HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **XMBQ**
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

2. The following issues arise on this appeal: (i) In construing a statutory provision that confers power to do a thing upon the occurrence of a particular event, but does not specify
20 the period in which the thing is to be done, is there a common law principle of construction that, subject to a contrary intention, the thing must be done 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?

3. For reasons developed below, the Minister submits that 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
30 time. That principle applies with less force to a power than a duty. (ii) No.

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 Respondent accepts, and does not wish to add to, the summary of facts set out in the Appellant's Submissions (**AS**) at [6]-[10].

PART V: ARGUMENT

A SUMMARY OF ARGUMENT

6. ***The principle of construction***: Where a statute confers power to do a thing upon the occurrence of a particular event, but does not specify the period in which the thing is to be done, there exists a relevant principle of construction that, subject to a contrary intention, the power is to be performed within a "reasonable time". The principle is responsive to the statutory text and context. In this connection, it is relevant that, where applied to a discretionary power, as opposed to a duty, the principle strikes at the existence, and not merely the exercise, of the power. That radical operation requires clear support in the statutory text and context and can be readily displaced by a contrary intention.

7. ***Section 501BA***: confers a non-delegable, non-compellable, power which is both extraordinary and exceptional in character. It is to be exercised by the Minister personally by determining whether it is in the national interest that the state of affairs obtaining in consequence of a decision made under s 501CA, to revoke a decision cancelling a person's visa, should be reversed.[1] That requires the Minister to evaluate matters affecting the "national interest", which may properly include a "wide range of considerations",[2] while cognisant of the potential harshness of the measure upon the affected non-citizen. The relevant principle of construction does not readily apply to s 501BA, because it does not confer a power which arises upon the occurrence of a particular event. Even if the principle were relevant, the text and context of s 501BA clearly displace its operation.

8. It is convenient to begin with the statutory text and context, proceed to consideration of the principle of construction, and conclude with the question of the application of that principle to s 501BA.

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1 ***CRRN*** *v Minister for Immigration and Multicultural Affairs* [2025] FCA 192 at [33] (Owens J).

2 ***S297/2013*** *v Minister for Immigration and Border Protection* ***[No 2]*** (2015) 255 CLR 231 at 242 [18] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ), quoting Hot Holdings Pty Ltd v Creasy (2002) 210 CLR 438 at 455 [50].

B THE SECTION 501BA POWER

9. The task of statutory construction begins and ends with the text, read in context.[3] The question is what the legislature is taken to have meant by the words that it used, and the result that is arrived at must ordinarily be one that the words of the provision under consideration are capable of bearing: *Minister for Immigration and Citizenship v XMBQ* (2026) 315 FCR 207 (**FFC**) at 221 [70] (Kennett J).

10. The object of the Act is to regulate, in the national interest, the coming into, and presence in Australia, of non-citizens: s 4(1). Consideration of the national interest raises "largely a political question"[4] which, "although broad and evaluative, is not unbounded".[5] The national interest will centrally include matters of national security and safety. It is a matter inherently amenable to change, depending upon the course of social and political events, and one the protection of which "is peculiarly within the province of the Executive".[6]

11. To advance its object, the Act provides for visas permitting non-citizens to enter or remain in Australia, and the Parliament intends the Act to be the only source of the right of non-citizens to so enter or remain: s 4(2). A non-citizen may only obtain permission to enter or remain in Australia by the grant of a visa. A non-citizen must not travel to Australia without a visa that is in effect: s 42. A non-citizen in the migration zone who holds a visa is a "lawful non-citizen": s 13(1); while a non-citizen in the migration zone who does not hold a visa is an "unlawful non-citizen": s 14(1). A person reasonably suspected of being an unlawful non-citizen must be detained by an officer under s 189(1) and (so long as that reasonable suspicion persists) must continue to be detained until granted a visa or removed from Australia: s 196(1). Part 2, Division 3, Subdivision AA regulates applications for visas. Where a valid visa application is made, s 65 requires the Minister

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3 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368 [14] (Kiefel CJ, Nettle and Gordon JJ) and 374 [37] (Gageler J); *ENT19 v Minister for Home Affairs* (2023) 278 CLR 75 at 105-106 [86]-[87] (Gordon, Edelman, Steward and Gleeson JJ*); DZY (a pseudonym) v Trustees of the Christian Brothers* (2025) 282 CLR 495 at 504-505 [23] (Gageler CJ, Gordon, Edelman and Gleeson JJ)).

