



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

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RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES THAT ARISE

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2. The first ground of appeal raises the following issues: (i) Is there a principle of construction 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? (ii) Must the power conferred upon the Minister by s 501BA(2) of the *Migration Act 1958* (Cth)) be exercised within a reasonable time of the "original decision" within s 501BA(1), such that it is thereafter not available? The second ground of appeal arises if the first ground succeeds: (iii) Was the exercise by the Respondent (**Minister**) of the s 501BA(2) power, on 30 May 2024, in respect of the Appellant, made within a reasonable time of the s 501CA(4) decision, (22 February 2023)?

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3. For the reasons developed below, those questions should be answered: (i) There is a common law principle of construction to the effect that, where a statute requires or authorises something to be done upon the occurrence of an event, but does not specify any period for the doing of that thing, the provision may, subject to a contrary intention, be construed as requiring that the thing be done within a reasonable time. That principle applies with less force to a power than a duty. (ii) No. (iii) Yes.

PART III: NOTICE OF CONSTITUTIONAL MATTER

4. No notice is required under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: FACTS

5. The Minister broadly agrees with the summary of the material facts set out by the Appellant in her submissions (AS) at [7]-[21], subject to the following matters.
6. The Minister's admitted knowledge of the Tribunal decision on the date it was made was constructive, not actual, knowledge: *cf* AS [10].¹
7. The document uploaded on 8 and 9 March 2023 was not a Ministerial Submission: *cf* AS [12]. It was a client brief which set out options for the Minister, being: (a) to consider using his personal powers under s 501BA (in which case a Ministerial Submission would be prepared for his consideration); or (b) to take no further action.²
- 10 8. At trial, the time taken to make the s 501BA(2) decision was the subject of evidence by Ms D'Amico, an Assistant Director in the Revocation and Discretionary Section of the National Character and Cancellation Centre of the Department of Home Affairs, tasked with preparing the Ministerial Submission. The Appellant did not challenge Ms D'Amico's evidence, and the primary judge accepted it: *Archer v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 471 (**Archer PJ**) at [36]-[42]. The chronology that evidence revealed was: (a) 22 February 2023: the Tribunal made its decision; (b) 24 February 2023: the Department assessed the case as meeting the thresholds for referral to the Minister; (c) 16 March 2023: the Department cleared the client brief for the Minister's Office; (d) 21 March 2023: the Minister's Office requested that a
20 Ministerial Submission be prepared; (e) 2 November 2023: Ms D'Amico allocated the task of drafting the Ministerial Submission; (f) 30 May 2024: the Department sent the Ministerial Submission to the Minister's Office; and (g) 30 May 2024: the Minister made the s 501BA decision.
9. In addition to contending that the total (15 month) period between the making of the original decision and the Minister's decision under s 501BA exceeds what the task *prima facie* required (AS [59]), the Appellant takes issue with the period of 7 months and 12 days

¹ The admitted fact was: "The Department became aware of the Tribunal's decision on 22 February 2023": Notice to Admit, 24 March 2025, [1]; Notice of Dispute, 7 April 2025, [1]; affidavit of Ms D'Amico of 28 April 2025 (**D'Amico affidavit**) [15], RBFM 4.

² Archer PJ [37]; D'Amico affidavit [22], RBFM 5-6.

between the Minister's Office requesting the Ministerial Submission and it being allocated to Ms D'Amico: AS [60]-[61].

10. As an aspect of this, the Appellant submits that the Minister "offered no evidence" for "what happened on the Appellant's file" during that period: AS [60]. Ms D'Amico did not have direct knowledge of what had occurred to the Appellant's file in the period immediately before it had been allocated to her. However, she gave unchallenged evidence³ about significant resourcing constraints arising in that period which the primary judge accepted as "an explanation as to how the resources of the Department were devoted to the prioritising of other more urgent matters within that period" and as constituting "a reasonable explanation for the fact that the task of preparing the Ministerial Submissions was not allocated until [2] November 2023": Archer PJ [44].
11. The resourcing matters about which Ms D'Amico gave evidence comprised: (a) the introduction in March 2023 of a new Ministerial Direction (which occupied case officers with, *inter alia*, sending new procedural fairness letters to persons with pending revocation requests); (b) the Department's operational response to the Full Federal Court decision in *Pearson v Minister for Home Affairs*⁴ which continued until mid-2023; and (c) case officers placing their existing case work on hold to prioritise the large number of persons and sensitive cases affected by the Full Federal Court's decision in *Minister for Immigration, Citizenship and Multicultural Affairs v EVE21* (decided on 13 June 2023),⁵ and this Court's decision in *Minister for Immigration, Citizenship and Multicultural Affairs v Thornton* (decided on 14 June 2023).⁶ Ms D'Amico detailed both her direct experience of those matters during that period, and her observations and awareness of how it had affected other case officers in the National Character and Cancellation Centre of the

³ D'Amico affidavit [26], RBFM 6-7.

⁴ (2022) 295 FCR 177; by which the Full Federal Court construed aggregate terms of imprisonment as incapable of constituting a relevant term of imprisonment for the purposes of s 501(3A) of the Act (as it then stood).

⁵ (2023) 298 FCR 57; by which the Full Federal Court allowed an appeal from the primary judge's holding that reg 2.55(3)(c) of the *Migration Regulations 1994* (Cth) (dealing with the way in which the Minister must give certain documents relating to proposed visa cancellation, cancellation or revocation of cancellation) was invalid.

⁶ (2023) 276 CLR 136; by which it was held that certain childhood offending could not be taken into account in visa decisions by reason of s 85ZR(2)(b) of the *Crimes Act 1914* (Cth).

Department. Ms D’Amico’s evidence is not fairly characterised as “generalised evidence about resourcing constraints”: *cf* AS [62].

