. The primary judge held there were "two time periods to consider": *Archer PJ* [44]. The first commenced on 21 March 2023 and concluded on 8 November 2023. There was no specific evidence about what held up the allocation to Ms D'Amico. However, his Honour was satisfied that there was a reasonable explanation for the fact the task of preparing the s 501BA Ministerial Submission was not allocated until 8 November 2023: the resources of the Department were devoted to "the prioritising of other more urgent matters within that period" caused by the commencement of Ministerial Direction No 99 and decisions of the Full Court and the High Court: *Archer PJ* [44].
17. His Honour considered the second time period for examination ran from 8 November 2023 until the Minister's decision of 30 May 2023: *Archer PJ* [44]. His Honour considered a specific explanation for delay within that period had been provided and considered the Christmas/New Year vacation period was a contributing factor: *Archer PJ* [45].

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<sup>15</sup> Affidavit of Elise Michelle D'Amico affirmed 28 April 2025 (**D'Amico Affidavit**).

<sup>16</sup> D'Amico Affidavit, Annexure ED-2. The reference to 8 November 2023 in *Archer PJ* [38] (McElwaine J) appears to be a typographical error.

18. His Honour concluded that although there was an identifiable period of delay which “called for an explanation”, he was satisfied with the explanation and that “it follows” that he was satisfied the delay was not unreasonable: *Archer PJ* [46].

*Archer Full Court*

19. The Full Court determined that an appeal from the primary judge’s conclusion depended on the assumption the power in s 501BA(2) was conditioned by an implied reasonable time limitation being correctly made: *Archer Full Court* [4]. The assumption was not correct, according to *XMBQ Full Court* handed down the same day: *Archer Full Court* [4].
20. In the result, the Full Court did not address Mrs Archer’s argument as to why the primary judge erred in finding the respondent did not exercise the power in s 501BA(2) of the Act within a reasonable time. Nor did the Full Court address Mrs Archer’s argument about discernment of whether the time taken was reasonable, which was based on:

not so much whether there has been an unreasonable delay during one or more periods, but whether the Minister has failed to exercise the power under s 501BA(2) within a reasonable time, so as to deny the connection to the original decision that is required by the purpose of the power.<sup>17</sup>

21. On that question, because the concern is not primarily with the Department justifying its action or inaction (“not so much whether there has been an unreasonable delay during one or more periods”), it mattered less what the Department did in the intervening period. Rather, whether the necessary connection to the s 501CA decision had been severed should have been tested principally by reference to what the statute itself required.

## **PART VI: ARGUMENT**

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### **A. STATUTORY POWERS MUST GENERALLY BE EXERCISED WITHIN A REASONABLE TIME**

22. It is a principle of interpretation that where no period is specified in a statute for the doing of an act authorised or required by the statute, the act must be effected within a reasonable time.<sup>18</sup> This is what was referred to below as the “ordinary rule”, and traced back to Dixon J’s judgment in *Koon Wing Lau*, although the rule has a much earlier origin.<sup>19</sup>

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<sup>17</sup> *XMBQ PJ* at [171] (Horan J).

<sup>18</sup> *CPCF* (2015) 255 CLR 514 at [451] (Keane J) citing *Koon Wing Lau* (1949) 80 CLR 533 at 573-574, 590; see also at [200] (Crennan J), at [313] (Kiefel J), at [376] (Gageler J), at [453] (Keane J).

<sup>19</sup> *Folkard v Metropolitan Railway Co* (1873) LR 8 CP 470 (Bovill CJ), explained in *Tjiong v Tjiong (No 2)* [2018] NSWSC 1981 at [134]-[136] (Parker J).

23. The facts of *Koon Wing Lau* show how the rule was applied to imply a reasonable time for the performance of a power. Under the *Immigration Act 1901-1949* (Cth) considered in that case, a person who would otherwise be a “prohibited immigrant” or an “immigrant ... required to pass the dictation test” could be exempted from those consequences, by certificate issued by the Minister. Subsection 4(4) provided that “[u]pon the expiration or cancellation of any such certificate, the Minister may declare the person named in the certificate to be a prohibited immigrant and that person may thereupon be deported from the Commonwealth in pursuance of an order of the Minister”. The provision enabling the Minister to declare a person to once again be a prohibited immigrant, and thus subject to deportation, was a discretionary power, not a duty. Both Dixon J (at 573-574) and Williams J (at 590) construed the power as being available only for a reasonable time after the expiry or cancellation of the certificate. Williams J made the additional observation that were it otherwise, a person could be “kept indefinitely in a different position to any other immigrant with respect to the right to become a member of the Australian community”.
24. The ordinary rule was applied in *CPCF*.<sup>20</sup> Regardless of whether the power in *CPCF* was free-standing or a coupled with a duty,<sup>21</sup> it has been observed that in implying a time limit in relation to a duty as distinct from a power, there is “no essential difference between the two”.<sup>22</sup> Contrary to the conclusion of the Full Court in *XMBQ Full Court* that there is no general rule of construction identified in *Koon Wing Lau*,<sup>23</sup> there are many examples of the application of the rule, both in relation to discretionary powers<sup>24</sup> and duties.<sup>25</sup>

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<sup>20</sup> *CPCF* (2015) 255 CLR 514 at [313] (Kiefel J), [451] (Keane J).