4 *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at 46 [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *ENT19* (2023) 278 CLR 75 at 80 [11] (Kiefel CJ, Gageler and Jagot JJ); 108-109 [93] (Gordon, Edelman, Steward and Gleeson JJ).

5 ***Graham*** *v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 30 [57] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

6 ***Palmer*** *v Minister for Immigration, Citizenship, and Multicultural Affairs* (2024) 306 FCR 156 at 167 [54], 168 [58]-[59] (Derrington and Hespe JJ).

to grant the visa if satisfied the applicable criteria are met and to refuse the visa if not so satisfied.[7]

12. Further, to advance its object, the Act provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by the Act: s 4(4). Part 9, Division 2 of the Act provides, *inter alia*, for the cancellation of a visa on character grounds: s 501. In the Full Federal Court below, Kennett J identified the three types of visa cancellation decisions for which s 501 provides at FFC 216-219 [47]-[59].

13. The pathway by which a decision under s 501BA may be reached begins with a mandatory cancellation decision under s 501(3A), passes through a revocation decision made by either the Minister (or a delegate) or the Tribunal under s 501CA, and concludes with a possible decision by the Minister personally to set aside the revocation decision and cancel the visa.

14. Section 501(3A) requires the Minister to cancel a visa granted to a person where that person is currently serving a sentence of imprisonment on a full-time basis in a custodial institution, and the Minister is satisfied that the person does not pass the character test because he or she has a substantial criminal record under s 501(6)(a) and (7)(a), (b) or (c), or because he or she has been convicted or found guilty of one or more sexually based offences involving a child (s 501(6)(e)). Section 501(5) excludes the rules of natural justice in respect of such a decision. A decision made by a delegate of the Minister under s 501(3A) is not reviewable by the Tribunal: s 500(1)(b), (4A)(c).

15. If the Minister (or a delegate) makes a mandatory cancellation decision under s 501(3A), s 501CA(3) requires that the person be invited to make representations about the revocation of that decision. Section 501CA(4) authorises the Minister (or a delegate) to revoke the original decision under s 501(3A) if the person makes representations in accordance with the invitation, and satisfies the Minister either that he or she passes the character test or that there is another reason why the original decision should be revoked. Where the decision under s 501CA(4) is made by a delegate, it is subject to review by the Tribunal: s 500(1)(ba). Where a revocation decision is made under s 501CA(4), s 501BA

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[7] ***Plaintiff S297/2013*** *v Minister for Immigration and Border Protection* (2014) 255 CLR 179 at 189-190 [37] (Crennan, Bell, Gageler and Keane JJ).

confers power on the Minister, personally, to set aside the original "non-adverse" decision and cancel the visa that has been granted to the person.

16. The legislative history of the suite of provisions of which s 501BA forms part was discussed by Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ in *Minister for Immigration v* ***Makasa***.[8] Among other things their Honours noted that:[9]

> The Second Reading Speech for the Bill for the Amending Act referred to another of the purposes of the Amending Act as being to enable the Minister "in exceptional or emergency circumstances" to act "personally" and "decisively" on matters of visa cancellation and refusal. Specifically addressing the justification for the powers to be conferred on the Minister under s 501A to override decisions of the AAT, the Second Reading Speech referred to the AAT having made "a number of character decisions that are clearly at odds with community standards and expectations". The Second Reading Speech stated that "[i]t is essential that the Minister, acting personally, have the power to intervene or set aside such decisions in the national interest".

17. Certain aspects of the text of s 501BA can then be noticed.

18. *First*, the apparent purpose of s 501BA, within Part 9, Division 2, is a protective one. It authorises the Minister to protect the safety of the Australian community by overriding what is otherwise the final decision in an administrative continuum. It does so by reference to the criterion of the national interest, and in respect of a narrow class of non-citizens, who have been involved in the commission of serious crimes.

19. *Second,* s 501BA(1) identifies the circumstance in which the provision applies: that a delegate of the Minister, or the Administrative Appeals **Tribunal** (as it then was), makes a decision under s 501CA to revoke a decision under s 501(3A) to cancel a visa that has been granted to a person (the *original decision*). It ascertains the statutory set to which the power applies, and specifies one (necessary, but not sufficient) condition for enlivening the power in s 501BA(2).