12. Ms D’Amico’s evidence explained how, from soon after the allocation of the Appellant’s file to her, she attended to the Department’s response to the decision of this Court on 28 November 2023 in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*,⁷ until Christmas.⁸ Ms D’Amico retained the file, instead of allocating it to a more junior case officer, in order to complete the Ministerial Submission, notwithstanding that she was acting in, and later promoted to, a different role.⁹
- 10 13. Ms D’Amico completed the Ministerial Submission by about 18 March 2024, whereupon it was subject to internal quality assurance review processes, which involved “review and suggested amendments and considerations from the Team Leader, Director and an Assurance and Legal Engagement officer”.¹⁰ From early May 2024, that was followed by a submission for final clearance and review (to ensure previous suggestions and amendments had been incorporated as appropriate), and a final request for an updated criminal history check.¹¹ When requesting that check on 22 May 2024, Ms D’Amico recorded the “competing priori[ties]” (and role changes) which had held up preparation of the Ministerial Submission.¹² The Ministerial Submission was made available to the Minister’s Office on 30 May 2024 and the decision was made that day.¹³

PART V: ARGUMENT

20 A GROUND ONE

(a) “Ordinary rule” applies to powers that arise upon the occurrence of an event

14. The Appellant contends that there 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

⁷ (2023) 280 CLR 137.

⁸ D’Amico affidavit [30], RBFM 7-8.

⁹ D’Amico affidavit [30], RBFM 7-8.

¹⁰ D’Amico affidavit [31], RBFM 8.

¹¹ D’Amico affidavit [32], RBFM 8.

¹² D’Amico affidavit [33]-[34], RBFM 8.

¹³ D’Amico affidavit [36], RBFM 9. There is a typographical error in the trial judge’s recording of that date as “30 May 2025”: Archer PJ [7].

must be effected within a reasonable time”: AS [22]; relying on Dixon J in *Koon Wing Lau v Caldwell*.¹⁴

15. In that case, this Court considered the meaning of s 4(4) of the *Immigration Act 1901-1949* (Cth), which conferred on the Minister a discretionary power to deport a prohibited immigrant upon the expiration or cancellation of a certificate. Section 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 [Australia] in pursuant of an order of the Minister”.

10 16. Justices Dixon and Williams separately concluded that “upon”, in the context of s 4(4), meant a “reasonable time” after the cancellation of any such certificate, but only Dixon J did so on the basis of an “ordinary rule” applying to the construction of s 4(4). Each of their Honours referred to the decision of the New South Wales Supreme Court in *Ex parte Lesiputty; Re Murphy*.¹⁵ Having expressed their agreement with the reasoning of Jordan CJ in *Ex parte Lesiputty*, Dixon J and Williams J each held that “after”, in the context of s 4(4), means a “reasonable time” after. Justice Dixon explained this as being “in accordance with the ordinary rule”.¹⁶ Justice Williams did not appear to rely on any “ordinary rule”. His Honour cited *Folkhard v Metropolitan Railway Co*,¹⁷ which concerned the proper construction of an Act which provided that leave must be “upon the trial”. In that context, Bovill CJ and Brett J had each construed “upon the trial”, in the
20 absence of a specified time period, to mean a “reasonable time” after, without reference to any “rule”. It is not authority for the “rule” referred to by Dixon J having a “much earlier origin”: cf AS [22].

17. In *Koon Wing Lau*, this Court was construing s 4(4) in the context of a constitutional challenge to the power as beyond the scope of the immigration power. Implying a “reasonable time” limit had the consequence that no question arose as to the validity of the provision. The provenance and scope of the “ordinary rule” to which Dixon J was referring is otherwise unclear. There is no basis in the authorities preceding *Koon Wing Lau* for a

¹⁴ (1949) 80 CLR 533.

¹⁵ (1947) 47 SR (NSW) 433 at 436 (Jordan CJ).

¹⁶ *Koon Wing Lau* (1949) 80 CLR 533 at 573 (Dixon J).

¹⁷ (1873) LR 8 CP 470.

general common law principle that would apply to any provision conferring a power to do a thing upon the occurrence of an event, as s 4(4) does.

18. What is clear is that Dixon J's statement, and the principle it articulates, have been applied in subsequent decisions of this Court. It may accordingly be accepted that there is a common law principle of construction to the effect that, where a statute requires or authorises something to be done upon the occurrence of an event, but does not specify any period for the doing of that thing, the provision may, subject to a contrary intention, be construed as requiring that the thing be done within a reasonable time. The principle is to be used in the exercise of construction, alongside other principles engaged by the text. It is responsive to the statutory text and context. Being an implication, it must be directly suggested by the words of a statute or be directly suggested by rules or principles not disapplied by the statute. In particular, it will be displaced where inconsistent with the terms in which a power is conferred or a duty imposed, or if otherwise inconsistent with the nature or statutory context of the power or duty.

(b) *Principle is weaker where no duty arises upon the occurrence of an event*

19. While the "ordinary rule" was first so described in the context of a discretionary power, the principle will apply with less force or, put differently, be more readily displaced, where the statute confers a discretionary power as opposed to imposing a mandatory duty: *cf* AS [24]. Where a provision imposes a duty, a writ of mandamus can issue, such that application of the principle of construction regulates the exercise of the power, by requiring that it be exercised within a reasonable time (of a stipulated event). By contrast, where a provision confers a power, such a writ cannot issue, such that application of the principle goes to the existence, or availability, of a power (AS [25]).¹⁸ A principle operating to that effect will require textual or contextual support and will be readily displaced by a contrary intention. That position is consistent with the authorities. Subsequent cases of this Court

¹⁸ *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 at 190 [37] (Crennan, Bell, Gageler and Keane JJ).

which have applied the “ordinary rule” have done so in the context of a statute in effect conferring a duty that arises upon the occurrence of a particular event.