<sup>21</sup> See e.g. *CPCF* (2015) 255 CLR 514 at [376] (Gageler J).

<sup>22</sup> *Findlay v Chief Commissioner of Police* (Unreported, Supreme Court of Victoria, Murphy J, 31 March 1977) at 6a.

<sup>23</sup> *XMBQ Full Court* at [82] (Kennett J) (Bromwich J agreeing at [1]).

<sup>24</sup> Each of the following cite *Koon Wing Lau*: *Kardas v Australian Securities Commission* (1998) 53 ALD 303 at 313 (Heerey J); *Tjong* at [129]-[148] (Parker J); *Findlay* at 6a (Murphy J). See also *Sullivan v Oil Company of Australia Ltd* [2002] 2 Qd R 94 at [38] (Muir J).

<sup>25</sup> Each of the following also cite *Koon Wing Lau*: *Re O'Reilly; Ex parte Australena Investments Pty Ltd* (1983) 58 ALR 577 at 578 (Murphy J); *Neal v Commissioner for Superannuation* (1987) 76 ALR 281 at 290 (Beaumont J); *BTR plc v Westinghouse Brake & Signal Co (Aust) Ltd* (1992) 34 FCR 246 at 272-273 (Beaumont J); *Repatriation Commission v Morris* (1997) 79 FCR 455 at 461 (Beaumont J); *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [102] (Gageler J); *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 at [37] (Crennan, Bell, Gageler and Keane JJ); *Giddings v Australian Information Commissioner* [2017] FCA 677 at [26] (Tracey J); *Knowles v Secretary, Department of Defence* [2021] FCAFC 215; 287 FCR 348 at [53] (Collier, Logan and Charlesworth JJ); *Patrick v Australian Information Commissioner (No 2)* [2023] FCA 530 at [37] (Wheelahan J); *Braun v Health Ombudsman* [2021] QSC 209 at [110] (Jackson J); *Viscariello v Legal Profession Conduct*

25. The consequence of the failure to exercise a power within a reasonable time is also a question of statutory interpretation,<sup>26</sup> although it will often be a corollary of the implication of a reasonable time for discretionary powers that the power ceases to be available after the expiry of that time. In *Koon Wing Lau*, the reasoning of Dixon J (and similarly of Williams J) that the power of the Minister to re-declare a person a “prohibited immigrant” must be exercised within a reasonable time of the expiration of the exemption certificate carried with it the necessary consequence that the power ceased to be available to the Minister after that time (“whether after the expiration or cancellation of a certificate the Minister may, without any limitation of the time that elapses, at any date, however distant, act under sub-s. (4)”). Other applications of a time limit both before and after *Koon Wing Lau* have also resulted in the apparent conclusion that the relevant power expired.<sup>27</sup>
26. The implication of a time limit has also been linked to legal unreasonableness, which has been acknowledged as including a temporal dimension.<sup>28</sup> For this reason, and in the alternative, the ordinary rule could be instead be viewed as a specific manifestation of the broader statutory implication that the “legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably”.<sup>29</sup> However, even if the ordinary rule is viewed in this way, it would still be desirable to continue to recognise the it as its own standalone implication: at the very least, it would serve as a helpful functional description, in much the same way as, for example, how procedural fairness is its own implication even though procedural fairness is also be understood as a specific manifestation of general unreasonableness.<sup>30</sup> If this alternative characterisation of the

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*Commissioner* [2021] SASFCF 24 at [68] (Tilmouth AJ). See also *R v Skurray* [1967] 2 NSW 611 at 616 (Asprey JA); *Shahi v Minister for Immigration and Citizenship* (2011) 246 CLR 163 at 174 [28] (French CJ, Gummow, Hayne and Bell JJ).

<sup>26</sup> *XMBQ PJ* at [125]-[128] (Horan J). Cf *XMBQ Full Court* at [4]-[5] (Thawley J) (Bromwich J agreeing at [1]).

<sup>27</sup> Above n 24; see also *Folkard v Metropolitan Railway Co* (1873) LR 8 CP 470 (Bovill CJ) (explained in *Tjong* at [134]-[136] (Parker J)).