20. *Third,* s 501BA(2) confers a discretionary power ("may"), to set aside the original decision, and cancel a visa that has been granted to a person, which can be exercised only if, and once, the Minister is satisfied of the two further conditions prescribed by s 501BA(2)(a) and (b). The first, factual, condition is that the Minister is satisfied that the person does not pass the character test because of: ***(a)*** having a substantial criminal record

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8 (2021) 270 CLR 430 at 441-442 [28]-[33].

9 *Makasa* (2021) 270 CLR 430 at 442 [33] (footnotes omitted).

(s 501(6)(a)) on the basis of: (i) having been sentenced to: death (s 501(7)(a)), imprisonment for life (s 501(7)(b)), or a term of imprisonment of 12 months or more (s 501(7)(c)); or ***(b)*** being convicted or found guilty by an Australian or foreign court of one or more sexually based offences involving a child: s 501(6)(e). The second, evaluative, condition requires the Minister to be satisfied that the cancellation is in the national interest: s 501BA(2)(b).

21. Articulation of these conditions reveals the narrow class of cases in which the Minister's power may be exercised. It also reveals a point of substantive separation between the original decision and the Minister's power. Neither the Tribunal, nor a delegate of the Minister, acting under s 501CA is called upon to consider the national interest. It is accordingly correct to conclude that: "the path by which, and the basis upon which, the Tribunal reached its conclusion are not inevitably relevant to the Minister's decision. It is the state of affairs produced by the Tribunal's decision that the Minister is required to consider against the national interest. It follows that when the Minister was considering whether to 'set aside' the Tribunal's decision, it was the result, and not the reasoning, that was in issue".[10]

22. Certain other aspects of the power are apparent. It operates only prospectively, and "does not have any implications for the lawfulness of things already done": FFC 228 [95] (Kennett J). The states of satisfaction on which s 501BA(2) hinges, imply a condition of reasonableness into its exercise.[11] Once the power has been exercised, the person affected is to be notified of the Minister's decision in accordance with s 501G. In contrast with ss 501(3) and 501C, the decision need not be tabled in the Parliament.

23. *Fourth,* s 501BA(3) expressly excludes the procedural fairness which the common law would otherwise imply. That is a feature shared with other exercises of specifically Ministerial powers and duties under ss 501(3), (3A) and 501A(3) (ss 501(5) and 501A(5)). In respect of s 501BA, the exclusion operates against a statutory background

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10 *CRRN* [2025] FCA 192 at [33] (Owens J); *GFE24 v Minister for Immigration and Citizenship* (2025) 313 FCR 210 at 213-214 [10]-[11] (Collier, Jackman and Younan JJ) (in exercising the power the Minister need not take into account the reasons why the Tribunal decision was made). See also FFC 221-222 [73] (Kennett J).

11 *Graham* (2017) 263 CLR 1 at 30 [57] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352 at 391 [158] (the Court); *Luong v Minister for Immigration, Citizenship and Multicultural Affairs* (2026) 315 FCR 159 at 174 [37] (the Court).

in which the person will have been invited to make representations in connection with the original decision under s 501CA(3).

24. *Fifth,* the power is non-delegable, and must be exercised by the Minister personally: s 501BA(4).

25. *Sixth,* a decision under s 501BA(2) is not reviewable under Part 5 of the Act by the Tribunal. Judicial review remains available in accordance with Part 8 of the Act.

26. *Seventh,* as the primary judge concluded in *XMBQ v Minister for Immigration and Multicultural Affairs* [2025] FCA 553 (**PJ**) at [104]), despite the absence of express words equivalent to those which apply to the "dispensing provisions" (e.g., ss 48B(6) and 197AE), the power in s 501BA is non-compellable.[12] A writ of mandamus will not issue for failure to perform the power.

27. *Eighth,* there is no express 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").[13]

28. *Ninth,* the power conferred by s 501BA to refuse to cancel a visa that has been granted to a person is expressly in addition to any other power under the Act, as in force from time to time, to refuse to grant a visa to a person, or to cancel a visa that has been granted to a person: s 501H(1). Likewise, s 118 confirms that none of the powers to cancel a visa there identified (including s 501BA) is limited, or otherwise affected, by each other. The statutory scheme discloses an intention that a Minister remain flexible in the exercise of his or her power to cancel visas.