- 10 20. ***Plaintiff S297/2013***¹⁹ concerned s 65A of the Migration Act, which specified time limits for the Minister to make a decision on certain protection visa applications. Justices Crennan, Bell, Gageler and Keane noted that the Act was, by contrast, silent as to the period within which the Minister must generally make a decision on a valid application for a visa under s 65 of the Migration Act. Citing the “ordinary rule” from *Koon Wing Lau*, their Honours concluded that “[t]he duties of the Minister to consider a valid application for a visa ... and to make a decision granting or refusing such a visa are, by implication, to be performed within a reasonable time”.²⁰ The principle of construction was accordingly applied to the duty to decide whether to grant or refuse a visa, which arose on the occurrence of a particular event, being the receipt of a visa application. The plurality explained that “[w]hat amounts to a reasonable time is ultimately for determination by a court, on an application for mandamus against the Minister under s 75(v) of the Constitution or equivalent statutory jurisdiction”.²¹ The consequence of implying a “reasonable time” limit was that the exercise of the power could be compelled.
- 20 21. Likewise, in ***CPCF v Minister for Immigration and Border Protection***,²² each of Crennan J, Kiefel J, Gageler J and Keane J cited Dixon J’s “ordinary rule” in *Koon Wing Lau* in concluding the power at issue – s 72(4)(b) of the *Maritime Powers Act 2013* (Cth) – was to be performed within a “reasonable time”.²³ Justice Gageler (as his Honour then was) observed that “[l]ike any other statutory duty for which no time for performance is specified, the duty to take, once triggered by detention, must be completed within a reasonable time”.²⁴
22. Section 72(4) provided that “[a] maritime officer may detain the person and take the person, or cause the person to be taken” to a place in or outside the migration zone. Justice Gageler explained: “[t]he maritime power conferred by s 72(4) of the Act is expressed to

¹⁹ (2014) 255 CLR 179.

²⁰ *Plaintiff S297/2013* (2014) 255 CLR 179 at 189-190 [37] (Crennan, Bell, Gageler and Keane JJ).

²¹ *Plaintiff S297/2013* (2014) 255 CLR 179 at 190 [37] (Crennan, Bell, Gageler and Keane JJ).

²² (2015) 255 CLR 514.

²³ *CPCF* (2015) 255 CLR 514 at 581 [200] (Crennan J), 608 [313] (Kiefel J), 625 [376] (Gageler J), 641 [451] (Keane J).

²⁴ *CPCF* (2015) 255 CLR 514 at 625 [376] (Gageler J).

be a composite power to detain a person and to take that person to a place. Detention of a person under the provision triggers a concomitant duty to take the detained person to a place.”²⁵ As such, the “ordinary rule” was applied in the context of a what was in effect a duty that arose upon the occurrence of a particular event. Failure to comply with the “reasonable time” limitation would mean “the limits of the authority conferred by s 72(4) to continue to detain the person would be transgressed.”²⁶

23. **AS [28]** contends that applying the principle in the present case leads to a result no more radical than that in *Koon Wing Lau*. However, the result in *Koon Wing Lau* must be understood within the context of the case, where expiry of the power was a predicate of constitutional validity. Here, the result is to render the s 501BA power more fragile than duties imposed on the Minister, where mandamus is available. Nor should the “reasonable time” limitation be regarded as an aspect of legal unreasonableness: **AS [26]**. There is a distinction between the implication of substantive reasonableness into, e.g., states of satisfaction, and the principle contended for here, which, when applied to a power, extinguishes it with the effluxion of time: *Minister for Immigration and Citizenship v XMBQ* (2026) 315 FCR 207 (**XMBQ FFC**) at 210-211 [9] (Thawley J); 222 [75] (Kennett J).²⁷ While procedural fairness and legal reasonableness may be closely linked,²⁸ the latter is not to be assessed through the lens of the former.²⁹

(c) No temporal limit should be implied into s 501BA

24. The Minister submits that the principle of construction does not readily apply here because s 501BA does not, properly construed, operate upon the occurrence of a relevant event. Alternatively, if the principle applies, it is readily displaced.
25. Section 501BA is an extraordinary power. The occasion for its exercise will arise only in a narrow class of cases where the Minister is satisfied that a non-citizen does not pass the character test, because he or she has a substantial criminal record by reason of having been

²⁵ *CPCF* (2015) 255 CLR 514 at 625 [376] (Gageler J).

²⁶ *CPCF* (2015) 255 CLR 514 at 626 [381] (Gageler J).

²⁷ **KDSP** v *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 279 FCR 1 at 31 [126] (Bromberg J).

²⁸ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 371 [92] (Gageler J).

²⁹ *Minister for Home Affairs v DUA16* (2020) 271 CLR 550 at 563 [26] (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ); *Minister for Immigration and Border Protection v CRY16* (2017) 253 FCR 475 at 491 [67]; *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29 at 44 [34].

sentenced to death, imprisonment for life, or a term of imprisonment of 12 months or more, or being convicted or found guilty of one or more sexually based offences involving a child: ss 501(6)(a), (e), (7)(a)-(c). It confers a non-delegable power, that must be exercised by the Minister personally: s 501BA(4). A decision made under s 501BA(2) is not reviewable under Part 5 of the Act by the Tribunal (though judicial review remains available in accordance with Part 8 of the Act). In contrast with ss 501(3) and 501C, the decision need not be tabled in the Parliament. The power is non-compellable,³⁰ despite the absence of express language equivalent to that in the “dispensing provisions” (e.g., ss 48B(6) and 197AE).