<sup>28</sup> *BTR plc* (1992) 34 FCR 246 at 272-273 and *Li* (2013) 249 CLR 332 at [105] (Gageler J), both citing *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 at 383-384 (Windeyer J): “It is, of course, true that, as a measure in fact of time, space, quantity and conduct, reasonableness is a concept deeply rooted in the common law; and so, in such cases, is the power of a court to say whether a particular decision of that fact is or is not within the bounds of reason” (emphasis added).

<sup>29</sup> *Li* (2013) 249 CLR 332 at [63] (Hayne, Kiefel and Bell JJ).

<sup>30</sup> *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at [168] (Edelman J); *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 at [5] (Allsop CJ).

ordinary rule is accepted, the same consequence follows: s 501BA(2) would be incapable of being exercised reasonably following the expiry of a reasonable time.

**B. THE POWER IN S 501BA(2) IS SUBJECT TO A LIMIT THAT IT MAY ONLY BE EXERCISED WITHIN A REASONABLE TIME**

**B.1 *Similarities with Koon Wing Lau***

27. The parallels between s 4(4) of the Act considered in *Koon Wing Lau*, with s 501BA(2) of the present Act, are striking. Both powers are ones which, if exercised, render the person liable to removal. Both powers are conditioned on the person having an entitlement to be in the country. Both are also stand-alone powers, as distinct from powers nested within duties.<sup>31</sup> Neither are powers in respect of which mandamus is available, let alone desirable, for the person aggrieved.<sup>32</sup>
28. There is no reason to doubt the correctness of the ordinary rule, which as noted above has been repeatedly applied. Applying the same logic of expiration of the power in subs 4(4) to s 501BA(2) of the present Act leads to a result that is no more radical than the result in *Koon Wing Lau*.

**B.2 *Text, context and purpose***

29. That s 501BA(2) should be treated like s 4(4) is supported by the usual statutory construction considerations of text, context and purpose.<sup>33</sup>
30. Starting with the text, the power in s 501BA(2) is only enlivened if a decision is made under “section 501CA (the original decision) to revoke a decision under subsection 501(3A) to cancel a visa that has been granted to a person”: s 501BA(1). The power in s 501BA(2) is thus dependent on an earlier event: the making of an ‘original decision’ under s 501CA. Further, in terms, the power in s 501BA(2) is directed to setting aside the original decision.<sup>34</sup>

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<sup>31</sup> *Morgan v Minister for Immigration and Multicultural Affairs* [2025] FCA 266 at [66]-[69] (McDonald J).

<sup>32</sup> *Morgan* [2025] FCA 266 at [69]-[70] (McDonald J); *XMBQ PJ* at [127] (Horan J).

<sup>33</sup> *XMBQ PJ* at [130] (Horan J); *Eswaran v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 496 at [53] (Longbottom J); cf *Archer Full Court* at [4] (the Court); *XMBQ Full Court* at [1] (Bromwich J), [26] (Thawley J), [117] (Kennett J).

<sup>34</sup> *XMBQ PJ* at [130] (Horan J).

31. Section 501BA is silent as to when in time the power in s 501BA(2) may be exercised. A condition of a reasonable time is implied, unless on the text, context and purpose there is an affirmative basis not to. Here, there is no such affirmative basis.
32. As to purpose, or “mischief” sought to be remedied,<sup>35</sup> s 501BA is concerned with protection of the Australian community. This is apparent from the location of the provision in Division 2 of Part 9 of the Act, together with all the other “character” provisions dealing with the exclusion of those considered by the executive to pose a community safety risk. In particular, the ultimate precipitant of s 501BA(2) is a mandatory cancellation under s 501(3A), which occurs in the specific “character” scenarios of the person having a substantial criminal record or having been convicted of sexually based offences involving a child. It is plain then that the animation of any s 501BA(2) exercise begins at s 501(3A) with the legislative concern, given effect at that root, to exclude a person with such a record from the Australian community because of the view taken that they are a safety risk. The point of s 501BA(2) is to override<sup>36</sup> the errant state of affairs produced by the s 501CA decision in favour of the non-citizen.<sup>37</sup> So much is confirmed by the extrinsic material, which explicitly refers to the ability to “remove” from the community a person who does not pass the character test.<sup>38</sup>
33. This protective purpose is not distorted nor diminished by the legislature making the power in s 501BA(2) conditional upon a view of the “national interest”, since that is a criterion which “although broad and evaluative, is not unbounded”.<sup>39</sup> Such a criterion must still be understood as being subject to the relevant statutory text, context and purpose (i.e. protection of the community).<sup>40</sup>

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<sup>35</sup> *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47] (Hayne, Heydon, Crennan and Kiefel JJ) citing *Commissioner for Railways (NSW) Agalinos* (1955) 92 CLR 390 at 397 (Dixon CJ), quoted with approval in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] (McHugh, Gummow, Kirby and Hayne JJ); *Heydon’s Case* (1584) 3 Co Rep 7a at 7B [76 ER 637 at 638].