29. This combination of matters exposes s 501BA as an extraordinary power. Its amplitude (alongside that of ss 501A and 501B) was described, in a manner endorsed at PJ [60], by Colvin J in *Moli v Minister for Immigration and Multicultural Affairs* in this way:[14]

> All these provisions operate to confer a form of national interest call-in power upon the Minister whereby the Minister can intervene personally to alter the course of the legislative scheme for the consideration of a valid application for

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12 See also FFC 209 [1] (Bromwich J); 213 [28] (Thawley J); *Palmer* (2024) 306 FCR 156 at 190 [163] (Feutrill J); *Eswaran v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 496 at [51] (Longbottom J); *Morgan v Minister for Immigration and Multicultural Affairs* [2025] FCA 266 at [56]-[57] (McDonald J).

13 See also PJ [61].

14 [2025] FCA 350 at [20] and [22] (emphasis added).

> a visa (as principally expressed in s 65).
>
> …
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> Taken together, the various provisions conferring the personal "national interest" powers upon the Minister operate as a form of qualification to the scheme for dealing with valid visa applications on the merits. That scheme includes the conferral of special powers which allow for the refusal of the application or the subsequent cancellation of a visa on character grounds.

30. It is a power of "ministerial override".[15] It is a power which, as Allsop CJ, Kenny and Banks-Smith JJ observed in *Minister for Home Affairs v Brown*, centrally touches "the protection of the Australian community, but that also affects the lives of ordinary people living in, or as part of, the Australian community who do not have the status of citizenship".[16] It is a power that, for all these reasons, was enacted on the basis it is to be exercised only in "exceptional circumstances".[17]

C THE "ORDINARY RULE" REFERRED TO IN *KOON WING LAU*

31. The Appellant's contention that s 501BA is subject to a "reasonable time" limitation relies on Dixon J's "ordinary rule" in ***Koon Wing Lau*** *v Calwell*.[18] That rule is said to operate such that, because s 501BA confers a power upon the occurrence of an event, but does not specify the time within which it must be exercised, there is a "common law principle of construction" that, subject to a contrary intention, the power must be exercised within a "reasonable time": **AS [2]**.

32. It may be accepted that there is a common law principle of construction broadly to this effect. The Minister's formulation of the principle is at [3] above. The principle is to be considered 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.

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15 *YTLT v Minister for Home Affairs* [2021] HCATrans 177 (Gageler J).

16 (2020) 275 FCR 188 at 199 [28].

17 Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) 15 [85].

18 (1949) 80 CLR 533.

33. The principle does not readily apply here, because s 501BA does not operate upon the occurrence of a relevant event. Even if it applies, it would do so with less force than in some of the cases where it has been applied, because s 501BA confers a discretionary power, as opposed to a duty: **AS [40]**. The principle may accordingly be readily displaced by a contrary intention.

(a) "Ordinary rule" applies to powers or duties that arise upon the occurrence of an event

34. In *Koon Wing Lau,*[19] 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".

35. 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).

36. Each of their Honours referred to the decision of the New South Wales Supreme Court in *Ex parte Lesiputty; Re Murphy*.[20] That case also concerned s 4(4) of *Immigration Act 1901-1949* (Cth), and whether the Minister's declaration was bad because it was not made until 28 April 1947, when the certificate of exemption had expired on 31 December 1946. The applicant contended that "upon" means "substantially at the same time as". Chief Justice Jordan rejected this argument: "[i]n the present context the word obviously means 'after': it would make nonsense of the subsection to give it any other meaning".[21] His Honour did not address whether "after" was otherwise temporally confined.

37. Having expressed their agreement with this 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

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19 (1949) 80 CLR 533.

20 (1947) 47 SR (NSW) 433.

21 (1947) 47 SR (NSW) 433 at 436 (Jordan CJ).

ordinary rule".[22] Justice Williams did not appear to rely on any "ordinary rule". His Honour cited *Folkhard v Metropolitan Railway Co,*[23] 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 absence of a specified time period, to mean a "reasonable time" after, without reference to any "rule".