- 10 26. This constellation of features immediately tends against the unqualified application of “ordinary” rules of construction to s 501BA. The text and context confirm that position and militate strongly against the implication of a time limit: *cf* **AS [31]**.
27. *First*, there is no explicitly temporal language in s 501BA. That is in contrast with several provisions in the pathway on which s 501BA falls: s 501CA(3) (“as soon as practicable after making the original decision”); s 500(6L)(c) (“within the period of 84 days”). The Appellant relies on the fact that each step leading up to s 501BA is time limited: **AS [37]**. But a concern with timely resolution is relevantly not evident in s 501BA; a matter made explicable by the fact that the circumstance to which it attaches is retention by a non-citizen of a visa.
- 20 28. *Second*, no textual indicators within s 501BA are correctly characterised as temporal. Section 501BA(1) neutrally states one (necessary but not sufficient) condition for the exercise of the Minister’s power; it ascertains the statutory set to which the power applies. Once a decision is made under s 501CA, s 501BA applies, in the sense that it is available for exercise. It continues to apply until the Minister decides (if so deciding) to consider the exercise of the power and the conditions in s 501BA(2) are satisfied. It is only at that point that the power can be exercised. The s 501BA power is not accurately characterised as

³⁰ *XMBQ v Minister for Immigration and Multicultural Affairs* [2005] FCA 553 at [104] (Horan J); *XMBQ v Minister for Immigration and Multicultural Affairs* [2005] FCA 209 [1] (Bromwich J); 213 [28] (Thawley J); *Morgan v Minister for Immigration and Multicultural Affairs* [2025] FCA 266 at [56]-[57] (McDonald J); *Palmer v Minister for Immigration, Citizenship, and Multicultural Affairs* (2024) 306 FCR 156 at 190 [163] (Feutrell J); *Eswaran v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 496 at [51] (Longbottom J).

dependent on an earlier event in a way relevant to the implication of a temporal limit: *cf* AS [30].

29. *Third*, the link between the original decision and the Minister's power does not support the implication of a temporal limit: *cf* AS [30]. There are clear points of connection between the original decision and any s 501BA(2) decision, including that the exclusion of procedural fairness by s 501BA is related to it having been afforded under s 501CA(3). However, the cumulative nature of the conditions s 501BA prescribes cannot be disregarded. The s 501BA(2) power is not exercised solely in response to an original decision under s 501CA. Section 501BA has a discrete and clear purpose: it authorises the Minister to protect the safety of the Australian community by overriding what is otherwise the final decision in an administrative continuum, by reference to the criterion of the national interest. That criterion is inherently political, intrinsically subject to (potentially sudden or extended) change, and uncouples the s 501BA decision from the original decision under s 501CA(4).
30. *Fourth*, and in any event, the power remains one directed to the state of affairs produced by the original decision, being the restoration to a non-citizen of a visa. That circumstance persists, in wholly meaningful ways, unless and until disturbed by a decision under s 501BA(2). Indeed, the nature and extent of connections formed by reason of that state of affairs, are matters the Minister could relevantly weigh in favour of the non-citizen. Nonetheless, it is tolerably clear that a changing conception of the national interest may cast a new light on past facts.
31. *Fifth*, it does not militate against the Minister's construction that it produces the consequence that s 501BA may duplicate s 501(3): *cf* AS [36], [40]. Section 501H expressly provides that the power conferred by s 501BA to cancel a visa that has been granted to a person is in addition to any other power under the Act: s 501H(1); and is complemented by s 118 in that operation. Where such overlap is explicitly recognised by the statute, it ought not be utilised to support a construction which seeks to limit the operation of the s 501BA power by implication of a temporal constraint on its exercise. The statutory scheme discloses an intention that the Minister will enjoy flexibility in the exercise of powers to cancel visas. The coherence of the statutory scheme is not undermined if s 501BA(2) is understood to allow the Minister to re-assess the national

interest a long time after the original decision was made, or simply to be slow in reaching a view about the state of affairs brought into existence by the original decision: XMBQ FFC 231 [109] (Kennett J).

32. *Sixth*, the Appellant's construction introduces incoherence into the statutory scheme. The power in s 501A(2) has an analogous structure and function to the power in s 501BA(2). The power to refuse a visa under s 501A(2)(a) does not lapse by reason of the effluxion of time, because it is part of the regime for performance of the duty to make a decision under s 65 and the duty does not lapse.³¹ Section 501A(2) addresses both the setting aside of decisions not to refuse and decisions not to cancel. As Kennett J observed, at XMBQ FFC [103], it is wholly unlikely that Parliament intended the power conferred by that subsection to lapse as a result of the effluxion of time in one kind of case but not in the other. The absence of a time limit for the exercise of the power in s 501A(2) makes it inherently less likely that Parliament intended a time limit to apply to s 501BA(2) but did not expressly say so.³² It does not answer the point that s 501A(2) in its refusal aspect is amenable to mandamus, whereas s 501BA(2) is not; because s 501A(2) is also available for cancellation, where mandamus is not available.

33. *Seventh*, the Appellant's construction produces incoherent results. It can be known *ex ante* that the statutory power is subject to an objective time limit, but the precise content of that requirement can only be known *ex post facto*, having regard to all of the circumstances of the case, including whether natural justice is in fact provided, the impact on the rights and interests of the person whose visa is to be cancelled, and the competing demands on departmental officers involved in advising the Minister. Those matters may elicit different assessments by different courts: XMBQ FFC 228-229 [96]-[97] (Kennett J).

34. *Eighth*, the harshness of the Minister's construction is mitigated by the implication of reasonableness in the exercise of the power; which ameliorates the matters raised at AS [42]. The states of satisfaction to be reached and the discretion itself are subject to when, and in what circumstances, findings can rationally and reasonably be made.³³ In that

³¹ KDSP (2020) 279 FCR 1 at 30-31 [117]-[127] (Bromberg J).