<sup>36</sup> *YTLT* [2021] HCATrans 177 (Gageler J); *Tereva v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 294 FCR 294 at [14], [28] (Mortimer J), [39]-[40] (Bromwich J).

<sup>37</sup> *XMBQ PJ* at [130] (Horan J); *XMBQ Full Court* at [73] (Kennett J) (Bromwich J agreeing at [1]) citing *CRRN v Minister for Immigration and Multicultural Affairs* [2025] FCA 192 at [33] (Owens J).

<sup>38</sup> *Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth)* at p 15 [85].

<sup>39</sup> *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [57] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

<sup>40</sup> *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 (Dixon J).

34. The extrinsic material also confirms that the power in s 501BA was enacted with the intention that if it were to be exercised, it would be done so “quickly” and “decisively”, in response to a “real and immediate” community protection concern said to arise from an errant Tribunal decision.<sup>41</sup> The intention that the power be exercised promptly is consistent with similar time-limitation conclusions reached in relation to other prophylactic powers also directed at protecting the community.<sup>42</sup>
35. Accordingly, purposive considerations support the application of the ordinary the ordinary rule.
36. As to context, construing s 501BA(2) as time-unlimited would elevate it to a “freestanding cancellation power”.<sup>43</sup> But that would duplicate s 501(3), which is also a no-natural justice cancellation power similarly conditioned on the Minister being satisfied cancellation is in the national interest.<sup>44</sup>
37. The context for the activation of the s 501BA(2) power also supports the application of the ordinary rule. Every step leading up to s 501BA(2) is time-limited, either explicitly or implicitly. Beginning with the mandatory cancellation under s 501(3A), “as soon as practicable” thereafter, the Minister must give notice of the cancellation and invite representations about revocation: s 501CA(3). Those representations must be made within 28 days.<sup>45</sup> There is then a duty (enforceable by mandamus) on the Minister to make a decision about revocation. If merits review is available, it must be sought within 9 days after the day on which the person was notified of the decision: s 500(6B). The Tribunal must then hear and determine the application within 84 days: s 500(6L). It is difficult to suppose that legislative recognition of the deleterious effect of delay on the non-citizen and the purpose of protecting the Australian community<sup>46</sup> (given expression by imposing time limits on decision-makers for every preceding step) suddenly stopped after the Tribunal process.
38. Interpreting s 501BA(2) as not being subject to a time limitation would also distort the visa class paradigm that is central to the Act. The Act does not contemplate that holders

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<sup>41</sup> Above n 6.

<sup>42</sup> See e.g. *Kardas* at 313 (Heerey J).

<sup>43</sup> *XMBQ PJ* at [70] (Horan J).

<sup>44</sup> Compare *Makasa* (2021) 270 CLR 430 at [54]-[55] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

<sup>45</sup> *Migration Regulations 1994* (Cth), reg 2.52(2)(b)).

<sup>46</sup> *Minister for Home Affairs v Brown* (2020) 275 FCR 188 at [28] (Allsop CJ, Kenny and Banks-Smith JJ).

of the same visa class have rights to be present in Australia with different levels of conditionality. It was this problem which Williams J referred to in *Koon Wing Lau* at 399 when his Honour said that subjecting a subset of immigrants to indefinite availability of s 4(4) would mean that subset would “be kept indefinitely in a different position to any other immigrant with respect to the right to become a member of the Australian community”. Although his Honour’s observation was in constitutional terms, the same idea of equality within a class of persons applies here, in statutory terms.

39. The conclusion reached by Williams J did not need to be couched in terms of the principle of legality, but the principle provides another rationale for the same result, given the dependence of non-citizens on visas for their liberty. It would offend the principle to suppose that the accident of a favourable Tribunal decision would bring with it a perpetual liability to deprivation of liberty, at the behest of the Minister who might consider that cancellation was, at a far-removed point in time, in the national interest. The non-citizen’s rights do not become irrelevant just because the non-citizen obtained success at the Tribunal; if anything, they become more important to the correct construction of s 501BA(2). Another established common law right which is relevantly invoked by the principle of legality is the presumption against retrospectively changing rights and obligations.<sup>47</sup> It may be accepted that s 501BA(2) intends to do this in response to the s 501CA(4) decision, but there are no clear words of intendment to support the construction that this liability is indefinite.
40. The unlikelihood that s 501BA(2) is perpetually available to exclude from the community those who fail a subset of the character test is also consistent with the ordinary operation of the Act in other respects. For example, a person might have restored to them by the Tribunal their permanent visa without a travel facility, then depart Australia with the effect that their visa ceases: s 82. The same person could then return to Australia on a different visa such as a resident return visa. Since the person would then hold a different visa, s 501BA could not be invoked. Another example is that a person might have restored to them under s 501CA(4) their visa, which is not a protection visa. The person may then subsequently be granted a protection visa. If s 501BA(2) were invoked, it could only be invoked against the original visa (because the protection visa would not have ever

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<sup>47</sup> *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at [30]-[31] (French CJ, Crennan and Kiefel JJ).

been cancelled under s 501(3A)). Cancellation of the original visa would leave the protection visa intact: s 501F(3).