38. The Court in *Koon Wing Lau* 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. In that context, 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 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. What is clear is that Dixon J's statement, and the principle it articulates, have been applied in subsequent decisions of this Court.

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

39. While the "ordinary rule" was first so described in the context of a discretionary power, the principle will apply with less force where the statute confers a discretionary power as opposed to a mandatory duty. 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.[24] It is radical in the strict sense. A principle operating to that effect would require textual or contextual support and would be readily displaced by contrary intention. That position is consistent with the authorities. Subsequent cases of this Court which have applied the "ordinary

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

23 (1873) LR 8 CP 470.

24 ***Plaintiff S297/2013*** *v Minister for Immigration and Border Protection* (2014) 255 CLR 179 at 190 [37] (Crennan, Bell, Gageler and Keane JJ). See also FFC 212 [13] (Thawley J), 222 [75] (Kennett J).

rule" have done so in the context of a statute which in effect confers a duty that arises upon the occurrence of a particular event: *cf* **AS [32]-[39]**.

40. ***Plaintiff S297/2013***[25] 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".[26]

41. 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".[27] The consequence of applying the "reasonable time" limit was not that the power was extinguished, but that its exercise could be compelled.

42. Likewise, in ***CPCF*** *v Minister for Immigration and Border Protection,*[28] 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".

43. Justice Crennan identified that there were a number of limitations on the s 72(4)(b) power, including the "implied … need to exercise the power within a reasonable time".[29] Justice Kiefel said "[w]here no time requirement is provided by a statute for the doing of an act, the law will imply a requirement that it be done as soon as reasonably practicable … at least where such an implication is possible".[30] Justice

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25 (2014) 255 CLR 179.

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

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

28 (2015) 255 CLR 514.

29 *CPCF* (2015) 255 CLR 514 at 581 [200] (Crennan J).

30 *CPCF* (2015) 255 CLR 514 at 608 [313] (Kiefel J).

Gageler (as his Honour then was) said "[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".[31] Justice Keane noted that the Minister had accepted that detention must be effected within a reasonable time and that this concession was rightly made "consistently with the principle of interpretation that ordinarily applies in cases where no period is specified in a statute for doing an act authorised or required by the statute".[32]

44. 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. As Gageler J explained: "[t]he maritime power conferred by s 72(4) of the Act is expressed to 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."[33] As such, the "ordinary rule" was again applied in the context of a duty that arose upon the occurrence of a particular event. His Honour held that 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",[34] which conforms to the nature of the power at issue.

45. As noted at **AS [39]**, Professor Pearce has observed that courts have been prepared to imply a reasonable time requirement. The authority to which Professor Pearce refers[35] – *R v Skurray*[36] – also accords with the principle of construction applying with greater force to duties rather than powers. In that case, President Wallace said "[i]t is well settled and good sense that where a penal provision requires an act to be done either without a time being stipulated, or even where the act must be done "forthwith" a reasonable time is implied sufficient to enable performance to be effected".[37] The provision at issue was to the effect that monies received by a licensee were to be held by them until paid into a

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31 *CPCF* (2015) 255 CLR 514 at 625 [376] (Gageler J).
32 *CPCF* (2015) 255 CLR 514 at 641 [451] (Keane J).
33 *CPCF* (2015) 255 CLR 514 at 625 [376] (Gageler J).
34 *CPCF* (2015) 255 CLR 514 at 626 [381] (Gageler J).
35 Considered in Pearce, *Statutory Interpretation in Australia* (10th ed, 2024) at 77 (**AS fn 61**).
36 (1967) 2 NSWR 611.
37 *R v Skurray* (1967) 2 NSWR 611 at 612.

trust account. The licensee was under an obligation which arose upon the occurrence of an event, being the receipt of relevant monies by a licensee.

46. Professor Pearce has also identified cases in which a "reasonable time" limitation has been implied where the statute conferred a discretionary power. However, in none of those cases was reference made to an "ordinary rule" or principle of construction. For example, *Hospital Benefit Fund*[38] concerned a discretionary power of the Minister to make a declaration that a changed provision of a constitution, articles of association or the rules of an organisation not take effect. The Full Federal Court implied a time limit on the basis "[t]he question must be answered upon the true construction of the section, in its setting, and having regard to the integrity of the scheme for which the Act provides".[39]

47. The "ordinary rule" is referred to by the Appellant variously as a "canon of construction", a "principle" and a "presumption": **AS [40]**. Matters of nomenclature might distract. The common law developed rules of statutory construction as an aid to discovering statutory meaning. All such rules will yield to contrary intention.[40] The "ordinary rule" will be more readily displaced by contrary text and context, where the statute confers a discretionary power as opposed to a duty, given that the consequence of its application would be to extinguish the power, rather that regulate the conditions of its exercise.