³² See also XMBQ FFC 214 [33] (Thawley J).

³³ GRCF v Minister for Immigration, Citizenship and Multicultural Affairs [2025] FCA 415 (Bennett J); LJ TZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2022) 179 ALD 299; [2022] FCA 1209 (Charlesworth J); CPDL v Minister for Immigration and Citizenship [2026] FCA 342 (Hill J).

connection, the Minister is not prevented from giving give an applicant an opportunity to be heard.³⁴

35. None of the Appellant’s contentions warrants a different conclusion.
36. *First*, the contention that purposive considerations support the application of the “reasonable time” limit into s 501BA, because it is directed to quickly and decisively responding to community protection concerns arising from an errant Tribunal decision, is to assume a requirement of temporal proximity: **AS [34]**. The evident purpose of s 501BA(2) is to permit the Minister to override the final decision in an administrative continuum: XMBQ FFC 231 [106] (Kennett J). The criterion by reference to which that may occur is protecting the national interest. Protection of that interest would be hampered by an “implied temporal guillotine” which would preclude the exercise of the power as community protection concerns relevant to the “national interest” criterion evolve over time: XMBQ FFC 214 [31] (Thawley J).
37. *Second*, the principle of legality does not support the Appellant’s contended limitation: *cf* **AS [39]**. That principle “does not affect the criteria that Parliament has selected in the exercise of its sole right to decide which non-citizens shall be permitted to enter and remain in Australia”.³⁵ In addition, a power to cancel a visa is not the source of the power to deprive a person of their liberty, in contrast with, e.g., ss 189 and 196 of the Act;³⁶ and s 501BA effects no retrospective change to rights or obligations.
38. *Third*, the Appellant identifies the exclusion of natural justice as indicating that the power was intended to be exercised promptly: **AS [41]**. That is a feature shared with other exercises of Ministerial powers and duties under ss 501(3), (3A) and 501A(3) (s 501(5)). The exclusion of natural justice reflects that the power is intended to be extraordinary and to displace ordinary common law principles; that tends to suggest a “reasonable time” limitation should not be imposed.

³⁴ *Ibrahim v Minister for Home Affairs* (2019) 270 FCR 12 at 20 [26].

³⁵ *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 273 CLR 21 at 42 [30] (the Court).

³⁶ *Cf Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 349 [56] (Kiefel CJ, Bell, Keane and Edelman J).

39. *Fourth*, while reasonableness may be an objective standard, and need not be indeterminate (AS [43]), the present indeterminacy arises from the fact the Minister is under no duty to decide whether to exercise the power,³⁷ which is directed to a criterion apt to change depending on the point in time at which it is assessed. There is no clear point from which a “reasonable time” (or the matters relevant thereto) is to be assessed, because of the inherently variable nature of the “national interest”. It is incongruous with the fact the Minister is not required to consider whether to exercise the power at all, that failure to do so within a certain period extinguishes the power.

10 40. *Fifth*, the premise of the Appellant’s contention that an interpretation of s 501BA as not subject to a time limit denies equality within the class of visa holders contrary to the Act, is mistaken: *cf* AS [38]. The same class of visa holder may have different conditions attached to their visa. In any event, s 501BA may arise for exercise in respect of any class of visa which is cancelled under s 501(3A).

B GROUND TWO

(a) Assessment of a “reasonable time”

41. If the Court reaches ground 2, it is necessary first to identify the measure of reasonableness within s 501BA, and then to assess whether the time taken to make the decision in this case exceeded that point.

20 42. As to the former, assistance can be derived from the principles applied in assessing whether a duty has been exercised within a reasonable time in connection with compelling the exercise of a duty through mandamus: AS [47].

43. In *Koon Wing Lau*, immediately after identifying the “ordinary rule”, Dixon J stated: “What is a reasonable time will depend upon all the facts, including the conduct of the person named in the certificate”.³⁸ The generality with which that inquiry was expressed coheres with more recent observations of this Court concerning the exercise of executive³⁹

³⁷ *Morgan* [2025] FCA 266 at [56]-[57], [62]-[63], [70]; *XMBQ* [2025] FCA 553 at [104]; *Palmer* (2024) 306 FCR 156 at 190 [163].

³⁸ *Koon Wing Lau* (1949) 80 CLR 533 at 574; see also *Moss v Moss* (1936) 55 CLR 166 at 179 (Dixon J).

³⁹ *Plaintiff S297/2013* (2014) 255 CLR 179 at 189-190 [37] (Crennan, Bell, Gageler and Keane JJ); *Li* (2013) 249 CLR 332 at 374 [102] (Gageler J); *CPCF* (2015) 255 CLR 514 at 642 [453] (Keane J).

and legislative⁴⁰ powers required to be exercised within a reasonable time. In *Plaintiff S297/2013*, in the context of unreasonable delay and the remedy of mandamus, Crennan, Bell, Gageler and Keane JJ observed that what amounts to a “reasonable time” must be assessed “having regard to the circumstances of the particular case within the context of the decision-making framework established by the Act”.⁴¹

- 10 44. It is to be expected that assessing the reasonableness of the time taken to make a decision would depend on all the circumstances of a particular case. The determination of legal unreasonableness in the context of judicial review is inherently fact-dependent and context-sensitive.⁴² It is in this light that “[a]n explanation for any delay is always a relevant consideration”;⁴³ because it should illuminate the circumstances in which the suggested delay falls to be assessed: *cf* AS [48].
45. With respect to s 501BA, the statutory text and context tend to augment (rather than diminish) the time within which it would otherwise be reasonable for the Minister to make a s 501BA(2) decision.
46. *First*, the use within s 501CA(3) (which falls within the same statutory pathway as s 501BA) of the phrase “as soon as practicable after making the original decision”, militates strongly against implying a time limit of that narrowness in s 501BA.⁴⁴
- 20 47. *Second*, the power in s 501BA is a non-delegable, personal power of the Minister, such that its exercise depends upon both the personal availability of the Minister, and the coincident capacity of the Minister’s Department to assist. The “press of ministerial business” will be a relevant matter.⁴⁵ It is self-evident that “[t]here are variants, in public administration, of departmental processes which are anterior to the exercise of statutory

⁴⁰ *Victoria v The Commonwealth* (1975) 134 CLR 81 at 186 (Mason J).