41. The exclusion of the rules of natural justice by s 501BA(3) was justified on the basis that “natural justice will have already been provided to the non-citizen through the revocation process available under s 501CA”.<sup>48</sup> This is consistent with the purpose of the power being to respond to the state of affairs produced by the s 501CA decision and Parliament’s intention that any decision under s 501BA(2) in response to the s 501CA decision being made promptly; urgency is a classical justification for removal of natural justice.<sup>49</sup>
42. Finally, the power is s 501BA(2) “overrides the executive process of an external and independent merits review”.<sup>50</sup> It may be accepted that the “considerable expenditure of public funds and resources” of going through merits review, and, importantly, succeeding, is rendered futile if the power in s 501BA(2) is exercised,<sup>51</sup> but again it is another thing to suppose that the prospect of futility is to exist indefinitely, long after the non-citizen re-establishes their life in the community, as they would be entitled to with their “default position” following Tribunal success.<sup>52</sup>
43. It is no answer to say that the implication of a limit of a reasonable time leads to indeterminacy. Reasonableness is not indeterminate; it is an objective standard,<sup>53</sup> deeply rooted in the common law,<sup>54</sup> and applied in many areas.

### C. DISCERNMENT OF WHETHER THE TIME TAKEN IS A REASONABLE TIME

44. Where there is a time limit for the exercise of s 501BA(2), there needs to be a framework for the determination of whether the time taken has been reasonable.

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<sup>48</sup> *XMBQ PJ* at [75] (Horan J) quoting the *Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth)* at p 15 [84].

<sup>49</sup> *Marine Hull & Liability Insurance Co Ltd v Hurford* (1985) 10 FCR 234 at 240-241 (Wilcox J) explained in *J Watties Canneries Ltd v Hayes* (Unreported, Federal Court of Australia, Keely, Wilcox and Gummow JJ, 21 July 1987); *Day v Harness Racing New South Wales* (2014) 88 NSWLR 594 at [105] (Leeming JA); *Alfabs Engineering Group Pty Ltd v Regan* [2002] NSWSC 316 at [51] (Parker J); *Cava v Marshall* [2003] SASC 371 at [124] (Mullighan J).

<sup>50</sup> *Tereva* (2022) 294 FCR 294 at [14] (Mortimer J).

<sup>51</sup> *Tereva* (2022) 294 FCR 294 at [14] (Mortimer J).

<sup>52</sup> *Song v Minister for Immigration and Citizenship* [2025] FCA 1351 at [87] (Hill J); *CPDL v Minister for Immigration and Citizenship* [2026] FCA 342 at [102](e) (Hill J).

<sup>53</sup> *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at [132]-[135], [150] (Edelman J).

<sup>54</sup> *Giris* (1969) 119 CLR 365 at 383 (Windeyer J).

45. This is not an enquiry that can be conducted in the abstract, given that it is well-established that reasonableness is a function of the particular statutory scheme.<sup>55</sup> Rather, discernment of a reasonable time must commence with recognition of what it is in the scheme that creates the limit in the first place.
46. The relevant features of the scheme terminating in a purported exercise of s 501BA(2) power are those set out above: that the exercise of the power only occurs after a contested Departmental process, followed by a contested Tribunal process, followed by the Minister forming a state of satisfaction in response to the Tribunal decision, based on the national interest, informed by the same notions of protection of the community which he had hitherto already been pursuing through the two antecedent contested processes.
47. In discerning whether the time taken was reasonable, there should also be parallels with the analysis of when mandamus will be issue to command performance of a statutory duty where the relevant Act is silent as to the period within which that duty is to be performed. Both the availability of mandamus, and the appellant's proposed limitation on the existence of power in s 501BA(2), stem from the same implication that the duty or power must be performed within a reasonable time. The analysis for whether a reasonable time has elapsed should therefore be informed by the same rules.<sup>56</sup>
48. However, there is a lack of Australian authority explaining the principles to be applied in determining whether a period of time is a reasonable time. There are generalised statements that reasonableness is a matter of statutory construction, reasonableness is assessed objectively, that "all the circumstances" are relevant and that specifically, an "explanation for any delay is always a relevant consideration".<sup>57</sup> But these statements are too abstract to be of analytical assistance. For example, these statements say nothing about what is required of the nature of any proffered explanation that tends towards the decision having been made within a reasonable time. They also produce incoherence, as

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<sup>55</sup> Cf e.g. *Archer PJ* at [35] (McElwaine J); *Morgan* [2025] FCA 266 at [49] (McDonald J); *GRCF v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 415 at [89] (Bennett J); *Chapman v Minister for Immigration and Multicultural Affairs* [2025] FCA 24 at [59] (Lee J).