D NO TEMPORAL LIMIT SHOULD BE IMPLIED INTO S 501BA

(a) Principle does not readily apply

48. The principle applies most readily where a statute confers a power that arises upon the occurrence of a particular event. Section 501BA does not confer such a power. Section 501BA(1) identifies the circumstance in which the provision applies ([17]-[18] above). When that circumstance arises, the occasion for the exercise of the power does not arise. Because the power is non-compellable ([25] above), the occasion for its exercise arises only if, and when, the Minister decides to consider exercising the power (cf *Plaintiff S297/2013* and *CPCF*).

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38 ***Hospital Benefit Fund*** *of WA Inc v Minister for Health, Housing & Community Services* (1992) 39 FCR 225.

39 *Hospital Benefit Fund* (1992) 39 FCR 225 at 227 (the Court).

40 *A-G (Qld) v Australian Industrial Relations Commission* (2002) 213 CLR 485 at 492 [6] (Gleeson CJ).

(b) Principle is readily displaced

49. In any event, if the principle applies, it is readily displaced. The statutory text and context militate strongly against any such implication.

50. *First*, there is no explicitly temporal language in the provision. That is in contrast with other provisions in the same statutory pathway; most closely s 501CA(3). The Appellant relies on the concern which the Act evinces that a person's visa status be resolved in a timely manner: **AS [49]**; PJ [61]. But that concern is relevantly not evident in s 501BA. That is explicable by the fact that the circumstance to which it attaches is one that is non-adverse in its operation to the non-citizen (i.e., restoration of a visa).

10 51. *Second*, no textual indicators within s 501BA are correctly characterised as temporal. Section 501BA(1) neutrally states one precondition for the exercise of the Minister's power. Once a decision is made under s 501CA, s 501BA applies, in the sense that it is available for exercise. It continues to be available until the Minister decides to consider the exercise of the power and the conditions in s 501BA(2) are satisfied, at which point alone can the power be exercised.

52. *Third,* the link between the original decision and the Minister's power does not support the implication of a temporal limit: *cf* **AS [45]-[46]**; PJ [70]; [75]-[76], [130]. It may be accepted that the power in s 501BA is not "freestanding", that the original decision is not a "merely historical event that attracts a fresh power" (PJ [131]), and that the exclusion
20 of procedural fairness by s 501BA is connected with it having been afforded under s 501CA(3): PJ [59]. While it would be artificial to divorce the evaluative criteria prescribed by s 501BA(2)(a) and (b) from the factum specified in s 501BA(1) (PJ [135]), it is also the case that the cumulative nature of the conditions s 501BA prescribes cannot be disregarded. The power is not exercised solely "in response to an original decision under s 501CA" (PJ [138]), but also in light of the Minister forming two requisite states of satisfaction. The object of one of those is the national interest, which is both inherently political and intrinsically subject to (potentially sudden or extended) change.

53. For reasons developed above, the supervening criterion of the "national interest" uncouples the substance of the Minister's decision from the original decision made under
30 s 501CA. The use of that criterion can be understood as one manifestation in the statutory regime of the repeated recognition in the Explanatory Memorandum to the Migration

Amendment (Character and General Visa Cancellation) Bill 2014 that, "the government is ultimately responsible for ensuring that decisions reflect community standards and expectations."[41] Thawley J was correct to observe, at FFC 214 [31], that: "What is in the national interest would be expected to evolve over time, possibly even radically changing course by reason of new events and circumstances. An implied temporal guillotine on the existence of the power would undermine s 501BA's evident purpose."

54. *Fourth*, it is wrong to say that delay in exercising the power will result in it no longer being able to be said that the power "is directed to the state of affairs produced by the original decision": *cf* PJ [134]; or that "a reasonable time limit ensures that the state of affairs resulting from the original decision remains the focus of the power": **AS [51]**. The state of affairs produced by the original decision is 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. Without straying unnecessarily into whether the Minister can take into account factual events post-dating the Tribunal's decision in a s 501BA decision, it is tolerably clear that a changing conception of the national interest may cast a new light on past facts.