⁴¹ *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 at 190 [37].

⁴² *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 567 [59] (Gageler J), 574 [84] (Nettle and Gordon JJ), 585 [134] (Edelman J).

⁴³ *Patrick v Australian Information Commissioner* (2024) 304 FCR 1 at 10 [37] (Bromwich, Abraham and McEvoy JJ).

⁴⁴ *Salemi v MacKellar (No 2)* (1977) 137 CLR 396; *Riley v Commonwealth* (1985) 159 CLR 1 at 12 (Gibbs CJ, Wilson and Dawson JJ).

⁴⁵ *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 65 (Brennan J); *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 1 at 15-16 [25] (Kiefel CJ, Gageler and Gleeson JJ); *KDSP* (2020) 279 FCR 1 at 51 [190] (O’Callaghan and Steward JJ).

powers but do not constitute or evidence their exercise”.⁴⁶ As five Justices of this Court recently explained, “[w]hen ... a Minister exercises a power personally, the law recognises that he or she does not work alone but makes decisions with the assistance of his or her department”.⁴⁷ Even on the premise that a time limit is to be implied, it is unlikely that the Parliament intended the Minister’s personal power to expire because of his or her Department’s attention to, or prioritisation of, competing business.

48. *Third*, the power is conferred by reference to the Minister’s opinion of the “national interest”, which is largely a political question, and “a matter of political responsibility”.⁴⁸ It would be anomalous for an otherwise broad personal power vested in the Minister to be

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49. *Fourth*, given the power is framed by reference to the national interest, the personal impact on the non-citizen is apt to assume less relevance.⁴⁹ Germane also to that assessment is the fact that the passage of time *before* making a s 501BA decision will not (unlike some other decision-making powers conferred personally on the Minister) prolong that person’s detention (as to which *cf* AS [27]).⁵⁰ The Minister acknowledges that the passage of time may contribute to the thickening of a non-citizen’s social ties within a community. However, in the broader context of the statutory scheme, what is reasonable must be

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50. *Fifth*, the fact that s 501BA(2) confers a discretionary power, entails that application of the principle of construction does not entitle an aggrieved person to sue for belated

⁴⁶ *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 654 [47] (French CJ and Kiefel J). See, e.g., the elaborate process for “lifting the bar” considered by the High Court in *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319.

⁴⁷ *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2024) 282 CLR 1 at 14 [18] (Gageler CJ, Gordon, Edelman, Steward and Gleeson JJ).

⁴⁸ *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 539 [102] (Gleeson CJ and Gummow J).

⁴⁹ *Tereva v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 294 FCR 270 at 279 [41] (Bromwich J).

⁵⁰ *Morgan* [2025] FCA 266 at [81].

performance of a duty, or lead to a decision being made unlawfully, but not invalidly.⁵¹ It instead instantiates what Gleeson CJ described in *NAIS* as the “rare” circumstance in which “delay, of itself, will vitiate proceedings, or a decision”.⁵² If Parliament intended this outcome in the context of exercising an extraordinary, and explicitly additional, power, the delay would need to be manifestly excessive (having regard to all the relevant circumstances) for the time taken to no longer be “reasonable”.

51. Beyond matters of text and context, the assessment of a reasonable time is affected by the fact that the reviewing court is not concerned with delay *simpliciter* but with delay which, in all the circumstances, is not “reasonable”. The assessment formed by the reviewing court admits of the ordinary margin of appreciation (the “usually high threshold”⁵³) afforded to the decision-maker, and does not involve the reviewing court’s substituted view of what a reasonable length of time should be. While “[u]ndue delay in decision-making, whether by courts or administrative bodies, is always to be deplored”,⁵⁴ the delay may nonetheless be “reasonable”.

52. Consistent with this, in *Patrick v Australian Information Commissioner*, the Full Federal Court set out the following passage from Fisher J’s judgment in *Thornton v Repatriation Commission*, correctly describing it as “a statement frequently cited with approval”:⁵⁵

The question is whether there are circumstances which a reasonable man might consider render this delay justified and not capricious. In the first instance it is, on the evidence, a delay for a considered reason and not in consequence of neglect, oversight or perversity.⁵⁶

53. What is a reasonable time is to be judged, in the statutory context and in all the circumstances, by whether a reasonable person might consider the delay to have been

⁵¹ *Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286 at 1296, cited with approval in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390-391 [93] (McHugh, Gummow, Kirby and Hayne JJ) and 374 [38] (Brennan CJ).

⁵² *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 at 473-474 [5].

⁵³ *Patrick* (2024) 304 FCR 1 at 25-16 [73] (the Court); *SZVFW* (2018) 264 CLR 541 at 551 [11] (Kiefel CJ), 564 [52] (Gageler J), 575 [89] (Nettle and Gordon JJ), 586 [135] (Edelman J).

⁵⁴ *NAIS* (2005) 228 CLR 470 at 473-474 [5] (Gleeson CJ).