<sup>56</sup> As contemplated in, e.g. *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 at [37] (Crennan, Bell, Gageler and Keane JJ); *XMBQ Full Court* at [88] (Kennett J).

<sup>57</sup> *Patrick v Australian Information Commissioner* [2024] FCAFC 93 at [37] (Bromwich, Abraham and McEvoy JJ) (in the context of a duty rather than discretionary power).

shown by the inconsistent results of the application of these statements. For example, some cases accept explanations of resourcing while others do not.<sup>58</sup>

49. Further, some existing cases seem to suggest that if an explanation sheds light on otherwise apparent inaction, then this means there has not been unreasonable delay in making the decision.<sup>59</sup> But it does not follow from the existence of an explanation, even if it is a “reasonable” explanation, that the decision will have been made in a reasonable time.<sup>60</sup> The chasm can be illustrated by supposing a protracted bureaucratic design that, by its design, means a matter will not be ready for decision for, say, 10 years. Every day may be day when a bureaucrat did work on the file. Yet taking 10 years to arrive at the decision is nevertheless unreasonable.
50. Cases also suggest that as a threshold matter, the applicant must show a delay that “calls for an explanation”.<sup>61</sup> Again, however, the cases are silent about how long the delay needs to be before it “calls for an explanation”.
51. However, there is a cogent, principled approach that can be transparently applied, which deals with these problems. That approach is to give primacy to the inherent nature of the statutory task to be performed. It ensures that the enquiry into the explanations that might be proffered is not just an unanchored normative conclusion, but instead remains tethered to the statute, which is necessary because a limit of reasonable time arises from and is conditioned by the statute. An “evident or intelligible justification” supplying reasonableness, in response to a statutory implication of reasonableness, has not been understood as any justification at large.<sup>62</sup>
52. Further, the approach of giving primacy to the inherent nature of the statutory task ensures that a non-statutory executive process cannot be elevated above the requirements of the statute itself, for which the non-statutory process is supposed to facilitate, not supplant. This elevation is the danger with the seemingly-prevailing approach that applies deference to executive choices which lack legislative authority. In the case of

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<sup>58</sup> See e.g. *Wei v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 29 FCR 455 at 477, *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 at [104] (Bromberg J); cf *Archer PJ* at [44].

<sup>59</sup> *Archer PJ* at [44], *Chapman* [2025] FCA 24 at [60]-[61] (Lee J).

<sup>60</sup> *Song* [2025] FCA 1351 at [89] (Hill J); *CPDL* [2026] FCA 342 at [103] (Hill J).

<sup>61</sup> *Thornton v Repatriation Commission* (1981) 35 ALR 485 at 492 (Fisher J); *AQM18 v Minister for Immigration and Border Protection* (2019) 268 FCR 424 at [59] (Besanko and Thawley JJ).

<sup>62</sup> *Li* (2013) 249 CLR 332 at [76] (Hayne, Kiefel and Bell JJ); *Stretton* (2016) 237 FCR 1 at [5]-[11] (Allsop CJ).

s 501BA(2), the provision is only about a decision being made; it and the Act more generally are agnostic as to how.<sup>63</sup>

53. Under this approach of giving primacy to the inherent nature of the statutory task to be performed, if an explanation is advanced for any delay, the explanation may be relevant so long as it goes to what is required by the statutory task. The primacy approach provides a coherent basis to identify which explanations are extraneous.
54. The approach is entrenched in the common law jurisdiction of Canada (and its origins are not due to any unique constitutional considerations) and has sometimes been referred to as the *Conille* approach (whether the time taken is longer than what “the nature of the process requires, *prima facie*”).<sup>64</sup> It is a principled basis for rejecting any explanation from a respondent that is blanket and generic, and which fails to grapple with the nature of the particular case concerned.<sup>65</sup> It is a unifying basis for rejecting explanations such as “institutional reorganisation” or the bureaucratically-invented “many levels of assessment and review involved”,<sup>66</sup> changes in Minister,<sup>67</sup> changes in jurisprudence,<sup>68</sup> and administrative backlog,<sup>69</sup> all matters which have nothing to do with the intrinsic nature of the statutory task, are matters over which an applicant has no control, and the burdens of which should not be borne by them. The “Minister is accountable to Parliament for his policy choices, and those choices are not to be gainsaid by the courts”, “but the limit of that deference” is the statute.<sup>70</sup>

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<sup>63</sup> Cf e.g. the detailed prescription in the processes in s 501(3A), s 501CA(3), (3A) and (4). See *Hood v Assistant Minister for Immigration* [2025] FCA 1336 at [35] (Kennett J); *XMBQ PJ* at [176] (Horan J).