55. It begs the question – timely in relation to what? – to submit that "Parliament may be taken to have intended that a state of affairs at odds with community standards and expectations, resulting from an original decision, would be remedied in a timely manner": **AS [52]**. The Appellant's contention is, timely in proximity and response to an original decision; the Minister's, timely in response to the criterion of the national interest. The correct answer can only be resolved through the exercise of construction.

56. *Fifth*, it does not militate against the Minister's construction that it produces the consequence that s 501BA overlaps with adjacent cancellation powers: *cf* **AS [47]-[48]**; PJ [138]; FFC 231 [107]-[108] (Kennett J). Section 501H expressly provides that the power conferred by s 501BA to refuse 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

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[41] Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 at 15 [86]; 27 [42]; 30 [65]; 35 [105],[108], [111]; 36 [114].

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 s 501BA by implication of a temporal constraint on its exercise. And as Kennett J observes at FFC 231 [109], 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.

57. *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.[42] Section 501A(2) addresses both the setting aside of decisions not to refuse and decisions not to cancel. As Kennett J observed, at FFC 230 [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.[43] The Appellant's answer to this point is candidly incomplete: **AS [60].** 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, as Kennett J identifies at FFC [103], s 501A(2) is also available for cancellation, where mandamus is <u>not</u> available.

58. *Seventh*, the Appellant's construction produces incoherent and inconvenient 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; which matters may elicit different assessments by different courts: FFC 228-229 [96]-[97] (Kennett J). It can be accepted, as **AS [59]** notes, that courts have long administered

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42 *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 279 FCR 1 at 30-31 [117]-[127] (Bromberg J).

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

"reasonable time" standards and that such standard can be evaluative. However, the present question is whether Parliament should be taken to have intended that the exceptional power of Ministerial override in s 501BA would be affected by that kind of uncertainty. For the reasons advanced above, it should not be.

59. *Eighth*, the harshness of the Minister's construction is mitigated by the implication of reasonableness in the exercise of the power. Both 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.[44] And in that context, the Minister is not prevented from giving an applicant an opportunity to be heard.[45] Once these matters are recalled, the Appellant's reliance on the displacement of the principles of natural justice as an explanation for why the s 501BA(2) power cannot be exercised many years after the original decision is weakened: **AS [54]**. As observed above, the power, being extraordinary in its nature, and because of the potential effects upon a non-citizen, was enacted on the basis it is to be exercised only in exceptional circumstances. That exercise will be further moderated by requirements of reasonableness. Its existence is not, however, contingent upon the power being exercised in reasonable proximity to the occurrence of the original decision.

PART VI: ESTIMATE OF TIME

60. 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 Archer.

Dated: 20 October 2026

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44 *GRCF v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCA 415 (Bennett J); *LJTZ 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).

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

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.	*Migration At 1958* (Cth)	Compilation No. 160 (29 March 2024 to 30 June 2024)	ss 4, 13, 14, 65, 189, 196, 500, 501, 501A, 501BA, 501CA, 501G, 501H	Act in force on the date of the Minister's decision	8 June 2024: date of the Minister's decision
2.	*Migration Act 1958* (Cth)	As amended (27 March 2014 to 27 May 2014)	ss 65, 65A	Version considered in *Plaintiff S297/2013* (2014) 255 CLR 179	17 May 2013: date of remittal by Refugee Review Tribunal to Minister of plaintiff's protection visa application 4 March 2014: date of Minister's purported determination
3.	*Immigration Act 1901 1949* (Cth)	As amended by No 31 of 1949 (12 July 1949 to 31 May 1959)	s 4	Version considered in *Koon Wing Lau* (1949) 80 CLR 533	21 December 1949: date of Court's published judgment in *Koon Wing Lau* (1949) 80 CLR 533
4.	*Maritime Powers Act 2013* (Cth)	As made (27 March 2013	s 72	Version considered in *CPCF* (2015) 255 CLR 514	1 July 2014: date of purported exercise of

	to 15 December 2014)	power considered in *CPCF* (2015) 255 CLR 514