⁵⁵ (2024) 304 FCR 1 at 10 [37] (the Court); special leave refused at [2024] HCASL 291 at [2]. See further: *ASPI5 v The Commonwealth* (2016) 248 FCR 372 at 379 [21]-[23] (Robertson, Griffiths and Bromwich JJ); *KDSP* (2020) 279 FCR 1 at 47 [176] (O’Callaghan and Steward JJ); *Re O’Reilly; Ex parte Australena Investments Pty Ltd* (1983) 58 ALJR 36 at 36-37 (Murphy J); *Li* (2013) 249 CLR 332 at [102] (Gageler J); *Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286 at 1293G.

⁵⁶ *Thornton v Repatriation Commission* (1981) 52 FLR 285 at 292.

justified and not capricious.⁵⁷ Regard to the principles of legal unreasonableness in assessing delay strikes an appropriate (and familiar) balance between the courts’ and the executive’s respective constitutional functions and expertise. As in the legal unreasonableness context, the court should not be drawn into direct judgments about how the executive should manage its competing business.⁵⁸ To the extent that allocation of resources can be assessed by a court in the context of executive delay, it is to be viewed through the lens of whether the delay was “reasonable” having regard to that allocation of resources.⁵⁹ The fact that different courts may ultimately form different views about explanations on the evidence reflects the fact-sensitive nature of any enquiry as to whether the time taken was “reasonable”: *cf* AS [49].⁶⁰ It follows that there is no identifiable period of time of which it can be said, *a priori*, that the time taken was, necessarily, unreasonable.

54. The Appellant contends that there is a lack of Australian authority explaining the principles to be applied in determining whether a period of time is a “reasonable time”: AS [48]. To the extent there is a lack of precisely apposite authority, that reflects the extraordinary nature of the submission that a “reasonable time” limitation should be implied in the context of a discretionary power.

55. In any event, the authorities from the mandamus context are instructive. Against the weight of that Australian authority, the Appellant urges the adoption of the *Conille* approach, derived from Canadian jurisprudence, of giving “primacy to the inherent nature of the statutory task to be performed” and asking whether the time taken is longer than what the nature of the task requires, *prima facie*: AS [51]-[58].

56. It is not uncommon for this Court to derive assistance from authorities of other common law jurisdictions, including Canada.⁶¹ This is not such an occasion.

⁵⁷ *Patrick* (2024) 304 FCR 1 at 10 [37] (the Court); *Hood v Assistant Minister for Immigration* [2025] FCA 1336 at [23(a)] (Kennett J); *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 at [26] (Bromberg J); *Neilson v Secretary, Dept of Planning and Environment* [2024] NSWCA 28 at [152] (Payne JA, Ward P agreeing).

⁵⁸ *Wei v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 29 FCR 455 at 477 (Neaves J) quoted with approval in *Patrick* (2024) 304 FCR 1 at [27] (the Court). See also *NAIS* (2005) 228 CLR 470 at [161] (Callinan and Heydon JJ).

⁵⁹ *Cf Patrick* (2024) 304 FCR 1 at 13-14 [59]-[60], 15 [70] (the Court).

⁶⁰ A particular court’s findings on delay would not bind another: “on a question of fact precedents are not of authority”: *Little Company of St Mary v The Commonwealth* (1942) 66 CLR 368 at 379 (Latham CJ).

⁶¹ *Minister for Immigration v SZDMS* (2010) 240 CLR 611 at 620-622 [23]-[28] (Gummow ACJ and Kiefel J).

57. Part of the difficulty in adopting *Conille*, is that it is apt to draw the reviewing court into strict judgment on matters of indoor management. The Appellant invites the court to estimate the time it would take for matters it judged “inherently related to the nature of the statutory task” in order to assess whether the task was in fact performed within a reasonable time: AS [58]; and to assess “what is required by the statutory task”: AS [53]. It is not apparent whether the reviewing court is to postulate the steps that are inherently related to (or required by) the statutory task, or is instead to look at the evidence of what was done in the particular case, and disregard steps in fact taken, but which the court assesses as not inherently related to (or required by) the task. A like difficulty affects the evidence required, which is not to “travel beyond the inherent nature of the statutory task”: AS [57], and [53], [58].
58. The undesirability of the Appellant’s approach can be seen on the facts of this case. The Department drew the Minister’s attention to matters in which he may wish to consider exercising his personal s 501BA(2) power, by an officer from the Complex and Controversial Cases Section first assessing each matter in which the Tribunal had reinstated a visa under s 501CA(4) against certain “referral thresholds” approved by the Minister.⁶² That sorting principle was an available, but not inevitable, choice. How a court is equipped to assess whether that step is inherently related to (or required by) the statutory task is neither explained nor apparent. There is a risk that strangers to the practicalities of the tasks involved will deprecate internal arrangements as having “nothing to do with the inherent nature of the statutory task”: AS [62].
59. Close analysis of the authorities cited by the Appellant exposes a disconformity between how the Appellant describes the *Conille* approach and how Canadian Federal Courts in fact apply it: AS [54]-[57].⁶³ The miscellany of factors considered in assessing delay beyond the inherent nature of the task include an agency’s non-binding “published service standards”,⁶⁴ “past practice”,⁶⁵ “Ministerial Instructions”⁶⁶ and a Minister’s media release

⁶² D’Amico affidavit [6], RBFM 3.

⁶³ In *Thomas v Canada (Minister of Public Safety and Emergency Preparedness)* 2020 FC 164 at [29] the first instance judge apparently accepted “the Federal Court of Appeal has never sanctioned the analytical framework adopted by this Court in the cases cited above”.

⁶⁴ *Andriendo v Canada (Minister of Citizenship and Immigration)* 2026 FC 1054 at [23].

⁶⁵ *Dragan v Canada (Minister of Citizenship and Immigration)* [2003] 4 FC 189 at 221 [61(5)].