<sup>64</sup> *Conille v Canada (Minister of Citizenship and Immigration)* [1999] 2 FC 33 (Tremblay-Lamer J). *Conille* was cited in *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 at [27] (Bromberg J) although without specifically pointing to the primacy of the inherent nature of the statutory task. Rather, that point was diluted with other considerations: see [23]-[27].

<sup>65</sup> *Andriendo v Canada (Citizenship and Immigration)*, 2026 FC 1054 at [24] (Grant J) (Federal Court of Canada).

<sup>66</sup> *Esmaili-Tarki v Canada (Public Safety and Emergency Preparedness)*; 2010 FC 697 at [14]-[15] (Beaudry J) (Federal Court of Canada). Cf *Archer* at [42] (McElwaine J).

<sup>67</sup> *Chirum v Canada (Public Safety and Emergency Preparedness)*, 2025 FC 259 at [25] (Go J) (Federal Court of Canada). Cf *Eswaran* [2025] FCA 496 at [61] (Longbottom J).

<sup>68</sup> *Thomas v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 164 at [24]-[25] (Fothergill J) (Federal Court of Canada).

<sup>69</sup> *Dragan v Canada (Citizenship and Immigration)* [2003] 4 FC 189 at [58] (Kelen J). Cf *Chapman v Minister for Immigration & Multicultural Affairs* [2025] FCA 24 at [48] (Lee J).

<sup>70</sup> *Liang v Canada (Citizenship and Immigration)* [2014] 1 FCR 352 at [41] (Rennie J).

55. Although not explicitly applied in Australia to date,<sup>71</sup> the approach is consistent with statements of principle that have been made from time to time. For example, Australian courts also recognise not gainsaying resourcing decisions of the executive, but that deference has also been understood as not stretching so far as to endorse of resourcing decisions that undermine rights created by Parliament.<sup>72</sup> Another example has been the correct recognition of the intrinsic nature of the task in s 501BA(2), which is simply to form a view on the Tribunal’s decision and determine whether it should be overturned based on “national interest”, and allied observations that the power is discretionary and intended to urgently address Tribunal outcomes.<sup>73</sup> The problem in the Australian cases has been the dilution of this recognition by incorrectly accepting, and elevating, the time required for bureaucratic machinery.<sup>74</sup>
56. Giving primacy of the inherent nature of the statutory task is consistent with the correct approach being concerned with “not so much whether there has been an unreasonable delay during one or more periods, but whether the Minister has failed to exercise the power under s 501BA(2) within a reasonable time”.<sup>75</sup> An untethered assessment of whether there is activity that explains the time consumed may result in the normative conclusion that such activity is not “unreasonable”, but that is not the same question as whether the time to arrive at the decision was a reasonable one.<sup>76</sup>
57. The *Conille* approach has two other factors. The second of the three factors is whether the applicant is responsible for the delay, which is not the case here. The third is whether “the authority responsible for the delay [has or] has not provided satisfactory justification”, but this has not been interpreted by the Courts as allowing acceptance of explanations that travel beyond the inherent nature of the statutory task.<sup>77</sup>
58. The application of this test to s 501BA(2) is as follows. The discernment of a “reasonable time” would, at most, involve examining the time it would take for the Minister to have their Department prepare a brief, and to consider the matter and make a decision. These are the things that are inherently related to the nature of the statutory task. Importantly,

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<sup>71</sup> But see n 64.

<sup>72</sup> *Wei* at 477 (Neave J). See also *CPDL* at [102](b) (Hill J); *Hood* [2025] FCA 1336 at [35] (Kennett J).

<sup>73</sup> *CPDL* at [102](d)-(e) (Hill J); *Hood* at [34] (Kennett J).

<sup>74</sup> See above n 64.

<sup>75</sup> *XMBQ PJ* at [171] (Horan J).

<sup>76</sup> *Song* at [89], [93] (Hill J).

<sup>77</sup> See paragraph 54 above.

the time inherently required for them is also influenced by the fact that the Minister will have been privy to the whole matter well before the Tribunal's decision, as a result of him being an active party to the Tribunal review dealing with the same facts (see paragraph 46 above). Extraneous to the inherent requirements of the statutory task are bureaucratic choices made by the Department or the Minister's office to structure their processes in any particular way (noting the statute is agnostic as to machinery), or diversion of resources to other tasks such as overseeing the introduction of new Ministerial directions or responding to court decisions. This is not to say that the Department or Minister's office cannot engage in these things, but it is to say that the consequences of these things are not to be visited on the person affected.<sup>78</sup>