⁶⁶ *Liang v Canada (Citizenship and Immigration)* [2014] 1 FCR 352 at 371-372 [42]-[43].

indicating an approximate time in which an applicant could expect to receive a decision.⁶⁷ The cases acknowledge the Minister’s “considerable leeway in determining how long any kind of application will take to process, based on his policy choices”, noting “[i]t is for the Minister, and not the Court, to run the department”.⁶⁸ The suggestion that the principle requires rejection of reliance on “administrative backlog” (AS [54]) is contradicted by a case discussed in one of the cited decisions, which accepted an explanation based on “backlog”, where accompanied by evidence outlining the process to reduce the backlog.⁶⁹

60. Perhaps most critically, the Canadian authorities do not stand for the proposition that there is unreasonable delay where the time taken is longer than what “the nature of the process requires, prima facie”: *cf* AS [54]. Satisfaction of that criterion is instead the occasion for the “authority responsible for the delay” to provide a “satisfactory justification” for that delay.⁷⁰ In that way, the criterion serves the purpose of determining when the onus is to be reversed, a matter recognised by Bromberg J in his consideration of the Canadian authorities on the *Conille* approach in *BMF16*.⁷¹ It is therefore irrelevant, even on the Canadian approach, to the question of whether the delay is “reasonable”.

61. The Australian authorities have addressed the question of onus in ascertaining whether the time taken is “reasonable”. In particular, following *BMF16* (where the Minister accepted he bore a “practical onus” in light of the delay at issue⁷²) the Full Federal Court accepted that, where the applicant has “established a delay which called for explanation, then the persuasive onus might shift to the Minister to establish what that explanation was”.⁷³ The Minister accepts there may be circumstances where a persuasive onus may shift to the Minister.

⁶⁷ *Liang* [2014] 1 FCR 352 at 367-368 [29], [31].

⁶⁸ *Liang* [2014] 1 FCR 352 at 370-371 [40].

⁶⁹ *Thomas* 2020 FC 164 at [26].

⁷⁰ *Conille v Canada (Minister of Citizenship and Immigration)* [1999] 2 FC 33 at [23].

⁷¹ [2016] FCA 1530 at [27].

⁷² [2016] FCA 1530 at [28].

⁷³ *AQM18 v Minister for Immigration and Border Protection* (2019) 268 FCR 424 at [59] (Besanko and Thawley JJ) (emphasis added).

(b) Assessment of “reasonable time” in the present case

62. In light of the above discussion, the Appellant’s conclusions as to what the s 501BA(2) task requires is incomplete (AS [59]) and is viewed through the lens of the wrong inquiry: AS [60]-[62].

63. It is not correct to say that the Minister “offered no evidence” about the period between 21 March 2023 and 2 November 2023 and the trial judge was correct to accept the explanation offered (specific resourcing constraints) as affecting the Appellant’s matter during that period and as constituting an acceptable explanation all to be measured within the bounds of legal reasonableness.

10 64. It is the delay overall that is to be assessed, not some discrete portion of the process thereof.⁷⁴ The Appellant’s rejection of the possibility that competing business of the Department or the Minister could provide an explanation is not improved by the presumed duties of a Minister in “keep[ing] themselves up to speed”: AS [62]. The evidence in this case was that the Minister exercised his personal power on the day he received the Ministerial Submission and no delay was personally attributable to him.

20 65. Ms D’Amico’s evidence was cogent and unchallenged. Within the bounds of legal reasonableness, and regardless of which party bore the persuasive onus, the trial judge was correct to find that the delay in the present case was not unreasonable. Or, to adopt and adapt Fisher J’s dictum, the circumstances here are those which a reasonable person might consider render the delay justified and not capricious.

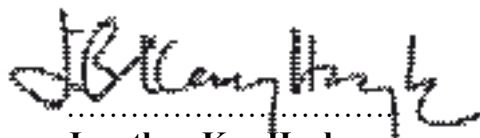
PART VI: ESTIMATE OF TIME

66. The Respondent estimates that 2.25 hours will be required for the presentation of his oral submissions in this appeal together with the appeal in XMBQ.

Dated: 20 October 2026



Ruth Higgins
Solicitor-General of the
Commonwealth



Jonathan Kay Hoyle
T: (02) 8001 9021
j.kayhoyle@stjames.net.au



Alexander Solomon-Bridge
T: (03) 9225 6495
asolomonbridge@vicbar.com.au

⁷⁴ Patrick (2024) 304 FCR 1 at 14 [61] (the Court).

ANNEXURE TO RESPONDENT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1.	<i>Migration Act 1958</i> (Cth)	Compilation No. 160 (29 March 2024 to 30 June 2024)	ss 4, 65, 189, 196, 500, 501, 501A, 501BA, 501C, 501CA, 501G 501H	Act in force on the date of the Minister's decision	30 May 2024: date of the Minister's decision
2.	<i>Immigration Act 1901</i> 1949 (Cth)	As amended by No 31 of 1949 (12 July 1949 to 31 May 1959)	s 4	Version considered in <i>Koon Wing Lau</i> (1949) 80 CLR 533	21 December 1949: date of Court's published judgment in <i>Koon Wing Lau</i> (1949) 80 CLR 533
3.	<i>Maritime Powers Act 2013</i> (Cth)	As made (27 March 2013 to 15 December 2014)	s 72	Version considered in <i>CPCF</i> (2015) 255 CLR 514	1 July 2014: date of purported exercise of power considered in <i>CPCF</i> (2015) 255 CLR 514
4.	<i>Crimes Act 1914</i> (Cth).	Compilation No. 144 (1 January 2023 – 30 June 2023)	s 85ZR(2)(b)	For context and background only as version considered in <i>Minister for Immigration, Citizenship and Multicultural Affairs v Thornton</i> (2023) 276 CLR 136	14 June 2023 date of Court's published judgment in <i>Thornton</i> (2023) 276 CLR 136