**D. THE DECISION IN THE APPELLANT'S CASE WAS NOT MADE WITHIN A REASONABLE TIME**

59. Prima facie, it did not require the Minister to take 15 months to make a decision, having regard to what the s 501BA(2) task inherently requires, which at most was to solicit a brief from his Department and then make a decision on that brief in response to the Tribunal's decision, with the benefit of the Department having already been armed with thorough knowledge of the matter through two contested anterior processes. The evidence adduced by the Minister below did not alter this prima facie starting point.
60. The Minister offered no evidence about what happened on the appellant's file, for almost half the period concerned. Ms D'Amico conceded she was "not aware" why the preparation of the s 501BA submission was allocated to her as late as 2 November 2023, some 7.5 months after it had been requested by the Minister on 21 March 2023.<sup>79</sup> There was no explanation about what was happening to the appellant's file during this period.
61. Applying the *Conille* test, 7.5 months (or 15 months) is far more than what the inherent nature of the s 501BA(2) task requires. The failure of the Minister to demonstrate any activity on the file during this period meant that he failed to expand the prima facie time required for the statutory task to anything approaching 7.5 months (or 15 months) (i.e. there is nothing on the evidence to invoke the third *Conille* factor).

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<sup>78</sup> Above n 70.

<sup>79</sup> D'Amico Affidavit, [25].

62. The Minister offered generalised evidence about resourcing constraints, including as a result of the need to divert resources to deal with a new Ministerial direction,<sup>80</sup> responding to courts handing down unrelated judgments,<sup>81</sup> prioritising other cohorts,<sup>82</sup> Ms D’Amico taking leave and then choosing to take up an appointment elsewhere in the Department,<sup>83</sup> and taking some 6 weeks for Delphic “usual internal quality assurance review”.<sup>84</sup> But these explanations were not subject of any attempt to tether them to the appellant’s particular case,<sup>85</sup> and in any event have nothing to do with the inherent nature of the statutory task. The courts below should have rejected those explanations.<sup>86</sup> The primary judge’s additional reasoning about the generalised business of Ministers who have a multitude of responsibilities is also beside the point:<sup>87</sup> a person who accepts appointment as a Minister “does so with the full knowledge of the tremendous power and responsibility that comes with it. It is incumbent on the individual appointed to such a powerful position to keep themselves up to speed on all their portfolios without delay”.<sup>88</sup> These explanations would not be accepted by the first or third *Conille* factors (they have been expressly rejected as such<sup>89</sup>) accordingly cannot constitute satisfactory explanations for the delay in making the decision.

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<sup>80</sup> *Archer PJ* at [38] (McElwaine J).

<sup>81</sup> D’Amico Affidavit, Annexure ED-2; *Archer PJ* at [38]-[40] (McElwaine J).

<sup>82</sup> *Archer PJ* at [41] (McElwaine J).

<sup>83</sup> *Archer PJ* at [41] (McElwaine J).

<sup>84</sup> *Archer PJ* at [42] (McElwaine J).

<sup>85</sup> There was no evidence that Mrs Archer’s case was allocated to a case officer before 2 November 2023. The resourcing constraints on case officers prior to 2 November 2023 (in “the months after” 3 March 2023, until “mid-2023” and in June 2023<sup>32</sup>) do not provide a reasonable explanation for the delay. Cf *Archer PJ* at [44].

<sup>86</sup> The acceptance of these explanations below also cannot be reconciled with the rejection of similar generalised explanations in *XMBQ PJ* at [176]-[177] (Horan J), *Song* at [94](b) (Hill J), *XPLW v Minister for Immigration and Multicultural Affairs* [2026] FCA 210 at [148]-[160] (Horan J), and *CPDL* at [109](b) (Hill J).

<sup>87</sup> *Archer PJ* at [44] (McElwaine J).

<sup>88</sup> *Chirum*, 2025 FC 259 at [25] (Go J).

<sup>89</sup> See paragraph 54 above.

**PART V: ESTIMATE OF TIME**

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63. Mrs Archer estimates that she will require 1 hour for the presentation of her oral submissions.

**Dated:** 24 September 2026



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## ANNEXURE TO THE APPELLANT'S SUBMISSIONS

| No                         | Description                            | Version                                            | Provision(s) | Reason for providing this version                                                       | Applicable date(s)                                                                    |
|----------------------------|----------------------------------------|----------------------------------------------------|--------------|-----------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------|
| <b><i>Commonwealth</i></b> |                                        |                                                    |              |                                                                                         |                                                                                       |
| 1.                         | <i>Migration Act 1958</i>              | Compilation No 160 (29 March 2024 to 30 June 2024) | s 501BA      | Version in force at the time the Minister purported to exercise the power in s 501BA(2) | 30 May 2024 (date of Minister's decision)                                             |
| 2.                         | <i>Immigration Act 1901-1949 (Cth)</i> | As amended by No 31 of 1949                        | s 4          | Version considered in <i>Koon Wing Lau v Calwell</i> (1949) 80 CLR 533                  | 21 December 1949 (judgment date for <i>Koon Wing Lau v Calwell</i> (1949) 80 CLR 533) |